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(2021)02ILR A1
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 08.02.2021

BEFORE

THE HON'BLE VIVEK KUMAR BIRLA, J.

Matters Under Article 227 No. 3403 of 2020

Zeeshan Ahmad ...Petitioner
Versus
Mehboob Ahmad & Ors. ...Respondents

Counsel for the Petitioner:
Sri Azim Ahmad Kazmi, Sri Mohd. Faiz

Counsel for the Respondents:
Sri Rashtrapati Khare, Sri Gaurav Khare

A. Constitution of India,1950-Article 226 & Provincial Small Cause Court Act,1887-Section 17-challenge to-maintainablity of application-application u/s 17 of the Act was filed along with the application under O 9 Rule 13 CPC on the same date-Apex Court held that it may be filed at any time upto the time of presentation of the application for setting aside ex parte decree or for review and the Court may treat it as a previous application-the delay on the part of the court in passing an appropriate order would not be held against the applicant because none can be made to suffer for the fault of the Court-application filed u/s 17 of the Act stands restored.(Para 1 to 11)

The writ petition is allowed. (E-5)

List of Cases cited:-

1. Kedarnath Vs Mohan Lal Kesarwani & ors.(2002) 1 ARC 186

2. Zulfiquar Hussain Vs Madan Gopal Chopra (2012) 1 ARC 311

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

1. Heard learned counsel for the petitioner and Sri Rashtrapati Khare, learned counsel for the respondents and perused the record.

2. Present petition has been filed challenging the impugned order 14.5.2019 passed by the Judge, Small Causes Court, Bareilly and the order dated 25.2.2020 passed by the revisional Court.

3. By the impugned order dated 14.5.2019 passed by the trial Court the application filed under Section 17 of Provincial Small Cause Court Act, 1887 (hereinafter referred to as the 'Act') has been rejected on the ground that the application was not maintainable in view of proviso to Section 17 of the Act. Revision filed against the same was also dismissed by the lower revisional court.

4. Challenging the impugned orderd, submission of learned counsel for the petitioner is that the application under Section 17 of the Act was filed along with the application under Order 9 Rule 13 CPC on the same date i.e. 5.10.2017. He submits that there is no dispute for this fact. Placing reliance on paragraph 9 of a decision of Hon'ble Apex Court in *Kedarnath vs. Mohan Lal Kesarwani & Ors.*, 2002 (1) ARC 186, it is submitted that the application filed under Section 17 of the Act along with application under Order 9 Rule 13 CPC would be maintainable as it has been observed by Hon'ble Apex Court that it may be filed at any time upto the time of presentation of the application for setting aside ex parte decree or for review and the Court may treat it as a previous application. Paragraph of the said judgement in *Kedar Nath* (supra) is quoted as under:

"9. A bare reading of the provision shows that the legislature have chosen to couch the language of the proviso in a mandatory form and we see no reason to interpret, construe and hold the nature of the proviso as directory. An application seeking to set aside an ex parte decree passed by a Court of Small Causes or for a review of its judgement must be accompanied by a deposit in the Court of the amount due from the applicant under the decree or in pursuance of the judgement. The provision as to deposit can be dispensed with by the Court in its discretion subject to a previous application by the applicant seeking direction of the Court for leave to furnish security and the nature thereof. The proviso does not provide for the extent of time by which such application for dispensation may be filed. We think that it may be filed at any time upto the time of presentation of the application for setting aside ex parte decree or for review and the Court may treat it as a previous application. The obligation of the applicant is to move a previous application for dispensation. It is then for the Court to make a prompt order. The delay on the part of the Court in passing an appropriate order would not be held against the applicant because none can be made to suffer for the fault of the Court." (Emphasis supplied)

5. Per contra, Sri Rashtrapati Khare, learned counsel for the respondents has supported the impugned orders and submits that application under Section 17 of the Act must have been filed previously i.e. before the filing of the application under Order 9 Rule 13 CPC.

6. Pure legal question is involved in the present case and exchange of affidavits is not necessary in this case as necessary facts are not in dispute. With the consent of parties present petition is being disposed of at the admission stage itself.

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

8. It is not in dispute that both the applications were filed on the same date i.e. 5.10.2017. In paragraph 9 of Kedarnath (supra) it has been observed that application under Section 17 of the Act must be on record at the time upto the time of presentation of application for setting aside decree and it is the discretion of the court to treat it as previous application. It is not in dispute that both the applications were filed simultaneously. In *Zulfiquar Hussain vs. Madan Gopal Chopra,* 2012 (1) ARC 311, this Court has held that the application can be filed simultaneously and would be maintainable. Relevant paragraphs 12, 13, 17, 18, 19, 20 are quoted as above:

"12. The facts have been noticed above in detail. They are not much in dispute. There is no dispute that neither the entire decretal amount nor the security in lieu thereof was furnished by the tenant on the date of filing of the application for setting aside the ex parte decree. Security with delay was furnished subsequently and that too was short. Whether the proviso to Section 17(1) of the Act is mandatory or directory and whether the tenant has complied with the said proviso or not are the questions fall for determination in the present revision.

13. The proviso provided that along with the application for setting aside the ex parte decree, besides other things, the applicant is to deposit the amount due from him under the decree or furnish such security for the performance of the decree,

as the court may, on a previous application made by him in this behalf, have directed. The proviso use the words "previous application". It means the application for permission to furnish security should be earlier than the application for setting aside the decree. An applicant can furnish only such security as the court have directed.

17. The aforesaid provision came up for consideration before the Apex Court in the case of Kedarnath (supra). The Apex Court noticed the various decisions given by the Allahabad High Court, which were relied upon by the landlord-applicant therein. It also noticed three decisions which were relied upon by the defendant-tenant therein. Out of three decisions relied upon by the defendant-tenant, one was Surendra Nath Mittal vs. Devanand Swarup and Anr., AIR 1987 Allahabad 132, one decision of Andhra Pradesh High Court and one decision of Bombay High Court. Apex Court has specifically laid down that the decisions relied upon by the defendant-tenant are single bench decisions and first two decisions are more or less ad hoc decisions, which do not notice the other decisions and the general trend of judicial opinion. The Apex Court specifically observed that the view propounded therein does not appeal to them and the third decision of the Bombay High Court does not lay down any general proposition of law and proceeds on its own facts.

18. After doing so, it laid down the law in para-8 of the report which is reproduced below, for the sake of convenience:

"8. A bare reading of the provision shows that the legislatures have chosen to couch the language of the proviso in a mandatory form and we see no reason to interpret, construe and hold the nature of the proviso as directory. An application seeking to set aside an ex parte decree passed by a court or small cause or for a review of its judgment must be accompanied by a deposit in the court of the amount due from the applicant under the decree or in pursuance of the judgment. The provision as to deposit can be dispensed with by the court in its discretion subject to a previous application by the applicant seeking direction of the court for leave to furnish security and the nature thereof. The proviso does not provide for the extent of time by which such application for dispensation may be filed. We think that it may be filed at any time upto the time of presentation of application for setting aside ex parte decree or for review and the Court may treat it as a previous application. The obligation of the applicant is to move a previous application for dispensation. It is then for the Court to make a prompt order. The delay on the part of the Court in passing an appropriate order would not be held against the applicant because none can be made to suffer for the fault of the Court."

19. The above decision of Apex Court leaves no room for doubt.

(1)that the proviso is mandatory

(2)the application seeking to set aside decree or review must be accompany by a deposit of decretal amount in court

(3)the application for dispensation of deposit can be filed upto the date of filing the application for setting aside the decree

(4)the proviso does not provide for the extension of time

20. Subsequently, this Court in the case of Shyam Shanker and others vs. Sahu Sarvesh Kumar and others, 2008 (3) ARC 115, followed the aforestated judgment of the Apex Court and has held that deposit of the decretal amount can be dispensed with by court if the application is

accompanied along with the application filed under Order 9 Rule 13 of the C.P.C. A subsequent application for permission to furnish the security cannot be entertained."
(Emphasis supplied)

9. In such view of the matter, the orders impugned herein are not sustainable in the eye of law as admittedly both the applications as mentioned above were filed on the same date i.e. 5.10.2017 and should have been considered by the trial court on its own merit and such application filed under Section 17 of the Act could not have been rejected as not maintainable.

10. For the reasons discussed hereinabove, present petition stands allowed. The impugned orders dated 25.2.2020 and 14.5.2019 are set aside and the application filed under Section 17 of the Act stands restored to its number and shall be considered and decided by the court below on its own merit, preferably within a period of one month from the date of production of a self-verified copy of this order, which can be verified from the official website of this Court.

11. It is made clear that this Court has not considered the merits of the application filed either under Section 17 of the Act or application filed under Order 9 Rule 13 CPC.

No order as to costs.

(2021)02ILR A4
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.02.2021, 05.01.2021, 19.01.2021

BEFORE

THE HON'BLE SURYA PRAKASH KESARWANI, J.

THE HON'BLE SHAMIM AHMED, J.

Habeas Corpus Writ Petition No. 1 of 2021

Shivam Keshari & Anr. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Ran Vijay Singh

Counsel for the Respondents:
G.A.

A. Constitution of India, 1950-Article 226 - Indian Penal Code, 1860-Sections 302,201-the police encountered the petiitoner's brother and his brother's friend to save the real culprits and SSP also misdirect the investigation –the respondents did not take any action despite court's order-even against the persons who were named in various applications moved by the petitioner-both the deceased's body was recovered in mirzapur district other than Varanasi-respondent entered missing report in G.D. after the order passed by the Court, no investigation or action taken against the two culprits-conduct of the respondents shows not only deliberate gross disobedience and disrespect to the order of the court but also intentional breach of fundamental rights-respondents including the SIT transfer investigation to the CBI for fair, impartial,expeditious and according to law investigation.(Para 1 to 29)

The petition is allowed. (E-5)

List of Cases cited:-

1. St. of W. B. & ors. Vs Committee for Protection of Democratic Rights, W. B. & ors.,(2010) 3 SCC 571

2. Ashok Kumar Todi Vs Kishwar Jahan & ors.,(2011) 3 SCC 758

3. K.V. Rajendran Vs SSP Vs CBCID , South Zone, Chennai & ors.,(2013) 12 SCC 480

4. Rubabbuddin Sheikh Vs St of Guj. & ors.,(2010) 2 SCC 200

5. Mithilesh Kumar Singh Vs St.of Raj. & ors,(2015) 9 SCC 795

6. Menka Gandhi Vs U.O.I.,(1978) AIR SC 597

7. Vinubhai Haribhai Malviya & ors. Vs St. of Guj. & anr.,(2019) AIR SC 5233

8. Subramanian Swamy Vs C.B.I.(2014) 8 SCC 682

9. Commr. of Police, Delhi Vs Registrar ,Delhi High Court, New Delhi,(1997) AIR SC 95

10. Rampal Pithwa Rahidas Vs St. of Mah.(1994) Suppl. 2 SCC 73

11. Sasi Thomas Vs State,(2006) 12 SCC 421

12. Mohd. Haroon & ors. Vs U.O.I. & anr.,(2014) 5 SCC 252

(Delivered by Hon'ble Surya Prakash Kesarwani, J. &
Hon'ble Shamim Ahmed, J.)

1. Heard Sri Ran Vijay Singh, learned counsel for the petitioners, Sri Manish Goyal, learned Additional Advocate General, assisted by Sri A.K. Sand, learned A.G.A.-I for the State-respondents and Sri Gyan Prakash, learned Assistant Solicitor General of India, assisted by Sri Sanjay Yadav, Advocate, representing the proposed respondent nos. 7 and 8.

2. Learned counsel for the petitioners has filed an impleadment application and an amendment application.

3. Learned counsel for the petitioners has served a copy of the writ petition along with applications and other affidavits upon Sri Gyan Prakash, learned Assistant Solicitor General of India, assisted by Sri Sanjay Yadav, Advocate. He has accepted notice on behalf of the respondent Nos.7 and 8.

4. After hearing learned counsels for the parties and with their consent, the impleadment application as well as the amendment application are allowed. The Union of India through Ministry of Home, New Delhi and Central Bureau of Investigation, New Delhi, through its Director, Plot No. 5-B, CGO Complex, Lodhi Road, New Delhi are allowed to be impleaded as respondent Nos. 7 and 8, during the course of the day. Amendment be also incorporated during the course of the day.

5. This writ petition has been filed praying for the following reliefs:

"(i) Issue a writ or direction in the nature of habeas corpus directing respondents to produce the petitioner no.2 (corpus) before this Hon'ble Court on such date and time as this Hon'ble Court may deem fit and proper in the circumstances of the case. And also direct the respondents to release the corpus from illegal confinement.

(1-a) Issue a writ order or direction in the nature of mandamus directing the Central Bureau of Investigation to investigate the cause of death and role of the police personals in death of Shubham Keshari (Corpus) and his friend Ravi Pandey and conclude the proceedings within stipulated period of time.

(1-b) Issue a writ order or direction in the nature of mandamus directing that the Judicial Inquiry may be conducted under the supervision of a retired Hon'ble High Court Judge of this Hon'ble Court.

(1-c) Issue a writ order or direction in the nature of mandamus directing the suspension of Senior Superintendent of Police, Varanasi, Station House Officer, P. S. Chowk, Varanasi, Station House Officer, P. S. Jaitpura, Varanasi, Station House Officer, P.S. Pandeypur, Varanasi, Station House Officer, P. S. Crime Branch, Varanasi, from service so that the investigation, as directed by this Hon'ble Court may, not be influenced in any manner whatsoever.

(ii) any other writ, order or direction as this Hon'ble Court may deem fit and proper in the circumstances of the case; and

(iii) Award costs in favour of petitioner."

6. In paragraphs-13-A, 13-B, 13-C, 13-D and 13-E of the writ petition, the petitioners have made serious allegations against the State Police and stated that the conduct of Police shows that the Police is attempting to save the actual culprits who caused the death of the corpus and there is no possibility of fair investigation by the Police of State of Uttar Pradesh and only investigation by a central agency would cause fair and proper investigation. Paragraphs-13-A, 13-B, 13-C, 13-D and 13-E of the writ petition, are reproduced below:

"13-A. That on 22.01.21 the oral undertaking was furnished on behalf of the State respondent that no police men will visit the house of the petitioner no. 1 and also no harassment would be done, inspite the team of SIT had gone to the house of the petitioner no. I on 24.01.2021 at 4:00 pm and inquired into the matter but during the inquiry a video was being made of the petitioner no.1, his mother and his sister and during making of the video regarding of the video was being paused by the police personnel when the mother and sister of the petitioner no. 1 and the petitioner no. 1 were stating names of the police personnel who were involved in the case. The signature of the aforesaid petitioner no.1, his mother and his sister were obtained on plain paper thereafter an application was immediately moved to the Chief Ministers and DGP Uttar Pradesh through e-mail on 24.01.202 1 has already been filed as Annexure No. RA-1 to the rejoinder affidavit dated 28.01.2021 and is part of record before this Hon'ble Court.

13-B. That in paragraph no. 8 of the short counter affidavit is has been shown that aadhaar card of the corpus was recovered but the aadhaar card of the corpus, in original, is in the house of the corpus and is in possession of the petitioner no.l and his family. A copy of the aadhar card has also being filed as Annexure No. RA-2 to the rejoinder affidavit dated 28.01.2021 and is part of record before this Hon'ble Court.

13-C. That police personnel have been named specifically by the petitioner no. 1 and as family members namely Gaurav Nigam and Suneel Nigam in application dated 26.11.2020 and 28.12.2020 and 31.12.2020 and no action has been taken by the police and till date FlR has been lodged by the police.

13-D. That despite of order dated 06.01.2021 passed by this Hon'ble Court has been taken by the police and as soon as the order dated 06.01.2021 was passed by this Hon'ble Court the corpus was encountered by the police which is evident from the post mortem report of the corpus which shown the duration of death of the corpus alter the order dated 06.01.2021.

13-E. That the conduct of the police shows that the police is attempting to save the actual culprits who caused the

death of the corpus and there is no possibility at all of fair investigation by the state police of Uttar Pradesh and only investigation by a central agency could cause fair and proper investigation in which no police personnel of state agency government would be permitted to interfere."

Submissions on behalf of the petitioners:-

7. Learned counsel for the petitioners submits that the corpus - petitioner No.2 and one his friend Ravi Pandey, have been brutally murdered in which the respondent Nos.2 to 6 and one Gaurav Nigam and Suneel Nigam have played role. He submits that despite applications dated 23.12.2020, 26.12.2020, 28.12.2020 and 31.12.2020 submitted before various Police Authorities including Crime Branch, Senior Superintendent of Police, Varanasi and Director General of Police, Uttar Pradesh, through speed post, fax and e-mail, no action was taken, until the corpus - petitioner No.2 (Shubham Kesari) and his friend Ravi Pandey were brutally murdered and FIR was registered on 18.01.2021. The respondent Nos.2 to 6 have also not taken any action despite specific orders passed by this court on 05.01.2021 and 06.01.2021 in which one of the application of the petitioner dated 31.12.2020 addressed to the respondent No.2, was also reproduced by this Court. After this Court passed the order dated 05.01.2021, the respondents have entered only the missing report in GD on 05.01.2021. Thus, the respondents have entered only the missing report in GD after about 14 days of the submission of the first application by the petitioner No.1 and have registered FIR No.0006/2021 under Sections 302, 201 IPC, P.S. Kotwali, District Varanasi on 18.01.2021 against unknown persons on the basis of First Information Report being Case Crime No.10 of 2021 dated 15.01.2021 under Sections 302, 201 I.P.C., P.S. Ahraura, District Mirzapur where the dead bodies of the corpus - petitioner No.2 and Ravi Pandey were recovered. This court in its order dated 05.01.2021 and 06.01.2021 quoted various paragraphs of the writ petition and issued directions to the respondent No.2 and yet no action was taken. The personal affidavit of the respondent No.2 dated 18.01.2021 which has been extensively reproduced in paragraph-7 of the order of this court dated 19.01.2021, would show that the respondent No.2 has tried to mislead this court and attempted to misdirect the investigation. Despite directions and observations made by this court in its various orders, the respondent No.2 and other State-respondents have not taken any action even against the persons who were named in various applications moved by the petitioner No.1, particularly the application dated 31.12.2020. It is only after registration of the aforesaid First Information Report No.0006/2021 dated 18.01.2021 under Sections 302, 201 IPC (on transfer of the case from Mirzapur to P.S. Kotwali on 18.01.2021 at 15:05 hours as mentioned in paragraph-16 of the personal affidavit of the respondent No.2 dated 18.01.2021), merely one of the named persons, i.e. Suneel Kumar Nigam and four other persons were arrested at 06:44 hours on 19.01.2021 and alleged recovery of motorcycle, helmet, black jacket and adhar cards of both the deceased was shown from the alleged spot identified and pointed out by the arrested persons as alleged in paragraph-8 of the short-counter affidavit filed on behalf of the respondent No.2. He further submits that the respondent Nos.2 to 6 are destroying the

evidences. He submits that even the adhar card of the corpus - petitioner No.2 is with the petitioners' family members whereas the respondents are showing its alleged recovery as afore-stated. He further submits that the investigating officer of the SIT to whom investigation has been transferred, is under influence of the respondent No.2 and the SIT cannot fairly investigate particularly when the investigation is being influenced by the respondent No.2. He further submits that investigation by police lacks credibility and it is necessary for having "a fair, honest and complete investigation", the investigation in the aforesaid Case Crime No.0006/2021 be transferred forthwith to the respondent No.8 otherwise the relevant evidences shall further be destroyed by the respondent Nos.2 to 6 to save the real culprits.

8. He further submits that the reliefs No.(1-a), (1-b) and (1-c) may also be granted.

Submissions on behalf of State - respondents:-

9. Sri Manish Goyal, learned Additional Advocate General assisted by Sri A.K. Sand, learned A.G.A.-I representing the State-respondents submits that the State Government also wants fair investigation and, therefore, in the event an order for investigation by the respondent No.8 (C.B.I.) is passed by this Court, the State Government has no objection to it and shall fully cooperate in the investigation.

Submissions on behalf of the respondent Nos.7 and 8:-

10. Sri Gyan Prakash, learned Assistant Solicitor General of India, representing respondent nos. 7 and 8 submitted that respondent nos. 7 and 8 shall follow the directions, which may be issued by this Court for CBI investigation in relation to the initially registered missing report dated 05.01.2021, FIR/ Case Crime No.10 of 2021, dated 15.01.2021, under Sections 302 and 201 I.P.C., Police Station Ahraura,District Mirzapur and transferred FIR No. 06 of 2021, dated 18.01.2021, under Sections 302 and 201 I.P.C., Police Station Kotwali, District Varanasi.

Discussion:

11. We have carefully considered the submissions of the learned counsels for the parties.

12. It is admitted fact of the case that the petitioner No.1 approached the respondent Nos.2 to 6 and submitted various applications to various authorities including the respondent Nos.2 and 3 and the Director General of Police, U.P. Lucknow being applications dated 23.12.2020, 26.12.2020 and 31.12.2020. These applications were sent to the authorities including the respondent No.2 by speed post, fax and e-mail. The corpus - petitioner No.2 was missing since 22.12.2020. In his application dated 26.12.2020, the petitioner No.1 specifically stated that the Police of Crime Branch, Police of Police Stations - Chowk, Jaitpura and Pandeypur, have lifted the corpus - petitioner No.2 and one Ravi Pandey at about 7 P.M. on 22.12.2020 when the corpus petitioner No.2 and his friend Ravi Pandey were returning on a motorcycle bearing registration No.UP65AT8867. It was also specifically stated in the aforesaid application that the applicant/ petitioner No.1 has apprehension that the police may implicate the corpus petitioner No.2 in a false case in which the police of the P.S.

Chowk Varanasi may have main role. In his **application dated 31.12.2020** addressed to various authorities including the respondent No.2 and sent by fax, speed post and e-mail, the petitioner No.1 specifically stated that the corpus - petitioner No.2 and his friend Ravi Pandey were lifted by the local police and in kidnapping of the corpus - petitioner No.2, the main **conspirators are the police of P.S. Chowk Varanasi,** one **Gaurav Nigam S/o Mohan Nigam,** resident of House No.CK48/189, Chowk, P.S. Chowk, Varanasi and **Suneel Nigam (maternal uncle of Gaurav Nigam) and raised apprehension that the corpus - petitioner No.2 and his friend Ravi Pandey may be murdered in a planned manner.**

13. By **order dated 05.01.20211**, this court incorporating averments made in paragraphs-4, 5, 6, 8, 9, 10, 11 and 12 of the writ petition; made certain observations and directed the respondent No.2 (Senior, Superintendent of Police, Varanasi) to file his personal affidavit. The relevant portion of the **order dated 05.01.2021** is reproduced below:

"The petitioners have moved several applications before the S.S.P. Varanasi, Director General of Police, Uttar Pradesh (D.G.P.) and other authorities through Speed Post, email and Fax yet neither any FIR has been registered nor whereabouts of the petitoner no.2 namely Shubham Keshari has been apprised to his family members.

Considering the facts and circumsances of the case and the submissions of learned counsel for the parties, we direct the respondent no.2 Senior Superintendent of Police, Varanasi to file his personal affidavit by tomorrow.

Put up on 06.01.2021 for further hearing at 2.00 p.m. "

14. Pursuant to the aforesaid order dated 05.01.2021, the respondent No.2 has not filed his personal affidavit and instead a personal affidavit of Sravan Kumar Singh, Superintendent of Police (Traffic), District Varanasi/ Incharge, Senior Superintendent of Police, Varanasi was filed in which it was attempted to demonstrate that the corpus - petitioner No.2 is an accused in some criminal cases and was on parole from 16.05.2020 on the basis of the order passed by Hon'ble Supreme Court in the background of COVID-19 Pandemic and in order to avoid returning to jail as per parole conditions, he appears to have gone underground.

15. Since no action was taken by the State - respondents despite the aforesaid orders of this court dated 05.01.2021, therefore, this court passed an order dated 06.01.2021 in which an application of the petitioner No.1 in which facts were noted and even the application of the petitioner No.1 dated 31.12.2020 received by the respondent No.2 was also quoted. **Paragraphs-6, 7, 8 and 9 of the order dated 06.01.2021 are reproduced below:**

"6. Despite the aforesaid application filed by the petitioner no.1, the respondent no.2 had not taken any action. Even in the personal affidavit filed today, there is no whisper about any action taken on the basis of the aforequoted application of the petitioner no.1, dated 31.12.2020.

7. Learned A.G.A. submits that a better personal affidavit of the respondent no.2 alongwith upto date progress of investigation shall be submitted on or before the next date fixed.

8. Let a personal affidavit be filed by the respondent No.2 with upto date progress of investigation. The respondent no.2 is also directed to produce the petitioner no.2 on the next date fixed.

9. ***Put up in the additional cause list on 19.01.2021."***

16. In the order dated 19.01.20212, which is made part of the present order, this Court referred and reproduced various paragraphs of the personal affidavit of the respondent No.2 dated 18.01.2021, short counter affidavit dated 19.01.2021 and supplementary affidavit of the petitioner No.1 dated 19.01.2021 and observed as under:

"10. Copies of newspaper cutting and photographs of the dead bodies filed alongwith the supplementary affidavit as Annexure - SA-3 clearly reveals that the petitioner No.2 and Ravi Pandey have been brutally murdered and burnt and thereafter their bodies were thrown in a trench so as to hide out the identity of the persons murdered, namely, the petitioner no.2 and Ravi Pandey. ***It is not only surprising, but extremely shocking that despite the application of the petitioner No.1, dated 26.10.2020 and 31.12.2020, about missing of the petitioner no.2, the respondents entered the missing report in G.D. on 05.01.2021 after this Court passed an order dated 05.01.2021 in the present writ petition. Even after this Court passed the order dated 06.01.2021, no investigation or action whatsoever was taken in relation to the police Officers/local police of Police Stations Chowk, Jaitpura, Lalapur Pandeypur, District Varanasi and named persons, namely, Gaurav Nigam and Sunil Nigam.***

11. ***The respondents remained silent and neither investigated nor took any positive step to investigate the matter with respect to the persons mentioned in the application of the petitioner no.1, dated 31.12.2020 and the police personnels. The personal affidavit of respondent no.2 filed today is totally silent in this regard. Even in the short counter affidavit filed by respondent no.2, there is no whisper with respect to any investigation or action by the respondent pursuant to the application of petitioner no.1 dated 31.12.2020.*** *In the short counter affidavit, it has been stated in the aforequoted paragraph nos. 6, 7, and 8 that one Sunil Nigam and four others have been arrested at 6:44 hours on 19.01.2021, from whose possession one motorcycle TVS Apache, bearing registration No. UP-65-AP-0725 and the motorcycle used by the deceased Subham Keshari were recovered. There is no whisper that from whose possession it was recovered.* ***Nothing has been stated that why respondents remained silent and have not taken any action or investigated the matter pursuant to the application of the petitioner no.1, dated 31.12.2020, till the petitioner no.2 was brutally murdered and body was recovered by the police of District Mirzapur on 15.01.2021 and the investigation was transferred on 18.01.2021 to Varanasi police.***

12. ***In the light of the facts and circumstances mentioned above, the role of respondents - Varanasi police including the respondent no.2 in the matter of brutal murder of the petitioner No.2 and one Ravi Pandey, is prima faice under serious cloud. Apart from above the conduct of the respondent no.2 shows not only deliberate gross disobedience and disrespect to the orders of this court but also deliberate and intentional breach of fundamental rights granted under Article 21 of the constitution of India as well as***

deliberate gross dereliction in duty resulting in murder of the petitioner No.2 and one Ravi Pandey."

17. On **02.02.2021,** this court heard the matter and passed the following **order**:

"Heard Sri Ran Vijay Singh, learned counsel for the petitioners and Sri Manish Goyal, learned Additional Advocate General, assisted by Sri Sheo Kumar Pal, learned Government Advocate and Sri A.K. Sand, learned A.G.A.-I for the State - respondents.

Rejoinder affidavit dated 28.01.2021, filed today by learned counsel for the petitioners, is taken on record.

Learned counsel for the petitioners referred to paragraphs 5, 6, and 13 of the rejoinder affidavit and Annexure 3 (copy of application dated 23.12.2020 of petitioner no.1) of the personal affidavit of the respondent no.2, dated 06.01.2021 and Annexure 1 (page 16 - copy of application of the petitioner No.1) of the counter affidavit of the respondent no.1, dated 22.01.2021 and submitted that manipulations are being done by the local police and its Senior Officers. He has also orally named several police Officers alleging their involvement and also referred to the facts noted in the orders of this Court dated 05.01.2021, 06.01.2021 and 19.01.2021 and submitted that investigation in FIR No.0006/2021, dated 18.01.2021, under Sections 302, 201 I.P.C. P.S. - Kotwali, City - Varanasi, may be transferred to the Central Bureau of Investigation, New Delhi, so that justice may be done.

Sri Manish Goyal, learned Additional Advocate General, has stated on instructions of Sri Tarun Gauba, Home Secretary, Government of U.P., Lucknow, who is present in Court; that the State Government shall immediately take appropriate action in the matter.

Learned counsel for the petitioners prays for and is granted liberty to move an appropriate application to amend the prayer and to implead Central Bureau of Investigation, New Delhi, through its Director, as respondent.

Put up as a fresh case on 08.02.2021 at 10 A.M."

18. In **State of West Bengal and others vs. Committee for Protection of Democratic Rights, West Bengal and others3, (Paras-68 and 69)**, Hon'ble Supreme Court held as under:

"68. Thus, having examined the rival contentions in the context of the Constitutional Scheme, we conclude as follows:

(i) The fundamental rights, enshrined in Part III of the Constitution, are inherent and cannot be extinguished by any Constitutional or Statutory provision. Any law that abrogates or abridges such rights would be violative of the basic structure doctrine. The actual effect and impact of the law on the rights guaranteed under Part III has to be taken into account in determining whether or not it destroys the basic structure.

(ii) Article 21 of the Constitution in its broad perspective seeks to protect the persons of their lives and personal liberties except according to the procedure established by law. The said Article in its broad application not only takes within its fold enforcement of the rights of an accused but also the rights of the victim. The State has a duty to enforce the human rights of a citizen providing for fair and impartial investigation against any person accused of commission of a cognizable offence, which may include its own officers. In certain

situations even a witness to the crime may seek for and shall be granted protection by the State.

(iii) In view of the constitutional scheme and the jurisdiction conferred on this Court under Article 32 and on the High Courts under Article 226 of the Constitution the power of judicial review being an integral part of the basic structure of the Constitution, no Act of Parliament can exclude or curtail the powers of the Constitutional Courts with regard to the enforcement of fundamental rights. As a matter of fact, such a power is essential to give practicable content to the objectives of the Constitution embodied in Part III and other parts of the Constitution. Moreover, in a federal constitution, the distribution of legislative powers between the Parliament and the State Legislature involves limitation on legislative powers and, therefore, this requires an authority other than the Parliament to ascertain whether such limitations are transgressed. Judicial review acts as the final arbiter not only to give effect to the distribution of legislative powers between the Parliament and the State Legislatures, it is also necessary to show any transgression by each entity. Therefore, to borrow the words of Lord Steyn, judicial review is justified by combination of "the principles of separation of powers, rule of law, the principle of constitutionality and the reach of judicial review".

(iv) If the federal structure is violated by any legislative action, the Constitution takes care to protect the federal structure by ensuring that Courts act as guardians and interpreters of the Constitution and provide remedy under Articles 32 and 226, whenever there is an attempted violation. In the circumstances, any direction by the Supreme Court or the High Court in exercise of power under Article 32 or 226 to uphold the Constitution and maintain the rule of law cannot be termed as violating the federal structure.

(v) Restriction on the Parliament by the Constitution and restriction on the Executive by the Parliament under an enactment, do not amount to restriction on the power of the Judiciary under Article 32 and 226 of the Constitution.

*(vi) If in terms of Entry 2 of List II of The Seventh Schedule on the one hand and Entry 2A and Entry 80 of List I on the other, an investigation by another agency is permissible subject to grant of consent by the State concerned, there is no reason as to why, in an exceptional situation, court would be preclud***we clarify that the department concerned is free to take appropriate action in accordance with the statute/rules/various orders applicable to them, after affording reasonable opportunity of hearing***.***ed from exercising the same power which the Union could exercise in terms of the provisions of the Statute. In our opinion, exercise of such power by the constitutional courts would not violate the doctrine of separation of powers. In fact, if in such a situation the court fails to grant relief, it would be failing in its constitutional duty.*

(vii) When the Special Police Act itself provides that subject to the consent by the State, the CBI can take up investigation in relation to the crime which was otherwise within the jurisdiction of the State Police, the court can also exercise its constitutional power of judicial review and direct the CBI to take up the investigation within the jurisdiction of the State. The power of the High Court under Article 226 of the Constitution cannot be taken away, curtailed or diluted by Section 6 of the Special Police Act. Irrespective of there being any statutory provision acting as a restriction on the powers of the Courts, the

restriction imposed by Section 6 of the Special Police Act on the powers of the Union, cannot be read as restriction on the powers of the Constitutional Courts. Therefore, exercise of power of judicial review by the High Court, in our opinion, would not amount to infringement of either the doctrine of separation of power or the federal structure.

69. In the final analysis, our answer to the question referred is that a direction by the High Court, in exercise of its jurisdiction under Article 226 of the Constitution, to CBI to investigate a cognizable offence alleged to have been committed within the territory of a State without the consent of that State will neither impinge upon the federal structure of the Constitution nor violate the doctrine of separation of power and shall be valid in law. Being the protectors of civil liberties of the citizens, this Court and the High Courts have not only the power and jurisdiction but also an obligation to protect the fundamental rights, guaranteed by Part III in general and under Article 21 of the Constitution in particular, zealously and vigilantly."

19. Sri **Ashok Kumar Todi vs. Kishwar Jahan and others,4 (Paras-37 and 56),** Hon'ble Supreme Court while affirming order for investigation by CBI also considered the directions passed by the High Court to take action against the officers on departmental side, and held as under:

"37. Even as early as in 1990, this Court has held that everyone associated with enforcement of law is expected to follow the directions and failure shall be seriously viewed and drastically dealt with. We also reiterate that the directions of this Court are not intended to be brushed aside and overlooked or ignored. Meticulous compliance is the only way to respond to directions of this Court.

56. ***Coming to the directions passed by the High Court about the conduct of the officers and taking action against them on the departmental side, we clarify that the department concerned is free to take appropriate action in accordance with the statute/rules/various orders applicable to them, after affording reasonable opportunity of hearing.*** *It should not be taken as neither the High Court nor this Court concluded the issue about the allegations made against them. However, we agree with the observation of the learned single Judge in respect of the conduct of the officers in interfering with the conjugal affairs of the couple even without any formal complaint against any one of them."*

20. In the case of **K.V. Rajendran vs. Superintendent of Police vs. CBCID, South Zone, Chennai and others5, (Paras-13, 14 and 17)**, Hon'ble Supreme Court observed that investigation can be transferred from the State Investigating Agency to any other independent agency like CBI and the power of transferring such investigation should be exercised in rare and exceptional cases where the court finds it necessary in order to do justice between the parties and to instil confidence in the public mind or where investigation by the State Police lacks credibility and it is necessary for having "a fair, honest and complete investigation" and particularly when it is imperative to retain public confidence in the impartial work of the State Agencies. In the aforesaid case, Hon'ble Supreme Court referred to its decision in**Rubabbuddin Sheikh v. State of Gujarat & Ors6** and observed that in

order to do justice and instil confidence in the minds of the victims as well of the public, the State Police Authorities could not be allowed to continue with the investigation when allegations and offences were mostly against top officials. It was further observed that where high officials of State authorities are involved, or the accusation itself is against the top officials of the investigating agency thereby allowing them to influence the investigation, and further that it is so necessary to do justice and to instil confidence in the investigation or where the investigation is prima facie found to be tainted/biased, the court could exercise its Constitutional powers for transferring an investigation from the State investigating agency to any other independent investigating agency like CBI only in rare and exceptional cases.

21. In **Mithilesh Kumar Singh vs. State of Rajasthan and others7**, **(Para-15),** Hon'ble Supreme Court while emphasizing the need of fair, proper and impartial investigation, considered the transfer of investigation to CBI and held as under:

"15. Suffice it to say that transfers have been ordered in varied situations but while doing so the test applied by the Court has always been whether a direction for transfer, was keeping in view the nature of allegations, necessary with a view to making the process of discovery of truth credible. What is important is that this Court has rarely, if ever, viewed at the threshold the prayer for transfer of investigation to CBI with suspicion. There is no reluctance on the part of the Court to grant relief to the victims or their families in cases, where intervention is called for, nor is it necessary for the petitioner seeking a transfer to make out a cast-iron case of abuse or neglect on the part of the State Police, before ordering a transfer. Transfer can be ordered once the Court is satisfied on the available material that such a course will promote the cause of justice, in a given case."

22. The criminal justice system mandates that any investigation into the crime should be fair, in accordance with law and should not be tainted. It is equally important that interested or influential persons are not able to misdirect or hijack the investigation, so as to throttle a fair investigation resulting in the offenders escaping punitive course of law. These are important facets of the rule of law. Breach of rule of law amounts to negation of equality under Article 14 of the Constitution of India. Article 21 of the Constitution of India makes it clear that the procedure in criminal trials must be right, just and fair and not arbitrary, fanciful or oppressive, vide **Menka Gandhi vs. Union of India8** (para-7) **and Vinubhai Haribhai Malviya and others vs. State of Gujrat and another9** (paras-16 and 17) **and Subramanian Swamy vs. C.B.I.10 (para-86).** Article 21 enshrines and guarantees the precious right of life and personal liberty to a person which can only be deprived on following the procedure established by law in a fair trial which assures the safety of the accused. **The assurance of a fair trial is the first imperative** of the dispensation of justice, vide **Commissioner of Police, Delhi vs. Registrar, Delhi High Court, New Delhi11 (para-16)**. The ultimate aim of all investigation and inquiry whether by the police or by the Magistrate is to ensure that those who have actually committed a crime, are correctly booked and those who have not, are not arraigned to stand trial. This is the minimal and fundamental

requirement of Article 21 of the Constitution of India. Interpretation of provisions of Cr.P.C. needs to be made so as to ensure that Article 21 is followed both in letter and in sprit. "A speedy trial" is the essence of companion in concept in "fair trial". Both being inalienable jurisprudentially, the guarantee under Article 21 of the Constitution of India embraces both life and liberty of the accused as well as interest of the victim, his near and dear ones as well as of the community at large and, therefore, cannot be alienated from each other. A fair trial includes fair investigation as reflected from Articles 20 and 21 of the Constitution of India. If the investigation is neither effective nor purposeful nor objective nor fair, the courts may if considered necessary, may order fair investigation, further investigation or reinvestigation as the case may be to discover the truth so as to prevent miscarriage of justice. However, no hard and fast rules as such can be prescribed by way of uniform and universal invocation and decision shall depend upon facts and circumstances of each case.

23. Fair and proper investigation is the primary duty of the investigating officer. In every civilized society, the police force is invested with powers of investigation of a crime to secure punishment for the criminal and it is in the interest of the society that the investigating agency must act honestly and fairly and not resort to fabricating false evidence or creating false clues only with a view to secure conviction because such acts shake the confidence of the common man not only in the investigating agency but in the ultimate analysis in the system of dispensation of criminal justice. Proper result must be obtained by recourse to proper means, otherwise it would be an invitation to anarchy, vide **Rampal Pithwa Rahidas vs. State of Maharastra12** (para-37). Investigation must be fair and effective and must proceed in the right direction in consonance with the ingredients of the offence and not in a haphazard manner moreso in serious case. Proper and fair investigation on the part of the investigating officer is the backbone of rule of law vide **Sasi Thomas vs. State13** (para-15 and 18).

24. **On the facts of the present case as briefly noted in foregoing paragraphs-12 to 18 of this order and also the facts noted in the orders dated 05.01.2021, 06.01.2021, 19.01.2021 and 02.02.2021, and also in view of the nature of allegations, particularly against the State Police and lack of credibility in the investigation by it, we are of the view that to make the process of discovery of truth, credible and to have a fair, honest and complete investigation to instil confidence in the minds of the victim's family as well of the public, the State Police Authorities should not be allowed to continue with the investigation and instead the investigation in the crime case in question be transferred to the respondent No.8 (Central Bureau of Investigation) for fair, honest, impartial and complete investigation so as to promote the cause of justice. Learned Additional Advocate General for the State-respondents has also agreed for transfer of investigation from SIT to CBI as noted above in paragraph-9. Therefore, we find it a fit case to direct transfer of investigatio**n from State Police/ SIT to CBI, i.e. the respondent No.8 and it is ordered accordingly.

25. Today, when the matter was taken up, this court specifically asked the learned

Additional Advocate General as to whether respondent No.1 has taken any action as per statement made before this court on 02.02.2021. The learned Additional Advocate General admitted that action has not yet been taken against any police officers in terms of the statement of the Secretary (Home) recorded in the order dated 02.02.2021, but the action to be taken is under consideration of the State Government for which procedure is being followed.

26. Considering the facts and circumstances mentioned above and also no objection of the respondent No.1 for investigation by the respondent No.8, **we direct the State - respondents including the SIT to forthwith transfer investigation to the respondent No.8 in First Information Report being Case Crime No.0006/2021 dated 18.01.2021 under Sections 302, 201 IPC, P.S. Kotwali District Varanasi. The respondent No.8 is directed to take up the investigation in the aforesaid FIR/ Case Crime No.006/2021 dated 18.01.2021 and complete the investigation fairly, impartially and in accordance with law, expeditiously.** On the next date fixed, an affidavit on behalf of the respondent No.8 shall be filed indicating that the investigation in the above matter has been started by it. **Thus, relief No.(1-a) stands granted.**

27. So far as the relief No.(1-b) is concerned, presently we do not find any good reason to issue directions for judicial inquiry in the light of the grant of relief No.(1-a).

28. So far as the relief No.(1-c) is concerned, we abstain from issuing any order in exercise of powers under Article 226 of the Constitution of India in view of the assurance of the Home Secretary, Government of U.P. noted in the aforequoted order dated 02.02.2021.

Question left open:-

29. Whether rule of law should prevail and fundamental rights guaranteed to people under Articles 14 and 21 of the Constitution of India should be observed or deliberate inaction, misconduct and dereliction in duty of officers, if any, should be excused or protected, is an important question before the State Government under the facts and circumstances of the present case. Keeping in mind the statement of the Home Secretary noticed in the aforequoted order dated 02.02.2021 and the observations of the Hon'ble Supreme Court in **Mohd. Haroon and others vs. Union of India and another14, (para-129),** that ***"the officers responsible for maintaining law and order, if found negligent, should be brought under the ambit of law irrespective of their status,"*** we presently leave this question open to the wisdom of the State Government for proceeding departmentally against erring officers strictly in accordance with law.

30. Affidavit of compliance on behalf of the State Government and the respondent No.8 shall be filed on the next date fixed.

31. **Put up in the additional cause list on 19.02.2021.**

Delivered by Hon'ble Surya Prakash Kesarwani, J.

&

Hon'ble Shamim Ahmed, J.

Heard Shri Ran Vijay Singh, learned counsel for the petitioners and learned AGA for the State.

This writ petition has been filed by the petitioers praying for the following reliefs:-

(I) Issue a writ or direction in the nature of habeas corpus directing respondents to produce the petitioner no.2 (corpus) before this Hon'ble Court on such

date and time as this Hon'ble Court may deem fit and proper in the circumsances of the case and also direct the respondents to release the corpus from illegal confinement.

In paragraph nos.4, 5, 6, 8, 9, 10, 11 and 12 of the Habeas Corpus Writ Petition, it has been stated as under:-

"4. That, an incident took place on 22.12.2020 at 7.00 PM with the petitioner no.2 (corpus), the police of police station Chowk, Police Station Jaitpura, police station Pandeypur and Crime Branch of district Varanasi caught the petitioner no.2 and his friend namely Ravi Pandey near the house of Sunil Gupta.

5. That, the petitioner number no.1 is brother of the petitioner no.2. After the alleged incident petitioner no.1 got information by the locality that the petitioner no.1 has been picked up by the police. After this information petitioner no.1 alongwith his family members went to concern police station Pandeypur where no information was given regarding the arresting of the petitioner no.2, thereafter petitioner no.1 and his family members started to search in other police station of district Varanasi, but no information could be collected regarding the petitioner no.2.

6. That, being compelled petitioner no.1 moved an application to Senior Superintendent of Police and Superintendent of Police (Crime) Varanasi through post on 26.12.2020 and also moved an application to District Magistrte, Varanasi on 26.12.2020 therein stating all correct facts of the matter, but no action was taken by the authorities. A photocopy of the applications along with the receipts dated 26.12.2020 are being filed collectively herewith and marked as Annexure No.1 to this writ petition.

8. That, the petitioner no.1 moved an application to DGP U.P., Senior Superintendent of Police and also moved an application to District Magistrate Varanasi on 31.12.2020 through e-mail, fax and post therein stating all correct facts of the matter, but no action was taken by the authorities. A photocopy of the applications along with the receipts dated 31.12.2020 are being filed collectively herewith and marked as Annexure No.3 to this writ petition.

9. That, the petitioner no.1 has been informed by the people of locality that his brother-petitioner no.2 has been taken away by the cops of the district Varanasi, but the police stations of district Varanasi are not given any information regarding the petitione no.2.

10. That, the petitioner no.2 has been detained illegally by the police of district Varanasi against his wishes.

11. That, the illegal confinement of the petitioner no.2 shows his life is in danger; he may be killed in fake encounter by the police.

12. That it is submitted that the continued illegal confinement of the petitoner no.2 by respondents against his wishes in violation of his right and liberty guaranteed under Article 21 of the Constitution of India and he is entitled to a direction from this Hon'ble Court to be set at liberty forthwith."

The petitioners have moved several applications before the S.S.P. Varanasi, Director General of Police, Uttar

Pradesh (D.G.P.) and other authorities through Speed Post, email and Fax yet neither any FIR has been registered nor whereabouts of the petitoner no.2 namely Shubham Keshari has been apprised to his family members.

Considering the facts and circumsances of the case and the submissions of learned counsel for the parties, we direct the respondent no.2 Senior Superintendent of Police, Varanasi to file his personal affidavit by tomorrow.

Put up on **06.01.2021** for further hearing at **2.00 p.m.**

(Delivered by Hon'ble Surya Prakash Kesarwani, J.

&

Hon'ble Shamim Ahmed, J.)

1. Heard Sri Ran Vijay Singh, learned counsel for the petitioners and Sri N.K. Verma, learned A.G.A. for the State - respondents.

2. A personal affidavit of Sri Amit Pathak, Deputy Inspector General of Police/Senior Superintendent of Police, District - Varanasi, dated 18.01.2021, and a short counter affidavit dated 19.01.2021, of Sri Vikas Chandra Tripathi, Additional Superintendent of Police (City), District - Varanasi, on behalf of the respondent no.2, have been filed today which are taken on record.

3. A supplementary affidavit dated 19.01.2021 by the petitioner no.1 has been filed today which is also taken on record.

4. On 06.01.2021, this Court passed the following order :-

"1. Heard learned counsel for the petitioner and Sri Patanjali Misra, learned A.G.A.

2. On 5.01.2021, this Court passed the following order :-

"Heard Shri Ran Vijay Singh, learned counsel for the petitioners and learned AGA for the State.

*This **writ petition has been filed** by the petitioers praying **for the following reliefs:-***

*(I) Issue a writ or direction in the nature of habeas corpus directing respondents **to produce the petitioner no.2 (corpus)** before this Hon'ble Court on such date and time as this Hon'ble Court may deem fit and proper in the circumstances of the case and also direct the respondents to release the corpus from illegal confinement.*

***In paragraph nos.4, 5,** 6, 8, 9, 10, 11 and 12 of the Habeas Corpus Writ Petition, it has been stated as under:-*

"4. That, an incident took place on 22.12.2020 at 7.00 PM with the petitioner no.2 (corpus), the police of police station Chowk, Police Station Jaitpura, police station Pandeypur and Crime Branch of district Varanasi caught the petitioner no.2 and his friend namely Ravi Pandey near the house of Sunil Gupta.

*5. That, the petitioner number no.1 is brother of the petitioner no.2. **After the alleged incident petitioner no.1 got information by the locality that the petitioner no.1 has been picked up by the police.** After this information petitioner no.1 alongwith his family members went to concern police station Pandeypur where no information was given regarding the arresting of the petitioner no.2, thereafter petitioner no.1 and his family members started to search in other police station of district Varanasi, but no information could be collected regarding the petitioner no.2.*

6. That, being compelled ***petitioner no.1 moved an application to Senior Superintendent of Police and Superintendent of Police (Crime) Varanasi through post on 26.12.2020*** *and also moved an application to District Magistrate, Varanasi on 26.12.2020 therein stating all correct facts of the matter, but no action was taken by the authorities. A photocopy of the applications along with the receipts dated 26.12.2020 are being filed collectively herewith and marked as Annexure No.1 to this writ petition.*

8. That, ***the petitioner no.1 moved an application to DGP U.P., Senior Superintendent of Police*** *and also moved an application to District Magistrate Varanasi* ***on 31.12.2020 through e-mail, fax and post therein*** *stating all correct facts of the matter, but no action was taken by the authorities. A photocopy of the applications along with the receipts dated 31.12.2020 are being filed collectively herewith and marked as Annexure No.3 to this writ petition.*

9. That, the petitioner no.1 has been informed by the people of locality that his brother-petitioner no.2 has been taken away by the cops of the district Varanasi, but the police stations of district Varanasi are not given any information regarding the petitioner no.2.

10. That, the petitioner no.2 has been detained illegally by the police of district Varanasi against his wishes.

11. ***That,*** *the illegal confinement of the petitioner no.2 shows* ***his life is in danger; he may be killed in fake encounter by the police.***

12. That it is submitted that the continued illegal confinement of the petitioner no.2 by respondents against his wishes in ***violation of his right and liberty guaranteed under Article 21 of the Constitution of India*** *and he is entitled to a direction from this Hon'ble Court to be set at liberty forthwith."*

The petitioners have moved several applications before the S.S.P. Varanasi, Director General of Police, Uttar Pradesh (D.G.P.) and other authorities through Speed Post, email and Fax yet neither any FIR has been registered nor whereabouts of the petitioner no.2 namely Shubham Keshari has been apprised to his family members.

Considering the facts and circumstances of the case and the submissions of learned counsel for the parties, ***we direct the respondent no.2 Senior Superintendent of Police, Varanasi to file his personal affidavit by tomorrow.***

Put up on 06.01.2021 for further hearing at 2.00 p.m."

3. In compliance to the aforequoted order, ***a personal affidavit of Sri Shrawan Kumar Singh, Superintendent of Police (Traffic), District - Varanasi/incharge, Senior Superintendent of Police, Varanasi, dated 06.01.2021, has been filed today,*** *which is taken on record.*

4. ***In paragraph 6 of the aforesaid personal affidavit, it has been admitted that the information given by the petitioner no.1 by application on 23.12.2020 regarding missing of the petitioner no.2 was entered in the G.D. No.040, dated 05.01.2021.*** *In paragraph 7 it has been stated that the petitioner has neither been arrested nor detained in any police station in District - Varanasi. In paragraph 9 it has been stated that the petitioner no.2 was on parole from 16.05.2020 on the basis of the order passed by the Hon'ble Supreme Court in the back ground of COVID - 19 Pandemic and he had been incarcerated in Case Crime No.178 of 2019 under Sections 406, 420*

I.P.C., P.S. Chowk, District - Varanasi and Case Crime No.190 of 2019 under Section 406 I.P.C., P.S. Chowk, District - Varanasi. It has further been stated in paragraph 9 of the personal affidavit that in order to avoid returning to jail as per parole conditions, the petitioner no.2 appears to have gone under ground.

5. ***The aforesaid personal affidavit prima facie appears to be unsatisfactory and indicates inaction on the part of the police*** *inasmuch as the application was given by the petitioner no.1 for missing of the petitioner no.2 on 23.12.2020 but missing report has been entered in the G.D. on 05.01.2021 after this Court passed the aforequoted order.* ***That apart, the petitioner no.1 has moved an application dated 31.12.2020*** *through speed post and fax, before the Senior Superintendent of Police, Varanasi,* ***in which he has clearly stated as under :-***

"सेवा में,

श्रीमान् वरिष्ठ पुलिस अधीक्षक महोदय,

जिला वाराणसी।

विषयः- प्रार्थी के भाई एवं उसके मित्र की पुलिस एवं विपक्षियों द्वारा अपहरण करके सुनियोजित हत्या करने की साजिश के सम्बन्ध मेः-

मोहदय,

निवेदन है कि प्रार्थी शिवम केशरी पुत्र रमाशंकर केशरी निवासी मकान नम्बर - के.64/48 गोला दीनानाथ, थाना कोतवाली, जिला वाराणसी का रहने वाला है। प्रार्थी का छोटा भाई शुभम केशरी दिनांक 22/12/2020 ई० को घर से अपने मित्र रवि पाण्डेय के साथ पड़ोस में रहने वाले सुनील गुप्ता के घर पर गया हुआ था। उसी दिन सायं लगभग 7:00 बजे प्रार्थी का भाई एवं उनका मित्र रवि पाण्डेय उक्त सुनील गुप्ता की मोटर साईकिल संख्या- UP 65 AT 8867 लेकर घर को वापस आ रहा था उसी समय ***पुलिस विभाग की अपराध शाखा एवं स्थानीय थाना चौक, वाराणसी, स्थानीय थाना जैतपुरा, वाराणसी तथा स्थानीय थाना लालपुर पाण्डेयपुर, जिला वाराणसी के पुलिस कर्मचारी प्रार्थी के भाई एवं उसके मित्र रवि पाण्डेय को सुनील गुप्ता के घर के पास से मारते पीटते हुए उठा ले गये।*** *प्रार्थी अपने भाई एवं रवि पाण्डेय के परिवार वाले जिला के सभी थानों पर उनका पता लगाये तो उनका कहीं भी पता नहीं लग रहा है।* ***प्रार्थी के भाई एवं उसके मित्र के अपहरण में थाना चौक, जिला वाराणसी के पुलिस वालों एवं गौरव निगम पुत्र स्व० मोहन निगम निवासी मकान नम्बर-सी.के.48/189 हड़हा चौक, थाना चौक, जिला वाराणसी तथा गौरव निगम के मामा सुनिल निगम के द्वारा प्रमुख रूप से साजिश की गयी है। प्रार्थी को आशंका है कि उक्त साजिशकर्ताओं द्वारा प्रार्थी के भाई एवं उसके मित्र की सुनियोजित हत्या की जा सकती है।*** *प्रार्थी की कहीं भी सुनवाई नहीं हो रही है। इस कारण प्रार्थी श्रीमान् जी के समक्ष पुनः प्रार्थना पुत्र प्रस्तुत कर रहा है।*

<u>प्रार्थना</u>

अतः श्रीमान जी से निवेदन है कि प्रार्थी के प्रार्थना पत्र के प्रकाश में जाँच करवा कर आवश्यक कार्यवाही करने का आदेश देने की कृपा करें। प्रार्थी आप श्रीमान् जी का सदैव आभारी रहेगा।

दिनांक :- 31/12/2020 ई०

हस्ताक्षर प्रार्थी
शिवम केशरी
मो०नं० - 9919891196"

6. Despite the aforesaid application filed by the petitioner no.1, the respondent no.2 had not taken any action. Even in the personal affidavit filed today, there is no whisper about any action taken on the basis of the aforequoted application of the petitioner no.1, dated 31.12.2020.

7. Learned A.G.A. submits that a better personal affidavit of the respondent no.2 alongwith upto date progress of investigation shall be submitted on or before the next date fixed.

8. Let a personal affidavit be filed by the respondent No.2 with upto date progress of investigation. The respondent no.2 is also directed to produce the petitioner no.2 on the next date fixed.

9. ***Put up in the additional cause list on 19.01.2021."***

5. In compliance to the aforesaid order dated 06.01.2021, the personal affidavit dated 18.01.2021 of the respondent no.2 has been filed today. In paragraphs 2 and 3 of his personal affidavit the respondent no.2 has stated that pursuant to the order dated 06.01.2021, he is filing a better personal affidavit alongwith upto date progress of investigation.

6. In **paragraphs 4 to 14 of his personal affidavit the respondent no.2 has stated** that the sub - Inspector Sachidanand Singh, constable Sudhir Bharti and constable Dinesh Kumar Yadav made **searches at all likely places** in an effort to trace out the petitioner No.2. In this process they inquired the petitioner no.1, one **Sri Anil Gupta, boatman Arun Kumar, Ram Shanker Kesari (father of the petitioner no.2),** Sunil Gupta, (friend of the petitioner) and **relative Mohit Kesari** and also affixed photo posters at various places but nothing fruitful could be achieved by these efforts and, therefore, reports were prepared and information were given to the DCRB Surveillance cell, Social Media, Electronic Media and news channel to try and trace out the petitioner No.2. In these paragraphs i.e. paragraphs 4 to 14 the aforesaid alleged investigation date wise i.e. on 06.01.2021 to 16.01.2021 have been mentioned. In paragraph 14 it has been stated that **on 16.01.2021, the police team made efforts to try and trace out the location ("pata rasi surag rasi") at various places. Telephone calls made by the Station House Officer of Police Station Ahraura, District - Mirzapur and Circle Officer - Naxal, were received by Inspector Kotwali that in the jurisdiction of police station Ahraura two dead bodies have been found in half burnt condition which were the bodies of petitioner no.2 and one Sri Ravi Pandey.**

7. The aforesaid **personal affidavit of the respondent no.2** runs in 18 paragraphs. Above referred paragraphs 4 to 16 of the **personal affidavit of the respondent no.2 are reproduced below :-**

"4. That on ***6.1.2021,*** *Sub Inspector Sachidanand Singh, Constable Suldhir Bharti and Constable Dinesh Kumar Yadav made* ***searches at all likely places*** *in an effort to trace out the person named Shubham Kesari. The brother of the said Shubham Kesari, named* ***Shivam Kesari, upon being questioned*** *disclosed that on 22.12.2020, at about 3 p.m., his brother named Shubham had gone with Ravi Pandey, son of Ashok Pandey, resident of Ashok Nagar Colony, Mahmoorganj, P.S. Bhelupur, Varanasi, to the house of their neighbour named Sunil Gupta, son of late Chhotey Lal Gulpta, resident of CK49/5, Bhooletan, P.S. Chowk, Varanasi. They had gone on Honda Shine Motorcycle, bearing registration No.UP 65-AT8867, and never returned. Sunil Gupta was contacted and questioned. He said that he was at home on 22.12.2020, and at about 3 p.m., Shubham Kesari came, and asked for his Bike (supra), as he had to go somewhere with his friend named Ravi Pandey. Sunil Gupta stated that he gave his*

Bike, but it never returned, neither dead Shubham Kesari. People of the locality confirmed that Shubham Kesari had been seen on a motorcycle in the afternoon of 22.12.2020, but did not know where he went. Examination of Footage of nearby CCTV Cameras could also not shed light on anything useful. Posters bearing the photograph of the missing Shubham Kesari were affixed at prominent public places and distributed in several mohallas, like Gola Dina Nath, Kashipura, Resham Katra, Bhooletan, Maidagin, Boolanala, Chowk, Godowalia and various Ganga Ghats. The police team went to Bhelupur, Lanka, Cantt, Kashi and Dharamshalas. They also visited hotels, bus-stands and railway sations and affixed posters with the Photograph, and made inquiries from the public. Nothing fruitful, however, could be achieved by these efforts. Reports were prepared and information given to the DCRB, the Surveillance Cell, Social Media, Electronic Media and News Channels to try and trace out Shubham Kesari.

5. That ***on 07.01.2021*** *Sub Inspector Sachidanand Singh, constable Suhir Bharti and constable Dinesh Kumar Yadav made* ***searches at all likely places*** *in a effort to trace out the person named Shubham Kesari, went to Bhooletan where* ***Anil Gupta,*** *son of Late Chhotey Lal Gupta, resident of CK 49/5 Bhooletan, P.S. Chowk, Varanasi. Confirmed that Shubham Kesari along with Ravi Pandey often used to visit their house. He corroborated his brother Sunil's statement that Shubham Kesari and Ravi Pandey had came to their house on 22.12.2020 at about 3 p.m., and borrowed his brother Sunil's bike. They left and never returned. Police summoned informant (mukhbir khaas) and enquired about Shubham Kesari but nothing fuitful emerged. The police team affixed posters bearing the photograph of the missing Shubham Kesari, at prominent public places and distributed in several mohallas, like Maidagin, Bisheshwar Ganj. Adampur Gol Gatta, Rajghat Kash, Padaun, Soojabad, Ram Nagar, Lanka, and Godowlia. Nothing fruitful, however, could be achieved by these efforts.*

6. That ***on 08.01.2021,*** *sub inspector Sachidanand Singh, and constable Ramu Yadav went to try and trace out Shubham Kesari, to many places, including, Maidagin, Chowk, Godowlia and affixed the photo posters at various public places, while enquiring from members of the public about the said Shubham Kesari. The team also proceeds to Dashshamedh where* ***boatman Arun Kumar*** *son of Faujdar and others were questioned and shown the photo posters, but they could not give any worthwhile information. The team also proceeded to Rajghat Padaun, Dulhipur where people were questioned and shown the photo posters, but they could not give any worthwhile information. They went to Kashi Station and affixed the photo-posters on train bogies and made enquiries from the public.*

7. That on ***09.01.2021 t****he police team made* ***searches at all likely places*** *in an effort to trace out the person named Shubham Kesari, and* ***visited the father of Shubham Kesari*** *who could not shed any light regarding his son's whereabouts. Sunil Gupta was again questioned who repeated his earlier statement (supra) and said he would inform the police if he got any information about Shubham Kesari. Photo posters were affixed at various public places and after summoning police informers, enquiries were made but these efforts did not yield any information. Head Constable Deo Narain was sent to various districts in order to get information.*

8. That ***on 10.01.2021*** *police team made efforts to try and trace out the location ("pata rasi surag rasi") at various places.* ***Ram Shanker Kesari, the father of***

Shubham Kesari and Sunil Gupta were again questioned, *but could not reveal anything useful. They promised to inform the police if anything positive came to their knowledge. The Corporator of Shabd Sagar named Bhaiya Lal Yadav was questioned but could not give any useful information. The spots where photo (posters had earlier been affixed were visited and enquiries made, but nothing fruitful emerged. The footage of CCTV cameras on the likely route taken by Shubham Kesari was examined.*

9. That on ***11.01.2021*** *police team made efforts to try and trace out the location ("pata rasi surag rasi") at various places. They questioned one Mohit Kesari, relative of Shubham Kesari, but he could not shed any light on the location of Shubham Kesari. Sunil Gupta was again questioned, but could not reveal anything useful. He promised to inform the police if anything positive came to their knowledge. Anil Gupta (brother of Sunil Gupta) was present and corroborated his earlier statement. The spots at public places where the photo posters weere affixed erlier were visited and enquiries made from the public, but nothing fruitful emerged. The team went to the DCRB office and made enquiries about progress, and were informed that the CDRs had been obtained and were being examined.*

10. That on ***12.01.2021 the*** *police team* ***visited all likely placed including houses of relatives*** *but nothing fruitful emerged from the enquiries. The spots at public places where the photo posters were affixed earlier were visited and enquiries made from the public and local shop keepers, but nothing fruitful emerged. The team went to Ramakant Nagar Colony, P.S. Sigra, where Sanjay Kumar Jaiswal and Neeraj Pandey were questioned but could not give any useful information.*

11. That ***on 13.01.2021,*** *the police team made efforts to try and trace out the location (" pata rasi surag rasi") at various places. They questioned Mohit keshari and Sunil Gupta but nothing fruitful emerged .* ***CCTV footage was examined,*** *and the persons on whose premises they were installed, were also questioned. The footage revealed that Shubham Kesari was seen driving the bike alone on 22.12.2020. The spots at public places where the photo posters were affixed earlier were visited and enquiries made from the public and local shop keepers, but nothing fruitful emerged. When the team reached Padaun, a friend of Shubham Kesari named Dilsher Ahmad was enquired about but he was not available. The team went to the office of the DCRB, where the " talaash gasti" of the police had been issued on 12.01.2021. The telecast and broadcast at all districts of U.P., had been made by Doordarshan, Lucknow and Aakashvani Kendra, Varanasi. Head constable Deo Narain returned from Ghaipur, Mau, Azamgarh, GRP and DCRB (of all three districts) after affixing photo posters at various places. The Circle Officer Kotwali constituted a team to trace out Shubham kesari.*

12. That ***on 14.01.2021,*** *the police team made efforts to tray and trace out the location (" pata rasi surag rasi") at various places. They a****gain questioned Mohit Kesari and Sunil Gupta*** *but nothing fruitful emerged. The spots at public places where the photo posters were affixed earlier were visited and enquires made from the public and local shop keepers, but nothing fruitful emerged. When the team reached Padaun, the friend of Shubham Kesari named Dilsher Ahmad was was found, who said that he had met Shubham Kesari in the jail. Since then they had been in touch. Often, Shubham Kesari used to*

say that his parole was about to end, but he was unable to arrange the money for bail. In case the money was not arranged, Subham Kesari had said that he would go underground.

13. That ***on 15.01.2021****, the police team made efforts to try and trace out the location ("Pata rasi surag rasi") at various places. The spots at public places where the photo posters were affixed earlier were visited and enquiries made from the public and local shop keepers, but nothing fruitful emerged. The CDR of the mobile No. 9151674317 belonging to Subham Kesari was obtained which revealed that he was in constant touch with mobile number 9451436168 of one Neeraj Pandey. Police questioned the said Neeraj Pandey who said that on 22.12.2020 Shubham Kesari and Ravi Pandey had come and he had taken them to Phool Mandi, Sigra, where one Vicky came and took Shubham Kesari and Ravi to some hotel.*

14. That ***on 16.01.2021,*** *the police team made efforts to try and trace out the location (" pata rasi surag rasi") at various place.* ***Telephone calls made by Station House Officer of police station Ahraura, District Mirzapur and Circle Officer Naxal district Mirzapur were received by Inspector Kotwali that in the jurisdiction of police station Ahraura, two dead bodies had been found in a half burnt condition. Relatives of Shubham Kesari and Ravi Pandey were taken to Mirzapur, where they identified the dead bodies as being those of Shubham Kesari and Ravi Pandey.*** *The relevant entry was incorporated in the General Diary at 14:19 hours.*

15. That ***a first information report was lodged on 15.01.2021 bearing Case Crime No. 10 of 2021 under sections 302,201 I.P.C. at Police Station Ahraura, District Mirzapur, against unknown accused,*** *by one Raj Kumar, who stated in the F.I.R. that he had chanced upon the dead bodies. A copy of the first information report is being attached and marked as Annexure No.1 to this personal affidavit.*

16. That the ***said case was transferred from Mirzapur to Police Station Kotwali on 18.01.2021 at 15:05 hours,*** *and the same shall be investigated with due diligence in a fair and impartial manner."*

8. The **short counter affidavit dated 19.01.2021** filed today on behalf of the respondent no.2 runs in ten paragraphs. In **paragraphs 6, 7, 8 and 9 of the aforesaid short counter affidavit it has been stated as under :-**

"6. That at Varanasi at 03.05 hours by Rapat No. 07 dated 18.01.2021, **case crime No. 06 of 2021 under sections 302, 201 of I.P.C. was registered against unknown persons.**

7. That **the investigation of the aforesaid case was undertaken by the Station House Officer of Police Station Kotwali, District Varanasi** and while conducting the investigation, **the names of following persons was revealed as being involved in the crime in question:-**

i. **Sunil Kumar Nigam s/o of Daya Prasad Nigam**

ii. Parvez Ahmad s/o Kausar Ali.

iii. Guddu Rajbhar s/o Bachau.

iv. Dilsher s/o Jaleel Ahmad

v. Neeraj Pandey s/o Dayananad Pandey

8. That the team, which had been constituted in the case **arrested the aforesaid five accused persons at 06.44; hours on 19.01.2021, from whose possession, the motorcycle TVS Apache bearing its registration No. UP-65-AP-**

0725 and the motorcycle used by the deceased Shumbam Keshari Hero Honda Shine were recovered. The one helmet of Shubham Keshari and black jacket of Ravi Pandey and the aadhar cards of both the deceased were recovered from the spot identified and pointed out by the arrested accused persons.

9. **That the investigation in the case is being conducted in a fair and impartial manner with due diligence."**

9. In supplementary affidavit dated 19.01.2021, the petitioner no.1 has stated in paragraphs 2 to 6 as under :

"2. That ***on 10.1.2021*** *at about 13:05 P.M.* ***Sub Inspector Sachidanand Singh and two Constable came to house of the petitioner No.1 and asked his mobile for putting on surveillance*** *and took away the mobile Phone of the petitioner asking passward. It is stated that the* ***Sub Inspector Sachidanand Singh started to send message through Whatsapp to relatives of the petitioner No.1 writing a message as "Subham ko bolana phone n kare".*** *As soon as this fact came into the knowledge of* ***the petitioner No.1, he immediately, moved applications to SSP and DM through Fax on 10.1.2021.*** *A Photocopy of the applications alongwith receipts dated 10.1.2021 are being filed collectively and marked as Annexure No. SA-1 to this affidavit.*

3. That, the petitioner no.1 also moved applications to DM, DGP and SSP through post as well as through e-mail to DGP on 11.1.2021 regarding the above incident. A photocopy of the applications alongwith receipts dated 11.1.2021 being filed collectively and marked as Annexure No. SA-2 to this affidavit.

4. That, it is relevant to mention here that the ***Sub Inspector Sachidanand Singh, another Sub Inspector and three Constable came to house of the petitioner No.1 and returned back the aforesaid mobile of the petitioner no.1 to his family member on 16.1.2021 and took signature on a plane paper.***

5. That, ***on 16.1.2021 the petitioner No.1 and his family member got information through newspaper "Dainik Jagran" that two unknown dead bodies have been found in police station-Ahraura, Mirzappur,*** *thereafter petitioner No.1 immediately moved to Ahraura, Mirzapur where the dead body was lying in* ***Chunar Mortuary, the petitioner No.1 made identification and found that the dead body was of petitioner no.2 (Corpus).*** *A photocopy of the Newspaper "Dainik Jagran" dated 16.1.2021 along with photographs of dead body of petitioner No.2 being filed collectively and marked as Annexure No.SA-3 to this affidavit.*

6. That, the ***petitioner no.1 has seen to Ashutosh Tiwari, SHO Chowk, Varanasi several times on the shop of Sunil Nigam situated Sarai Hadha, P.S. Chowk after picked up the petitioner no.2 by the police,*** *it can be identified through collecting CCTV Footage near the shops."*

10. Copies of newspaper cutting and photographs of the dead bodies filed alongwith the supplementary affidavit as Annexure - SA-3 clearly reveals that the petitioner No.2 and Ravi Pandey have been brutally murdered and burnt and thereafter their bodies were thrown in a trench so as to hide out the identity of the persons murdered, namely, the petitioner no.2 and Ravi Pandey. It is not only surprising, but extremely shocking that despite the application of the petitioner No.1, dated 26.10.2020 and 31.12.2020, about missing of the petitioner no.2, the respondents entered the missing report in G.D. on

05.01.2021 after this Court passed an order dated 05.01.2021 in the present writ petition. Even after this Court passed the order dated 06.01.2021, no investigation or action whatsoever was taken in relation to the police Officers/local police of Police Stations Chowk, Jaitpura, Lalapur Pandeypur, District Varanasi and named persons, namely, Gaurav Nigam and Sunil Nigam.

11. The respondents remained silent and neither investigated nor took any positive step to investigate the matter with respect to the persons mentioned in the application of the petitioner no.1, dated 31.12.2020 and the police personnels. The personal affidavit of respondent no.2 filed today is totally silent in this regard. Even in the short counter affidavit filed by respondent no.2, there is no whisper with respect to any investigation or action by the respondent pursuant to the application of petitioner no.1 dated 31.12.2020. In the short counter affidavit, it has been stated in the aforequoted paragraph nos. 6, 7, and 8 that one Sunil Nigam and four others have been arrested at 6:44 hours on 19.01.2021, from whose possession one motorcycle TVS Apache, bearing registration No. UP-65-AP-0725 and the motorcycle used by the deceased Subham Keshari were recovered. There is no whisper that from whose possession it was recovered. Nothing has been stated that why respondents remained silent and have not taken any action or investigated the matter pursuant to the application of the petitioner no.1, dated 31.12.2020, till the petitioner no.2 was brutally murdered and body was recovered by the police of District Mirzapur on 15.01.2021 and the investigation was transferred on 18.01.2021 to Varanasi police.

12. In the light of the facts and circumstances mentioned above, the role of respondents - Varanasi police including the respondent no.2 in the matter of brutal murder of the petitioner No.2 and one Ravi Pandey, is prima faice under serious cloud. Apart from above the conduct of the respondent no.2 shows not only deliberate gross disobedience and disrespect to the orders of this court but also deliberate and intentional breach of fundamental rights granted under Article 21 of the constitution of India as well as deliberate gross dereliction in duty resulting in murder of the petitioner No.2 and one Ravi Pandey.

13. Sri Sheo Kumar Pal, learned G.A. prays for and is granted two days' time to enable the respondent No.1 to file counter affidavit to the writ petition and the supplementary affidavit by means of his personal affidavit. The respondent No.2 shall also file counter affidavit by means of his personal affidavit annexing therewith postmortem report of the petitioner No.2 and Ravi Pandey. They shall file counter affidavits on or before the next date fixed failing which both the respondent No.1 and 2 shall remain personally present.

14. **Put up in the additional cause list on 22.01.2021 at 2.00 P.M.**

15. Copy of this order be given by the office to the learned Government Advocate for communication and necessary compliance.

(2021)02ILR A26
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.01.2021

BEFORE

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

Habeas Corpus No. 193 of 2020

Rachhit Pandey & Anr. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Dharmendra Kumar Yadav, Sri Kailash Singh Yadav, Sri Ravi Yadav

Counsel for the Respondents:
G.A., Sri Satyendra Singh

A. Constitution of India,1950-Article 226-maintainability of-petitioner and his wife admittedly are living separately and their minor son is in the custody of his mother-there being no pleading in regard to any kind of illegal custody-the present petition is not maintaible-in the case of detention of child the only person competent to move the court for a writ of habeas corpus would be one who is entitled to the custody of the child-the applicant becomes entitled to the writ as of right where the applicant establishes a prima facie case that the detention is unlawful-the custody of minor is on the touchstone of principle of parens patriae jurisdiction-however , petitioner does not want the custody but being father of corpus, he wants only visitation rights, for that he could avail the remedy in Family Court.(Para 3 to 48)

The petition is dismissed. (E-5)

List of Cases cited:-

1. Mohammad Ikram Hussain Vs St of U.P.& ors., (1964) AIR 1625

2. Kanu Sanyal Vs D.M. Darjeeling.(1973) 2 SCC 674

3. Gaura Nagpal Vs Sumedha Nagpal,(2009) 1 SCC 42

4. Nithya Anand Raghvan Vs State (NCT of Delhi) & anr.,(2017) 8 SCC 454

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

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

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

1. Heard Sri Dharm Pal Yadav, learned counsel for the petitioners, Sri Vinod Kant, learned Additional Advocate General alongwith Sri Sanjay Sharma, learned Additional Government Advocate appearing for the State-respondents and Sri Satyendra Singh, learned counsel for the respondent no.4.

2. The present petition has been filed for a writ of habeas corpus praying for the following reliefs:-

"(i) issue a writ, order or direction in the nature of Habeas Corpus directing the respondents to produce the corpus before this Hon'ble Court and the petitioner no.1 be allowed to remain in the company of the petitioner no.2.

(ii) issue a writ, order or direction commanding the respondents to resolve the matrimonial dispute, if any, by amicable dialogue, mediation or court expeditiously and the visiting rights be granted to the petitioner no.2 as he is being denied access to meet his child.

(iii) issue any other writ, order or direction as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case.

(iv) award cost of the petition to the petitioners."

3. The order sheet of the case indicates that at the very outset when the case was taken up on 27.02.2020, learned counsel for the petitioners submitted that the petitioner no.2 did not want the custody of the corpus i.e. the petitioner no.1 and that he was pressing the petition only for visitation rights. The aforementioned

contention as noticed in the order dated 27.02.2020 is as follows:-

"Learned counsel for the petitioners at the very outset submitted that petitioner no. 2 does not want the custody of corpus, petitioner no. 1 as he is in the custody of his mother, respondent No. 4, but being father of corpus, he is only pressing this petition for visitation right."

4. The order sheet further indicates that the only dispute which is being agitated in the present case is with regard to the claim set up by the petitioner no.2 for visitation rights.

5. As per the case set up in the petition, the petitioner no.2 claims to have married the respondent no.4 on 24.02.2014 and thereafter a male child i.e. the petitioner no.1 was born on 17.06.2016. Soon thereafter, sometime in October, 2016 the respondent no.4 (wife) is stated to have deserted the petitioner no.2 and went to her parental home. Since then she is stated to have never returned to her matrimonial home.

6. It is contended that the petitioner no.2 and the respondent no.4 are living separately since October, 2016 and that the petitioner no.1 i.e. the minor son is in the custody of his mother i.e. respondent no.4. An application, under Section 9 of the Hindu Marriage Act, 19551, seeking restitution of conjugal rights is stated to have been filed by the petitioner no.2 (husband) on 13.03.2019 and the same is said to be pending before the Principal Judge, Family Court, Kanpur Nagar. The petitioner no.2 by means of the present petition has sought to raise a claim with regard to custody of the minor son and also visitation rights.

7. The respondent no.4, wife, has filed her personal affidavit dated 16.12.2020 wherein it is averred that she has filed a divorce suit under Section 13 of the HMA before the Principal Judge, Family Court, Azamgarh being Divorce Suit No.874 of 2020 (Kavita v Rohan Pandey), which is pending and the next date fixed in the case is 08.02.2021. It is also submitted that the petitioner no.1, minor son, is living with his mother i.e. respondent no.4 who is his lawful guardian and that the minor son cannot be said to be in any kind of illegal custody or detention and, accordingly, the present habeas corpus petition is not maintainable and is liable to be dismissed.

8. Parties have exchanged pleadings. With the consent of parties the petition is taken up for disposal.

9. Learned Additional Advocate General appearing for the State-respondents submits that the facts of the present case show that the petitioner no.2 and the respondent no.4 admittedly are living separately and the petitioner no.1 i.e. the minor son is in the custody of his mother and in view of the aforesaid, and in particular there being no pleading with regard to any kind of illegal custody, the present petition which has been filed for a writ of habeas corpus, would not be maintainable.

10. Counsel for the petitioners fairly submits that the only prayer that he seeks to press in the present petition is in respect to the relief regarding grant of visitation rights.

11. The counsel for the contesting respondent no.4 submits that since the relief sought in the present petition is confined to grant of visitation rights and

proceedings relating to matrimonial disputes between the parties are pending before the Family Court, the present petition seeking a writ of habeas corpus would not be entertainable.

12. The fact with regard to the petitioner no.2 and respondent no.4 (i.e. the husband and wife) living separately since October, 2016 is undisputed. It is also an admitted fact that divorce proceeding between the husband and the wife is pending before the Family Court and that the petitioner no.1 who is a minor aged about four years is presently in the custody of his mother. It is also the admitted position between the parties that the petitioner no.1 (minor son) who was born on 17.06.2016, has continuously stayed with his mother since October, 2016, when she is stated to have left her matrimonial home.

13. The order dated 27.02.2020 passed by this Court indicates that the petitioner no.2 i.e. the husband never sought the custody of the corpus and at the very outset it was stated on behalf of the said petitioner that since the minor son is in the custody of his mother he was only making a prayer for grant of visitation rights.

14. The writ of habeas corpus is a prerogative writ, an extraordinary remedy, evolved under the common law and incorporated in our constitutional law, having the objective to protect and safeguard individual liberty.

15. In "Judicial Remedies in Public Law"2, the writ of habeas corpus has been described as follows:-

"The writ of habeas corpus is a writ of right but not of course. This means that the applicant has to show a prima facie case that he is being unlawfully detained."

16. The above principle with regard to a writ of habeas corpus being a writ of right and not a writ of course and that it may be granted only on reasonable ground or probable cause being shown, has been reiterated in **Mohammad Ikram Hussain v State of U.P. and others3, Kanu Sanyal v District Magistrate Darjeeling4.**

17. The nature and scope of writ of habeas corpus was considered in the case of **Kanu Sanyal** (supra) and the Supreme Court after tracing the development of the writ of habeas corpus by Common-Law Courts in England held that the writ of habeas corpus is essentially a procedural writ dealing with the machinery of justice but not the substantive law with an object to secure release of a person who is illegally restrained of his liberty.

18. The exercise of the extraordinary jurisdiction for issuance of a writ of habeas corpus would, therefore, be seen to be dependent on the jurisdictional fact where the applicant establishes a *prima facie* case that the detention is unlawful. It is only where the aforementioned jurisdictional fact is established that the applicant becomes entitled to the writ as of right.

19. In the case of detention of a child or a minor the only person competent to move the court for a writ of habeas corpus would be one who is entitled to the custody of the child.

20. In the instant case, the minor child, soon after his birth, and ever since he was infant of four months, has been in the custody of his mother (respondent no.4),

who has admittedly left her matrimonial home and is living separately.

21. The law relating to guardians and wards is governed in terms of the Guardians and Wards Act, 18905 and an order with regard to guardianship upon an application filed by a person claiming entitlement may be passed under the aforesaid enactment.

22. Looking to the subject nature of disputes concerning the family and the need to adopt an approach radically different from that adopted in an ordinary civil proceeding, the Family Courts Act, 19846 was enacted for establishing family courts for speedy settlement of family disputes and the jurisdiction in respect of suits and proceedings relating to matrimonial matters and also relating to guardianship and custody of a minor is vested in the family courts.

23. The Hindu Minority and Guardianship Act, 19567 was enacted to amend and codify certain parts of the law relating to minority and guardianship among Hindus. The Act is supplemental to the Guardians and Wards Act, and in terms of Section 2 thereof its provisions are in addition to and not in derogation to the Guardians and Wards Act.

24. The petitioner no.1 (minor son) is about four and half years of age and in terms of Section 6(a) of the HMGA the custody of a minor who has not completed the age of five years shall ordinarily be with the mother.

25. The provision with regard to making of an application regarding claims based on entitlement of guardianship is under the GWA and under Section 12 thereof the court is empowered to make interlocutory orders for protection of a minor including an order for temporary custody and protection of the person or property of the minor.

26. An application for restitution of conjugal rights filed by the petitioner no.2 (father) under Section 9 of the HMA and also a petition filed under Section 13 of the HMA, by the respondent no.4 (mother), are stated to be pending between the parties.

27. The subject matter relating to custody of children during the pendency of the proceedings under the HMA is governed in terms of the provisions contained under Section 26 thereof. The aforesaid section applies to "any proceeding" under the HMA and it gives the power to the court to make provisions in regard to: (i) custody, (ii) maintenance, and (iii) education of minor children. For this purpose the court may make such provisions in the decree as it may deem just and proper and it may also pass interim orders during the pendency of the proceedings and all such orders even after passing of the decree.

28. The provisions under Section 26 of the HMA were considered in **Gaurav Nagpal v Sumedha Nagpal8**, and it was held as follows:-

"Section 26 of the Hindu Marriage Act, 1955 provides for custody of children and declares that in any proceeding under the said Act, the Court could make, from time to time, such interim orders as it might deem just and proper with respect to custody, maintenance and education of minor children, consistently with their wishes, wherever possible."

29. In the case at hand, proceedings under the HMA being pending between the parties before the Family Court, the jurisdiction of the court under Section 26 may be invoked for seeking orders with regard to custody of the minor and the relief in respect of visitation rights.

30. The court where the aforesaid proceedings are pending would be empowered to pass all such orders and make provisions with regard to custody and grant of visitation rights, from time to time, in discharge of its duty relating to the care and custody of the minor keeping in view what would best serve the interest of the child.

31. The object and scope of a writ of habeas corpus in the context of a claim relating to custody of a minor child fell for consideration in **Nithya Anand Raghvan v State (NCT of Delhi)** and another9, and it was held that the principal duty of the court in such matters is to ascertain whether the custody of the child is unlawful and 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.

32. In the context of the facts of the case, it was noted that the private respondent therein being the biological mother of the minor and a natural guardian, it could be presumed that the custody of the minor with his/her mother was lawful, and in such a case only in an exceptionable situation the custody of the minor may be ordered to be taken away from the mother for being given to any other person including the father of the child, in exercise of writ jurisdiction. The observations made in the judgment in this regard are as follows:-

"44. ...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 (2001) 5 SCC 247, 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 Dinshaw v. Arvand M. Dinshaw (1987) 1 SCC 42, 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 Vs. State (NCT of Delhi) & Ors. 2004 SCC OnLine Del 699,

relied upon by the appellant). It is not necessary to multiply the authorities on this proposition.

x x x

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."

33. In the aforesaid judgment, the view taken in an earlier decision in the case of **Sayed Saleemuddin v Dr. Rukhsana and others10**, was taken note of. In the case of **Sayed Saleemuddin (supra)** while deciding the scope of a habeas corpus petition seeking transfer of custody of children from father to mother it was held that in such cases the principal consideration for the court would be 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 the present custody should be changed and the children should be left in the care and custody of some one else. It was stated thus:-

"11. ...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..."

34. The question of maintainability of a habeas corpus petition under Article 226 of the Constitution of India for custody of a minor was examined in **Tejaswini Gaud and others v Shekhar Jagdish Prasad Tewari and others11** and it was held that the petition would be maintainable where detention by parents or others is found to be illegal and without any authority of law and the extraordinary remedy of a prerogative writ of habeas corpus can be availed in exceptional cases where ordinary remedy provided by the law is either unavailable or ineffective. The observations made in the judgment in this regard are as follows:-

"14. Writ of habeas corpus is a prerogative process for securing the liberty of the subject by affording an effective means of immediate release from an illegal or improper detention. The writ also extends its influence to restore the custody of a minor to his guardian when wrongfully deprived of it. The detention of a minor by a person who is not entitled to his legal custody is treated as equivalent to illegal detention for the purpose of granting writ, directing custody of the minor child. For restoration of the custody of a minor from a person who according to the personal law, is not his legal or natural guardian, in

appropriate cases, the writ court has jurisdiction.

x x x

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 of 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."

35. It is therefore seen that in an application seeking a writ of habeas corpus for custody of a minor child, as is the case herein, the principal consideration for the court would be to ascertain whether the custody of the child can be said to be unlawful and illegal and whether the welfare of the child requires that the present custody should be changed and the child should be handed over in the care and custody of somebody else other than in

36. It is well settled that in matters of custody the welfare of child would be of a paramount consideration and the role of the court in examining the cases of custody of a minor is on the touchstone of principle of *parens patriae jurisdiction.*

37. Proceedings in the nature of habeas corpus may not be used to examine the question of the custody of a child. The prerogative writ of habeas corpus, is in the nature of extraordinary remedy, and the writ is issued, where in the circumstances of a particular case, the ordinary remedy provided under law is either not available or is ineffective. The power of the High Court, in granting a writ, in child custody matters, would be qualified only in cases where the detention of a minor is by a person who is not entitled to his/her legal custody.

38. In a case where facts are disputed and a detailed inquiry is required, the court may decline to exercise its extraordinary

jurisdiction and may direct the parties to approach the appropriate court.

39. In the facts of the present case, the respondent no.4 alongwith her minor son who was an infant of about four months (at that relevant point of time i.e. in October, 2016), is stated to have left her matrimonial home and since then the minor is said to be in the custody of his mother.

40. The two parents are admittedly living separately since the time that the respondent no.4 is stated to have left her matrimonial home, and matrimonial disputes are pending between the parties, in the form of an application filed by the petitioner no.2 seeking restitution of conjugal rights under Section 9 of the HMA and the respondent no.4 (wife) seeking a divorce by filing a petition under Section 13 of the HMA.

41. Admittedly, the relief sought in the present writ petition is restricted to a claim for visitation rights.

42. The petitioner no.1, who is presently less than five years of age, is stated to be exclusively in the care and custody of his mother, ever since he was an infant of four months of age.

43. In terms of the provisions under Section 6(a) of the HMGA, the custody of a minor who has not completed the age of five years is to be ordinarily with the mother, and in view thereof the custody of the petitioner no.1 (minor son) with the respondent no.4 (mother) *prima facie* cannot be said to be illegal.

44. A writ of habeas corpus, as has been consistently held, though a writ of right is not to be issued as a matter of course, particularly when the writ is sought against a parent for the custody of a child.

45. Insofar as a claim with regard to visitation rights is concerned, it is always open to the parties concerned to avail the remedy by moving an appropriate application before the Family Court where proceedings with regard to the matrimonial disputes between the parties are stated to be pending.

46. It is made clear that the observations made, herein above, are *prima facie* in nature and the same are without prejudice to the rights and contentions of the parties, which may be agitated in the proceedings before the court below.

47. Having regard to the aforesaid, this Court is not inclined to exercise its extraordinary prerogative jurisdiction for issuance of a writ of habeas corpus, in the facts of the case.

48. The writ petition stands accordingly dismissed.

(2021)02ILR A34
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.01.2021

BEFORE

THE HON'BLE PRITINKER DIWAKER, J.
THE HON'BLE SUBHASH CHANDRA SHARMA, J.

Habeas Corpus Writ Petition No. 317 of 2020

Rakesh Singh ...Petitioner
Versus
U.O.I. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Vinay Kumar Singh, Sri Mohd. Raghib Ali, Sri Saghir Ahmad(Senior Advocate)

Counsel for the Respondents:
A.S.G.I., G.A., Sri Surendra Nath Chauhan

A. Constitution of India ,1950-Article 226 & National Security Act,1980-Section 3(2)-challenge to –validity of detention order passed by District Magistrate-grounds of detention is not communicated to the detenu while communicated to the petitioner-petitioner were prejudicial to the maintenance of public order and had disturbed the normalcy of the society-there was enmity between the parties over the defeat of election of Chairman, Nagar panchayat-they opened fire to the deceased-there were seven criminal history of the petitioner-at the time of incident all shopkeepers located nearby shut their shops immediately-people were in fear and felt unsafe, they closed their doors since this was the murder of present Chairman-the atmosphere remained panic for few days-Hence,the apprehension entertained by the detaining authority is genuine and well founded-no illegality found in the impugned orders.(Para 1 to 22)

The petition is dismissed. (E-5)

List of Cases cited:-

1. Ashok Kumar Vs Delhi Administration, (1982) AIR SC 1143

2. Victoria Fernandes Vs Lalmal Sawma, (1992) AIR SC 687

3. St. of U.P & anr. Vs Sanjay Pratap Gupta @ Pappu & ors. (2004) 8 SCC 591

4. Kuso Sah Vs St. of Bih. (1974) 1 SCC 185

5. Harpreet Kaur Vs St. of Mah.(1992) 2 SC 177

6. T.K Gopal @ Gopi Vs St. of Karn. (2000) 6 SCC 168

7. St. of Mah. Vs Mohd. Yakub (1980) 2 SC 1158

8. Mustakmiya Jabbarmiya Shaikh Vs. M.M Mehta , (1995) 3 SCC 237

9. Amanulla Khan Kudeatalla Khan Pathan Vs. St. of Guj., (1999) 5 SCC 613

10. Hasan Khan Ibne Haider Khan Vs R.H. Mendonca, (2000) 3 SCC 511.

11. Smt Bimla Rani Vs U.O.I. (1989) 26 ACC 589 SC

12. Alijan Mian Vs DM, Dhanbad,(1983) 3 SCR 930 AIR 1983 SC 1130

13. Attorney General of India Vs Amratlal Prajivandas ,(1994) AIR SC 2179

14. Kamarunnissa & ors. Vs. UOI (1991) 1 SCC 128

15. Champion R. Sangma Vs St. of Meghalaya (2015) 16 SCC 253

(Delivered by Hon'ble Subhash Chandra Sharma, J.)

1. Heard Sri Saghir Ahmad, learned Senior Advocate assisted by Sri Vinay Kumar Singh, learned counsel for the petitioner, Ms. Kumari Meena, learned A.G.A. for the State-respondents and Sri Surendra Nath Chauhan, for Union of India.

2. By this writ petition under Article 226 of the Constitution of India petitioner Rakesh Singh prays for issuance of a writ, order or direction in the nature of Habeas Corpus challenging the validity and constitutionality of the impugned detention order dated 15.01.2020 passed by District Magistrate, Sonebhadra/respondent no.3 (hereinafter referred to as ' the detaining authority') under sub section (2) of Section 3 of National Security Act, 1980 (for short

the 'NSA') on being satisfied that petitioner's detention was necessary with a view to prevent him from acting in any manner prejudicial to the maintenance of public order as well as confirmation order dated 23.01.2020 passed by the Under Secretary Home (Confidential) Department, Government of U.P., Lucknow/respondent no.2. Petitioner has also prayed for a direction to the respondents to set him at liberty and to award cost to him.

3. The order of detention alongwith the grounds of detention was served upon the petitioner on 15.01.2020. Against the said order, the petitioner made a representation dated 24.01.2020 to the Detaining Authority, the Secretary, Department of Home and another representation to the Advisory Board constituted under Section 9 of the N.S.A. The case of the petitioner alongwith his representation was placed before the Advisory Board who opined that there was sufficient cause for the detention of the petitioner. Accordingly, in exercise of powers conferred under Section 12 (1) of the NSA, the State Government confirmed the aforesaid order of detention and directed that the petitioner be detained for a period of three months from the date of detention vide order dated 24.02.2020 which was communicated to the petitioner on 29.02.2020.

4. According to the grounds of detention the activities of the petitioner were prejudicial to the maintenance of public order and had disturbed the normalcy of the society. An F.I.R. was lodged against him on 01.10.2019 at 5:30 O'clock as Crime No.180/2019 under Sections 147, 148, 149, 302, 506 & 120B I.P.C. at Police Station Pipri, District Sonebhadra. While petitioner was in jail in that case, the in-charge of Police Station Pipri sent a report to Superintendent of Police, Sonebhadra alleging that on 30.09.2019 at about 10:00 P.M. Chairman Renukoot, Shiv Pratap Singh aged about 38 years R/o Hanuman Singh Katra Renukoot was present in his residential office. Ajit Kushwaha, Dilip Pareeda and Rinku were also there. Younger brother of Shiv Pratap Singh @ Dablu Singh was sitting out of office. While Shiv Pratap Singh was hearing the problems of public, all of a sudden two boys on motorcycles arrived at opposite side of the road and getting their motorcycles stood there, came towards the office. One of the boy was standing out of office and other boy entered into the room. He bade *namaste* to Chairman Shiv Pratap Singh. He could not heed towards the boy on account of talk on phone. That boy opened fire upon him which pierced on the left side chest of Shiv Pratap Singh. Meanwhile, other boy also opened fire which stroke at the door. People present there tried to catch them but failed and culprits having reached at the divider on the road, fired in the air and fled away. Shiv Pratap Singh was brought to the Hospital at Hindalco from where he was referred to Trauma Center, Varanasi. On 01.10.2019 at about 2:30 A.M. he succumbed to injuries.

5. During investigation, it came into light that Anil Singh brother of petitioner was Ex-Chairman of Renukoot and deceased Shiv Pratap Singh was present Chairman. There was enmity because brother of petitioner was defeated in election of Chairman, Nagar Panchayat. Shiv Pratap Singh and members of his family caused injuries to the brother of petitioner and Jamuna Singh with danda, knife and sword in which Jamuna Singh and one Rohit Singh got injured. Jamuna

Singh said to take revenge instead of lodging F.I.R., but uncle of Jamuna Singh namely Santosh Singh lodged F.I.R. at Police Station Pipri as Crime No.12/2019, under Sections 147, 148, 149, 506, 307 & 7 Criminal Law Amendment Act. Meanwhile, there was altercation between petitioner's brother & Vijay Pratap Singh, brother of the deceased. As a result, petitioner engaged himself in conspiracy to murder Shiv Pratap Singh through Rakesh Prasad Maurya. Brajesh Singh brother of petitioner continued to talk to Jamuna Singh who was told to arrange shooters. On whose instance Bhagwan Singh arranged and sent Gandhi Yadav, Lav Singh, Sudhanshu Singh, Ravi Singh, Anda, Manish and other 12 people to Renukoot. They were stayed at Hotel Glory on 07.09.2019 by Brajesh, brother of petitioner on the I.D. of his driver Ramjaan. Brajesh Singh and shooters were seen together in C.C.T.V. Rakesh Singh was in contact with Jamuna Singh & Anil Singh during this period. The shooters lived in Hotel Glory from 07.09.2019 to 09.09.2019. Meanwhile, deceased Shiv Pratap Singh was got identified by the shooters. Again on 28.09.2019, shooters were called through phone by Jamuna Singh on the instance of Brajesh Singh and Anil Singh, brothers of petitioner. On 29.09.2019 shooters were stayed in Jwalamukhi Guest House. Brajesh Singh also provided Rs.25,000/- for purchasing motorcycle to Gandhi Yadav. In this way, on 30.09.2019 the incident was got caused by the petitioner as a result of long hatched conspiracy with other accused persons and after the commission of incident, vehicle Scorpio, Bearing No. UP 67 F 4444 owned by Anil Singh brother of petitioner and driven by Ramjaan was deployed to escort the shooters. Investigating Officer recorded statements of witnesses and collected other evidence in which involvement of petitioner was found established and on 02.10.2019 he was arrested by police. There is criminal history of the petitioner i.e. ten criminal cases are registered at Police Station and all are pending before the Court after charge-sheet. This incident took place at 10:00 P.M. in the mid of Renukoot market. All shop-keepers located nearby shut their shops immediately. People were in fear and they closed their doors since this was a murder of Chairman so people were affected adversely and felt unsafe. The atmosphere remained panic for few days. Even students did not attend their schools due to fear. Public order was totally disturbed. Extra Forces and P.A.C. were also deployed to bring the situation under control. On 20.12.2019, he applied for bail before the Court which created possibility of petitioner being released on bail and again to indulge himself in such activities those were likely to affect adversely public order, therefore, his detention became necessary under the N.S.A.

6. In the aforementioned circumstances, Station House Officer, Pipri sent a report with relevant papers to Superintendent of Police, Sonebhadra for detaining the petitioner under Section 3(2) of N.S.A. Thereupon, Superintendent of Police, Sonebhadra, after considering the matter became satisfied with the report sent by Station House Officer and submitted his report to District Magistrate, Sonebhadra for detaining the petitioner under Section 3(2) of N.S.A. to prevent him from indulging in such activities causing disturbance of public order.

7. On the basis of material placed before him, as briefly referred to above, Detaining Authority came to the conclusion that petitioner's activities are prejudicial to

the maintenance of public order and his activities have disturbed the normalcy of the society. Thus, keeping in view his criminal record and activities, the Detaining Authority felt satisfied that there was every apprehension/imminent possibility that just after his release from jail he will again indulge in such type of activities which will adversely affect the maintenance of public order and, therefore, to prevent him from committing similar activities prejudicial to the maintenance of public order it became necessary to detain him with immediate effect under Section 3(2) of the N.S.A. Hence, the Detaining Authority passed impugned order dated 15.01.2020 for detaining the petitioner under Section 3(2) of the N.S.A. The Detaining Authority communicated the grounds of detention to petitioner on 15.01.2020. On 24.01.2020, petitioner has sent his representation through Jail Superintendent, Sonebhadra to Detaining Authority which was rejected on 24.01.2020 by the Detaining Authority and other representation was sent to State, which was also rejected on 31.01.2020.

8. We have also gone through the record including counter-affidavits of respondents and rejoinder affidavits of petitioner. The petitioner has challenged the impugned order on following grounds :-

(I) Because since 03.10.2019, the petitioner is languishing in jail in connection with F.I.R. No.180/2019 dated 01.10.2019 whereas he is quite innocent and has committed no offence at all.

(II) Because since 15.01.2020, the petitioner has been detained in pursuance to the detention order and in as much as also detention extension order dated 11.04.2020 for a period of 6 months w.e.f 15.01.2020 to 13.07.2020 in a District Jail, Sonebhadra at Robertsganj.

(III) Because, in any manner there is no prejudice to the security of the state or from acting in any manner prejudicial of the maintaining of the public order, if the petitioner wouldn't be detained so as such there is no necessity to make an order directing to the petitioner to detain him into jail.

(IV) Because, there is no credible information or cogent reason apparent on record to believe that either the petitioner would be released from jail or he would act prejudicial to the maintenance to the security of the State or to maintenance of the public order.

(V) Because, there is only bald statement and stale ground. It is further submitted that mere ipse dixit of the detaining authority is not sufficient to pass the detention order.

(VI) Because, the petitioner has neither taken law and order in his own hand nor disturbed the public tranquility. It is further submitted, the alleged so called apprehension is the creation of the mind of the sponsoring recommending/authorities.

(VII) Because, the intent of the legislation to enact the National Security Act is preventive not punitive. But the respondent no.3 by misusing his power has passed the detention order, in order to punish the petitioner.

(VIII) Because, the continuous detention of the petitioner is against the intent of the Section 3(2), (4), (5) and 8 to 12 of the Act and in as much as also contrary to the Article 22(5) readwith Article 21 and 14 of the Constitution of India.

(IX) Because, in this case the constitutional safeguard embodied in the Article 22(5) of the Constitution of India has not been followed.

(X) Because, either in the detention order dated 15.01.2020 and approval order dated 23.01.2020 the period of detention has not been disclosed.

(XI) Because, the detention order dated 15.01.2020 and in as much as also

detention extension order dated 11.04.2020 are illegal and unconstitutional and without application of independent mind, hence not sustainable and the petitioner deserves to be set at liberty forthwith from the District Jail, Sonebhadra at Robertsganj, in the interest of justice, so the justice may be done.

9. The respondents have filed counter-affidavits wherein they have denied the points raised by the petitioner and reiterated their claim that the activities of the petitioner were prejudicial to the maintenance of public order, his activities have disturbed the normalcy of the society and then there was every possibility that just after his release from jail, he will again indulge in such activities which will adversely affect the public orders and therefore, to prevent him from further committing similar criminal activities prejudicial to the maintenance of public order, the impugned orders were justified.

10. It is strenuously urged by learned counsel for the petitioner that the impugned orders are wholly arbitrary and the petitioner has been illegally detained by misusing the provisions of the N.S.A. on the basis of unfounded apprehension that if the detenue was released on bail, he would again carry on criminal activities in the area. Except the alleged criminal cases, there was no criminal record of the petitioner and petitioner did not indulge in any such activity which may form the basis for satisfaction of the Detaining Authority to come to a conclusion that he is likely to disturb the public order. At the best, it could be a matter of law and order and not disturbance of public order. The reliance on the alleged criminal case is misplaced. In nutshell, the case of the petitioner is that there was absolutely no cogent material before the Detaining Authority to form the requisite belief that the petitioner was indulging in criminal activities which were prejudicial to the maintenance of public order and unless prevented, he would indulge in similar activities in future. Learned counsel for the petitioner also contended that even if the allegation/instances relied upon by the Detaining Authority are taken a face value, still at best, these may tantamount "to law and order" and by no stretch of imagination can be construed as activities prejudicial to the maintenance of public order within the meaning of sub section (2) of Section 3 of N.S.A. It is alleged that the detention order against the petitioner has been passed only with a view to frustrate the bail. It is urged that instead of clamping the impugned order on the petitioner, the best course open to the respondents was to oppose the bail application. It is urged that the detention order as well as it's confirmation order are mala fide inasmuch as they were made merely to circumvent the petitioner's enlargement on bail. It is also urged by the learned counsel that the grounds of order of detention and further extension thereof were not communicated to him, which caused prejudice to the petitioner. In this way, the impugned order becomes arbitrary and suffers from illegality and material irregularity, therefore, the same are liable to be interfered with and quashed by this Hon'ble Court.

11. Per contra, learned counsel for the State, while supporting the order of detention and denying the allegation that it has been passed only with a view to frustrate the bail order, has submitted that the activities of the petitioner were directed against the public at large and were sufficient to bring them within the ambit of public order. The satisfaction of the

Detaining Authority is based on reliable and relevant material and that there was no illegality in the impugned orders. It is urged that if the Detaining Authority arrives at the subjective satisfaction that the activities of the detenue are prejudicial to the maintenance of public order and passes the detention order, that cannot be interfered by this Hon'ble Court. The grounds of detention were promptly communicated to the petitioner within the stipulated time and there is no need of supplying the grounds of extension of such detention order to the detenue. In addition to this, there is a long criminal history of the petitioner.

12. Thus, the main question for consideration before this Court is whether the activities of the petitioner highlighted in the grounds of detention fall within realm of public order or law and order.

13. The distinction between the two concepts of "public order" and "law and order" has been lucidly explained by the Apex Court in **Ashok Kumar Vs. Delhi Administration, AIR 1982 SC 1143.** Inter alia, observing that the true distinction between the areas of "public order" and "law and order", being fine and sometimes overlapping, does not lie in the nature or quality of the act but in the degree and extent of its reach upon society, their Lordships said that the act by itself is not determinant of its own gravity. It is the potentiality of the act to disturb the even tempo of the life of the community which makes it "prejudicial to the maintenance of public order". If the contravention in its effect is confined only to a few individuals directly involved, as distinct from a wide spectrum of public, it would raise the problem of "law and order" only. It is the length, magnitude and intensity of the terror wave unleashed by a particular act or violence creating disorder that distinguishes it as an act affecting "public order" from that concerning "law and order". On the facts of that case the Court held that whenever there is an armed hold up by gangsters in a residential area of the city and persons are deprived of their belongings at the point of knife or revolver they become victims of organised crime and such acts when enumerated in the grounds of detention, clearly show that the activities of a detenu cover a wide field falling within the ambit of the concept of "public order".

14. To the same effect are the observations of the Apex Court in **Victoria Fernandes Vs. Lalmal Sawma, AIR 1992 SC 687**, wherein, relying on its earlier decisions, including Ashok Kumar's case (supra), it was reiterated that while the expression "law and order" is wider in scope, in as much as contravention of law always affects order, "public order" has a narrower ambit and public order would be affected by only such contravention which affects the community and public at large.

15. The distinction between violation of 'law and order' and an act that would constitute disturbing the maintenance of 'public order' had also fallen for consideration of the Hon'ble Supreme Court in **State of U.P. & Anr. V. Sanjay Pratap Gupta @ Pappu and others reported in 2004 (8) SCC 591,** where the Apex Court after an extensive survey of authority on the issue brought out the distinction in fine detail thus :-

"12. The true distinction between the areas of law and order and public order lies not merely in the nature or quality of the act, but in the degree and extent of its

reach upon society. Acts similar in nature, but committed in different contexts and circumstances, might cause different reactions. In one case it might affect specific individuals only, and therefore touches the problem of law and order only, while in another it might affect public order. The act by itself, therefore, is not determinant of its own gravity. In its quality it may not differ from other similar acts, but in its potentiality, that is, in its impact on society, it may be very different.

13. The two concepts have well-defined contours, it being well established that stray and unorganized crimes of theft and assault are not matters of public order since they do not tend to affect the even flow of public life. Infractions of law are bound in some measure to lead to disorder but every infraction of law does not necessarily result in public disorder. Law and order represents the largest scale within which is the next circle representing public order and the smallest circle represents the security of State. "Law and order" comprehends disorders of less gravity than those affecting "public order" just as "public order" comprehends disorders of less gravity than those affecting "security of State". **(See Kuso Sah v. State of Bihar 1974 1 SCC 185, Harpreet Kaur v. State of Maharashtra 1992 2 SCC 177, T.K Gopal Alias Gopi v. State Of Karnataka 2000 6 SCC 168 and State of Maharashtra v. Mohd. Yakub 1980 2 SC 1158).**

14. The stand that a single act cannot be considered sufficient for holding that public order was affected is clearly without substance. It is not the number of acts that matters. What has to be seen is the effect of the act on the even tempo of life, the extent of its reach upon society and its impact."

16. The issue has also been dealt with in the case of Sant Singh vs. District Magistrate, Varanasi reported in 2000 Cri LJ 2230 wherein paragraph 7 of the report dealing with the point it was held thus:-

"7. The two connotations 'law and order' and 'public 'order' are not the words of magic but of reality which embrace within its ambit different situations, motives and impact of the particular criminal acts. As a matter of fact, in a long series of cases, these two expressions have come to be interpreted by the apex Court. It is not necessary to refer all those cases all over again in every decision for one simple reason that they have been quoted and discussed in earlier decision of this Court dated 14-10-1999 in Habeas Corpus Writ Petition No. 33888 of 1999- Udaiveer Singh v. State of U.P. and the decision dated 1-12-1999 in Habeas Corpus Writ Petition No. 38159 of 1999 Rajiv Vashistha v. State of U.P. (Reported in 1999 All Cri R 2777). The gamut of all the above decisions in short is that the true distinction between the areas of 'public order' and 'law and order' lies not in nature and quality of the act, but in the degree and extent of its reach upon society. Sometimes the distinction between the two concepts of law and order' and 'public order' is so fine that it overlaps. Acts similar in nature but committed in different contexts and circumstances might cause different reactions. In one case it might affect specific individuals only and therefore, touch the problem of 'law and order', while in another it might affect 'public order'. The act by itself, therefore, is not determination of its own gravity. It is the potentiality of the act to disturb the even tempo of the community which makes it prejudicial to the maintenance of 'public order''.

17. The scope of expression "acting in any manner prejudicial to the maintenance of public order" as appearing in Sub-Section 2 of Section 3 of the NSA also came up for consideration of the Supreme Court in **Mustakmiya Jabbarmiya Shaikh Vs. M.M. Mehta, (1995) 3 SCC 237; Amanulla Khan Kudeatalla Khan Pathan Vs. State of Gujarat, (1999) 5 SCC 613 and Hasan Khan Ibne Haider Khan Vs. R.H. Mendonca, (2000) 3 SCC 511.** The Apex Court held that the fallout, the extent and reach of the alleged activities must be of such a nature that they travel beyond the capacity of the ordinary law to deal with the person concerned or to prevent his subversive activities affecting the community at large or a large section of the society. It is the degree of disturbance and its impact upon the even tempo of life of the society or the people of a locality which determines whether the disturbance caused by such activities amounts only to a breach of "law and order" or it amounts to a breach of "public order". In **Amnulla Khan's case** (supra), it has been held that the activities involving extortion, giving threat to public and assaulting businessmen near their place of work were sufficient to affect the even tempo of life of the society and in turn amounting to the disturbance of the "public order" and not mere disturbance of "law and order".

18. Dealing with the question as to whether one solitary instance can be the basis of an order of detention, the Apex Court in **Smt. Bimla Rani v. Union of India, 1989 (26) ACC 589 SC** observed that the question is whether the incident had prejudicially affected the 'public order'. In other words, whether it affected the even tempo of the life of the community. In **Alijan Mian v. District Magistrate Dhanbad, 1983 (3) SCR 930 AIR 1983 SC 1130** it was held that even one incident may be sufficient to satisfy the detaining authority in this regard, depending upon the nature of the incident. Similar view has been expressed in the host of other decisions. The question was answered more appropriately and with all clarity in the case of **Attorney General of India v. Amratlal Prajivandas, AIR 1994 SC 2179**, wherein the apex Court ruled that it is beyond dispute that the order of detention can be passed on the basis of a single act. The test is whether the act is such that it gives rise to an inference that the person would continue to indulge in similar prejudical activities. It cannot be said as a principle that one single act cannot be constituted the basis for detention. Thus, the argument of learned counsel for the petitioner that since it is solitary incident of the petitioner, he deserves sympathy, is rejected. Now the law, as it stands, is that even one solitary incident may give rise to the disturbance of 'public order'. It is not the multiplicity but the fall out of various criminal acts. Though there is consistency in the various decisions of the apex Court about the interpretation of the expressions of 'law and order' and 'public order' undue insistence on the case law is not going to pay any dividend as each case revolves round its own peculiar facts and has to be viewed in the light of the various attending factors. It is difficult to find a case on all fours with the case in hand.

19. In the instant case, examining the grounds of detention, briefly referred to above, on the touchstone of the legal position as emerging from the aforementioned decisions, we are of the view that the activities relied upon by the Detaining Authority to come to the aforementioned conclusion, cannot be said to be mere disturbance of "law and order".

As noted in the grounds of detention, the activities of the petitioner pertains to engage into conspiracy to get a person assassinated who being elected by the people as Chairman of Nagar Panchayat and so creating a menace in the society at large. There is material on record to show that petitioner, being brother of ex-Chairman of Nagar Panchayat, engaged into conspiracy to get the elected Chairman murdered through hired shooters which created panic in the public affecting the normal tempo of life. Shops in the market remained closed. Students also not attended their schools for several days. Ordinary life in the city was paralysed. It will certainly result in disturbance of public order. To assassinate an elected person, while discharging his duties in his office, strikes at the root of the State's authority and is directly connected to 'public order'. This act of petitioner was not directed against a single individual, but against the public at large having the effect of disturbing even tempo of life of the community and thus, breaching the "public order". Thus, we are unable to hold that there was no material before the Detaining Authority to come to the conclusion, it did, to say that the activities of petitioner can be construed as activities prejudicial to the maintenance of "public order," within the meaning of Sub-Section (2) of Section 3 of the NSA. We have, therefore, no hesitation in holding that the instances of petitioner's activities, enumerated in the grounds of detention, clearly show that his activities cover a wide field and fall within the contours of the concept of "public order"and the Detaining Authority was justified in law in passing the impugned order of detention as its confirmation order against the petitioner.

20. As regards the plea of learned counsel for the petitioner that the impugned order is vitiated because it has been passed with a mala fide intention to frustrate the bail likely to be allowed to the petitioner, we are of the view that there is no substance in the contention. No doubt, when the proceedings of clamping provisions of NSA were initiated, the petitioner was in jail but it is settled by a catena of decisions of the Apex Court that even when a person is in custody, a detention order can validly be passed if the authority passing the order is aware of the fact of his being in custody and he has reason to believe, on the basis of material placed before him, that there is imminent possibility of his being released on bail and that on being so released, he would in all probability indulge in prejudicial activities and to prevent him from doing so, it is necessary to detain him. A detention order cannot be struck down on the ground that the proper course for the authority was to oppose the bail application and if bail is granted notwithstanding such opposition, to question it before a higher Court, as is sought and pleaded by learned counsel for the petitioner. In this regard, criteria was laid down by the Hon'ble Apex Court in the case of **Kamarunnissa and others vs. Union of India (1991) 1 SCC 128** also fortified in **Champion R. Sangma vs. State of Meghalaya (2015) 16 SCC 253,** it was held :-

"13. In case of a person in custody a detention order can validly be passed (1) if the authority passing the order is aware of the fact that he is actually in custody; (2) if he has reason believe on the basis of reliable material placed before him (a) that there is a real possibility of his being released on bail, and (b) that on being so released he would in all probability indulge in prejudicial activity

and (3) if it is felt essential to detain him to prevent him from so doing."

21. So far as the argument relating to non supply of grounds of order of detention and further extension thereof is concerned, it is noteworthy to mention that the grounds of detention were communicated to the petitioner at the time of passing the impugned detention order dated 15.01.2020. It was further extended by the State which was communicated to the petitioner in due time. There was no such requirement to furnish grounds of extension to the detenue because the grounds of detention were the same, so no any prejudice was likely to be caused to the petitioner.

22. Having considered the matter in the light of the facts and circumstances, noted above, we are of the opinion that the apprehension entertained by the Detaining Authority, to the effect that petitioner's activities are prejudicial to the maintenance of public order, is genuine and well founded. Thus, we do not find any illegality in the impugned orders, warranting our interference. The writ petition, being bereft of any merit, is ***dismissed*** accordingly. There will, however, be no order as to costs.

(2021)02ILR A44
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.01.2021

BEFORE

THE HON'BLE PRITINKER DIWAKER , J.
THE HON'BLE SUBHASH CHANDRA SHARMA, J.

Habeas Corpus Writ Petition No. 329 of 2020

Anil Singh ...Petitioner(In Jail)
Versus
U.O.I. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Vinay Kumar Singh, Sri Mohd. Raghib Ali, Sri Saghir Ahmad(Senior Adv.)

Counsel for the Respondents:
A.S.G.I., G.A., Sri Santosh Kr. Singh Paliwal

A. Constitution of India ,1950-Article 226 & National Security Act,1980-Section 3(2)-challenge to –validity of detention order passed by District Magistrate-grounds of detention is not communicated to the detenu while communicated to the petitioner-petitioner were prejudicial to the maintenance of public order and had disturbed the normalcy of the society-there was enmity between the parties over the defeat of election of Chairman, Nagar panchayat-they opened fire to the deceased-there were seven criminal history of the petitioner-at the time of incident all shopkeepers located nearby shut their shops immediately-people were in fear and felt unsafe, they closed their doors since this was the murder of present Chairman-the atmosphere remained panic for few days-Hence,the apprehension entertained by the detaining authority is genuine and well founded-no illegality found in the impugned orders.(Para 1 to 22)

The petition is dismissed. (E-5)

List of Cases cited:

1. Ashok Kumar Vs Delhi Administration, (1982) AIR SC 1143

2. Victoria Fernandes Vs Lalmal Sawma, (1992) AIR SC 687

3. St. of U.P. & anr. Vs Sanjay Pratap Gupta @ Pappu & ors. (2004) 8 SCC 591

4. Kuso Sah Vs St. of Bih. (1974) 1 SCC 185

5. Harpreet Kaur Vs St. of Mah.(1992) 2 SC 177

6. T.K Gopal @ Gopi Vs St. of Karn. (2000) 6 SCC 168

7. St. of Mah. Vs Mohd. Yakub (1980) 2 SC 1158

8. Mustakmiya Jabbarmiya Shaikh Vs. M.M Mehta , (1995) 3 SCC 237

9. Amanulla Khan Kudeatalla Khan Pathan Vs. St. of Guj., (1999) 5 SCC 613

10. Hasan Khan Ibne Haider Khan Vs R.H. Mendonca, (2000) 3 SCC 511.

11. Smt Bimla Rani Vs U.O.I. (1989) 26 ACC 589 SC

12. Alijan Mian Vs D.M., Dhanbad,(1983) 3 SCR 930 AIR 1983 SC 1130

13. Attorney General of India Vs Amratlal Prajivandas ,(1994) AIR SC 2179

14. Kamarunnissa & ors. Vs U.O.I.(1991) 1 SCC 128

15. Champion R. Sangma Vs St. of Meghalaya (2015) 16 SCC 253

(Delivered by Hon'ble Subhash Chandra Sharma, J.)

1. Heard Sri Saghir Ahmad, learned Senior Advocate assisted by Sri Vinay Kumar Singh, learned counsel for the petitioner, Ms. Kumari Meena, learned A.G.A. for the State-respondents and Sri Santosh Kumar Singh Paliwal, for Union of India.

2. By this writ petition under Article 226 of the Constitution of India petitioner Anil Singh prays for issuance of a writ, order or direction in the nature of Habeas Corpus challenging the validity and constitutionality of the impugned detention order dated 20.11.2019 passed by District Magistrate, Sonebhadra/respondent no.3 (hereinafter referred to as ' the detaining authority') under sub section (2) of Section 3 of National Security Act, 1980 (for short the 'NSA') on being satisfied that petitioner's detention was necessary with a view to prevent him from acting in any manner prejudicial to the maintenance of public order as well as confirmation order dated 29.11.2020 passed by the Under Secretary Home (Confidential) Department, Government of U.P., Lucknow/respondent no.2. Petitioner has also prayed for a direction to the respondents to set him at liberty and to award cost to him.

3. The order of detention alongwith the grounds of detention was served upon the petitioner on 20.11.2019. Against the said order, the petitioner made a representation dated 26.11.2019 to the Detaining Authority, the Secretary, Department of Home and another representation to the Advisory Board constituted under Section 9 of the N.S.A. The case of the petitioner alongwith his representation was placed before the Advisory Board who opined that there was sufficient cause for the detention of the petitioner. Accordingly, in exercise of powers conferred under Section 12 (1) of the NSA, the State Government confirmed the aforesaid order of detention and directed that the petitioner be detained for a period of three months from the date of detention vide order dated 31.12.2020 which was communicated to the petitioner on 06.01.2020.

4. According to the grounds of detention the activities of the petitioner were prejudicial to the maintenance of public order and had disturbed the normalcy of the society. An F.I.R. was lodged against him on 01.10.2019 at 5:30 O'clock as Crime No.180/2019 under

Sections 147, 148, 149, 302, 506 & 120B I.P.C. at Police Station Pipri, District Sonebhadra. While petitioner was in jail in that case, the in-charge of Police Station Pipri sent a report to Superintendent of Police, Sonebhadra alleging that on 30.09.2019 at about 10:00 P.M. Chairman Renukoot, Shiv Pratap Singh aged about 38 years R/o Hanuman Singh Katra, Renukoot was present in his residential office. Ajit Kushwaha, Dilip Pareeda and Rinku were also there. Younger brother of Shiv Pratap Singh @ Dablu Singh was sitting out of office. While Shiv Pratap Singh was hearing the problems of public, all of a sudden two boys on motorcycles arrived at opposite side of the road and getting their motorcycles stood there, came towards the office. One of the boy was standing out of office and other boy entered into the room. He bade *namaste* to Chairman Shiv Pratap Singh. He could not heed towards the boy on account of talk on phone. That boy opened fire upon him which pierced on the left side chest of Shiv Pratap Singh. Meanwhile, other boy also opened fire which stroke at the door. People present there tried to catch them but failed and culprits having reached at the divider on the road, fired in the air and fled away. Shiv Pratap Singh was brought to the Hospital at Hindalco from where he was referred to Trauma Center, Varanasi. On 01.10.2019 at about 2:30 A.M. he succumbed to injuries.

5. During investigation, it came into light that petitioner was Ex-Chairman of Renukoot and deceased Shiv Pratap Singh was present Chairman. There was enmity because petitioner was defeated in election of Chairman, Nagar Panchayat. Shiv Pratap Singh and members of his family caused injuries to the brother of petitioner and Jamuna Singh with danda, knife and sword in which Jamuna Singh and one Rohit Singh got injured. Jamuna Singh said to take revenge instead of lodging F.I.R., but uncle of Jamuna Singh namely Santosh Singh lodged F.I.R. at Police Station Pipri as Crime No.12/2019, under Sections 147, 148, 149, 506, 307 & 7 Criminal Law Amendment Act. Meanwhile, there was altercation between petitioner's brother Vijay Pratap Singh and brother of the deceased. As a result, petitioner engaged himself in conspiracy to murder Shiv Pratap Singh through Rakesh Prasad Maurya. Brajesh Singh brother of petitioner continued to talk to Jamuna Singh who was told to arrange shooters. On whose instance Bhagwan Singh arranged and sent Gandhi Yadav, Lav Singh, Sudhanshu Singh, Ravi Singh, Anda, Manish and other 12 people to Renukoot. They were stayed at Hotel Glory on 07.09.2019 by Brajesh, brother of petitioner on the I.D. of his driver Ramjaan. Brajesh Singh and shooters were seen together in C.C.T.V. Brajesh Singh was in contact with Jamuna Singh during this period. The shooters lived in Hotel Glory from 07.09.2019 to 09.09.2019. Meanwhile, deceased Shiv Pratap Singh was got identified by the shooters. Again on 28.09.2019, shooters were called through phone by Jamuna Singh on the instance of Brajesh Singh, brother of petitioner. On 29.09.2019 shooters were stayed in Jwalamukhi Guest House. Brajesh Singh also provided Rs.25,000/- for purchasing motorcycle to Gandhi Yadav. In this way, on 30.09.2019 the incident was got caused by the petitioner as a result of long hatched conspiracy with other accused persons and after the commission of incident, vehicle Scorpio, Bearing No. UP 67 F 4444 owned by the petitioner and driven by Ramjaan was deployed to escort the shooters. Investigating Officer recorded statements of witnesses and collected other evidence

in which involvement of petitioner was found established and on 02.10.2019 he was arrested by police. There is criminal history of the petitioner i.e. seven criminal cases are registered at Police Station and all are pending before the Court after charge-sheet. This incident took place at 10:00 P.M. in the mid of Renukoot market. All shop-keepers located nearby shut their shops immediately. People were in fear and they closed their doors since this was a murder of Chairman so people were affected adversely and felt unsafe. The atmosphere remained panic for few days. Even students did not attend their schools due to fear. Public order was totally disturbed. Extra Forces and P.A.C. were also deployed to bring the situation under control. On 02.10.2019, he applied for bail before the Court which created possibility of petitioner being released on bail and again to indulge himself in such activities those were likely to affect adversely public order, therefore, his detention became necessary under the N.S.A.

6. In the aforementioned circumstances, Station House Officer, Pipri sent a report with relevant papers to Superintendent of Police, Sonebhadra for detaining the petitioner under Section 3(2) of N.S.A. Thereupon, Superintendent of Police, Sonebhadra, after considering the matter became satisfied with the report sent by Station House Officer and submitted his report to District Magistrate, Sonebhadra for detaining the petitioner under Section 3(2) of N.S.A. to prevent him from indulging in such activities causing disturbance of public order.

7. On the basis of material placed before him, as briefly referred to above, Detaining Authority came to the conclusion that petitioner's activities are prejudicial to the maintenance of public order and his activities have disturbed the normalcy of the society. Thus, keeping in view his criminal record and activities, the Detaining Authority felt satisfied that there was every apprehension/imminent possibility that just after his release from jail he will again indulge in such type of activities which will adversely affect the maintenance of public order and, therefore, to prevent him from committing similar activities prejudicial to the maintenance of public order it became necessary to detain him with immediate effect under Section 3(2) of the N.S.A. Hence, the Detaining Authority passed impugned order dated 20.11.2019 for detaining the petitioner under Section 3(2) of the N.S.A. The Detaining Authority communicated the grounds of detention to petitioner on 20.11.2019. On 26.11.2019, petitioner has sent his representation through Jail Superintendent, Sonebhadra to Detaining Authority which was rejected on 28.11.2019 by the Detaining Authority and other representation was sent to State, which was also rejected on 09.12.2020.

8. We have also gone through the record including counter-affidavits of respondents and rejoinder affidavits of petitioner. The petitioner has challenged the impugned order on following grounds :-

(I) Because since 03.10.2019, the petitioner is languishing in jail in connection with F.I.R. No.180/2019 dated 01.10.2019 whereas he is quite innocent and has committed no offence at all.

(II) Because since 20.11.2019, the petitioner has been detained in pursuance to the detention and in as much as also detention extension order dated 18.02.2020 and 14.05.2020 for a period of 9 months w.e.f 20.11.2019 till 16.08.2020 in a District Jail, Sonebhadra at Robertsganj.

(III) Because, in any manner there is no prejudice to the security of the state or from acting in any manner

prejudicial of the maintaining of the public order, if the petitioner wouldn't be detained so as such there is no necessity to make an order directing to the petitioner to detain him into jail.

(IV) Because, there is no credible information or cogent reason apparent on record to believe that either the petitioner would be released from jail or he would act prejudicial to the maintenance to the security of the State or to maintenance of the public order.

(V) Because, there is only bald statement and stale ground. It is further submitted, mere ipse dixit of the detaining authority to pass the detention order.

(VI) Because, the petitioner has neither taken law and order in his own hand nor disturbed the public tranquility. It is further submitted, the alleged so called apprehension is the creation of the mind of the sponsoring recommending/authorities.

(VII) Because, the intent of the legislation to enact the National Security Act is preventive not punitive. But the respondent no.3 by misusing his power has passed the detention order, in order to punish the petitioner.

(VIII) Because, the continuous detention of the petitioner is against the intent of the Section 3(2), (4), and 8 to 12 of the Act and in as much as also contrary to the Article 22(5) readwith Article 21 and 14 of the Constitution of India.

(IX) Because, in this case the constitutional safeguard embodied in the Article 22(5) of the Constitution of India has not been followed.

(X) Because, either in the detention order dated 20.11.2019 and approval order dated 29.11.2019 the period of detention has not been disclosed.

(XI) Because, the detention order dated 20.11.2019 and in as much as also detention extension order dated 18.02.20 and 14.05.2020 are illegal and unconstitutional and without application of independent mind, hence not sustainable and the petitioner deserves to be set at liberty forthwith from the District Jail, Sonebhadra at Robertsganj, in the interest of justice, so the justice may be done.

9. The respondents have filed counter-affidavits wherein they have denied the points raised by the petitioner and reiterated their claim that the activities of the petitioner were prejudicial to the maintenance of public order, his activities have disturbed the normalcy of the society and then there was every possibility that just after his release from jail, he will again indulge in such activities which will adversely affect the public orders and therefore, to prevent him from further committing similar criminal activities prejudicial to the maintenance of public order, the impugned orders were justified.

10. It is strenuously urged by learned counsel for the petitioner that the impugned orders are wholly arbitrary and the petitioner has been illegally detained by misusing the provisions of the N.S.A. on the basis of unfounded apprehension that if the detenue was released on bail, he would again carry on criminal activities in the area. Except the alleged criminal cases, there was no criminal record of the petitioner and petitioner did not indulge in any such activity which may form the basis for satisfaction of the Detaining Authority to come to conclusion that he is likely to disturb the public order. At the best, it could be a matter of law and order and not disturbance of public order. The reliance on the alleged criminal case is misplaced. In nutshell, the case of the petitioner is that there was absolutely no cogent material before the Detaining Authority to form the

requisite belief that the petitioner was indulging in criminal activities which were prejudicial to the maintenance of public order and unless prevented, he would indulge in similar activities in future. Learned counsel for the petitioner also contended that even if the allegation/instances relied upon by the Detaining Authority are taken a face value, still at best, these may tantamount "to law and order" and by no stretch of imagination can be construed as activities prejudicial to the maintenance of public order within the meaning of sub section (2) of Section 3 of N.S.A. It is alleged that the detention order against the petitioner has been passed only with a view to frustrate the bail. It is urged that instead of clamping the impugned order on the petitioner, the best course open to the respondents was to oppose the bail application. It is urged that the detention order as well as it's confirmation order are mala fide inasmuch as they were made merely to circumvent the petitioner's enlargement on bail. It is also urged by the learned counsel that the grounds of order of detention and further extension thereof were not communicated to him, which caused prejudice to the petitioner. In this way, the impugned order becomes arbitrary and suffers from illegality and material irregularity, therefore, the same are liable to be interfered with and quashed by this Hon'ble Court.

11. Per contra, learned counsel for the State, while supporting the order of detention and denying the allegation that it has been passed only with a view to frustrate the bail order, has submitted that the activities of the petitioner were directed against the public at large and were sufficient to bring them within the ambit of public order. The satisfaction of the Detaining Authority is based on reliable and relevant material and that there was no illegality in the impugned orders. It is urged that if the Detaining Authority arrives at the subjective satisfaction that the activities of the detenue are prejudicial to the maintenance of public order and passes the detention order, that cannot be interfered by this Hon'ble Court. The grounds of detention were promptly communicated to the petitioner within the stipulated time and there is no need of supplying the grounds of extension of such detention order to the detenue. In addition to this, there is a long criminal history of the petitioner.

12. Thus, the main question for consideration before this Court is whether the activities of the petitioner highlighted in the grounds of detention fall within realm of public order or law and order.

13. The distinction between the two concepts of "public order" and "law and order" has been lucidly explained by the Apex Court in **Ashok Kumar Vs. Delhi Administration, AIR 1982 SC 1143.** Inter alia, observing that the true distinction between the areas of "public order" and "law and order", being fine and sometimes overlapping, does not lie in the nature or quality of the act but in the degree and extent of its reach upon society, their Lordships said that the act by itself is not determinant of its own gravity. It is the potentiality of the act to disturb the even tempo of the life of the community which makes it "prejudicial to the maintenance of public order". If the contravention in its effect is confined only to a few individuals directly involved, as distinct from a wide spectrum of public, it would raise the problem of "law and order" only. It is the length, magnitude and intensity of the terror wave unleashed by a particular act or violence creating disorder that

distinguishes it as an act affecting "public order" from that concerning "law and order". On the facts of that case the Court held that whenever there is an armed hold up by gangsters in a residential area of the city and persons are deprived of their belongings at the point of knife or revolver they become victims of organised crime and such acts when enumerated in the grounds of detention, clearly show that the activities of a detenu cover a wide field falling within the ambit of the concept of "public order".

14. To the same effect are the observations of the Apex Court in **Victoria Fernandes Vs. Lalmal Sawma, AIR 1992 SC 687,** wherein, relying on its earlier decisions, including Ashok Kumar's case (supra), it was reiterated that while the expression "law and order" is wider in scope, in as much as contravention of law always affects order, "public order" has a narrower ambit and public order would be affected by only such contravention which affects the community and public at large.

15. The distinction between violation of 'law and order' and an act that would constitute disturbing the maintenance of 'public order' had also fallen for consideration of the Hon'ble Supreme Court in **State of U.P. & Anr. V. Sanjay Pratap Gupta @ Pappu and others reported in 2004 (8) SCC 591**, where the Apex Court after an extensive survey of authority on the issue brought out the distinction in fine detail thus:-

"12. The true distinction between the areas of law and order and public order lies not merely in the nature or quality of the act, but in the degree and extent of its reach upon society. Acts similar in nature, but committed in different contexts and circumstances, might cause different reactions. In one case it might affect specific individuals only, and therefore touches the problem of law and order only, while in another it might affect public order. The act by itself, therefore, is not determinant of its own gravity. In its quality it may not differ from other similar acts, but in its potentiality, that is, in its impact on society, it may be very different.

13. The two concepts have well-defined contours, it being well established that stray and unorganized crimes of theft and assault are not matters of public order since they do not tend to affect the even flow of public life. Infractions of law are bound in some measure to lead to disorder but every infraction of law does not necessarily result in public disorder. Law and order represents the largest scale within which is the next circle representing public order and the smallest circle represents the security of State. "Law and order" comprehends disorders of less gravity than those affecting "public order" just as "public order" comprehends disorders of less gravity than those affecting "security of State". **(See Kuso Sah v. State of Bihar 1974 1 SCC 185, Harpreet Kaur v. State of Maharashtra 1992 2 SCC 177, T.K Gopal Alias Gopi v. State Of Karnataka 2000 6 SCC 168 and State of Maharashtra v. Mohd. Yakub 1980 2 SC 1158).**

14. The stand that a single act cannot be considered sufficient for holding that public order was affected is clearly without substance. It is not the number of acts that matters. What has to be seen is the effect of the act on the even tempo of life, the extent of its reach upon society and its impact."

16. The issue has also been dealt with in the case of Sant Singh vs. District

Magistrate, Varanasi reported in 2000 Cri LJ 2230 wherein paragraph 7 of the report dealing with the point it was held thus:-

"7. The two connotations 'law and order' and 'public 'order' are not the words of magic but of reality which embrace within its ambit different situations, motives and impact of the particular criminal acts. As a matter of fact, in a long series of cases, these two expressions have come to be interpreted by the apex Court. It is not necessary to refer all those cases all over again in every decision for one simple reason that they have been quoted and discussed in earlier decision of this Court dated 14-10-1999 in Habeas Corpus Writ Petition No. 33888 of 1999- Udaiveer Singh v. State of U.P. and the decision dated 1-12-1999 in Habeas Corpus Writ Petition No. 38159 of 1999 Rajiv Vashistha v. State of U.P. (Reported in 1999 All Cri R 2777). The gamut of all the above decisions in short is that the true distinction between the areas of 'public order' and 'law and order' lies not in nature and quality of the act, but in the degree and extent of its reach upon society. Sometimes the distinction between the two concepts of law and order' and 'public order' is so fine that it overlaps. Acts similar in nature but committed in different contexts and circumstances might cause different reactions. In one case it might affect specific individuals only and therefore, touch the problem of 'law and order', while in another it might affect 'public order'. The act by itself, therefore, is not determination of its own gravity. It is the potentiality of the act to disturb the even tempo of the community which makes it prejudicial to the maintenance of 'public order''.

17. The scope of expression "acting in any manner prejudicial to the maintenance of public order" as appearing in Sub-Section 2 of Section 3 of the NSA also came up for consideration of the Supreme Court in **Mustakmiya Jabbarmiya Shaikh Vs. M.M. Mehta, (1995) 3 SCC 237; Amanulla Khan Kudeatalla Khan Pathan Vs. State of Gujarat, (1999) 5 SCC 613 and Hasan Khan Ibne Haider Khan Vs. R.H. Mendonca, (2000) 3 SCC 511.** The Apex Court held that the fallout, the extent and reach of the alleged activities must be of such a nature that they travel beyond the capacity of the ordinary law to deal with the person concerned or to prevent his subversive activities affecting the community at large or a large section of the society. It is the degree of disturbance and its impact upon the even tempo of life of the society or the people of a locality which determines whether the disturbance caused by such activities amounts only to a breach of "law and order" or it amounts to a breach of "public order". In **Amnulla Khan's case** (supra), it has been held that the activities involving extortion, giving threat to public and assaulting businessmen near their place of work were sufficient to affect the even tempo of life of the society and in turn amounting to the disturbance of the "public order" and not mere disturbance of "law and order".

18. Dealing with the question as to whether one solitary instance can be the basis of an order of detention, the Apex Court in **Smt. Bimla Rani v. Union of India, 1989 (26) ACC 589 SC** observed that the question is whether the incident had prejudicially affected the 'public order'. In other words, whether it affected the even tempo of the life of the community. In **Alijan Mian v. District Magistrate Dhanbad, 1983 (3) SCR 930 AIR 1983 SC 1130** it was held that even one incident may be sufficient to satisfy the detaining

authority in this regard, depending upon the nature of the incident. Similar view has been expressed in the host of other decisions. The question was answered more appropriately and with all clarity in the case of **Attorney General of India v. Amratlal Prajivandas, AIR 1994 SC 2179,** wherein the apex Court ruled that it is beyond dispute that the order of detention can be passed on the basis of a single act. The test is whether the act is such that it gives rise to an inference that the person would continue to indulge in similar prejudical activities. It cannot be said as a principle that one single act cannot be constituted the basis for detention. Thus, the argument of learned counsel for the petitioner that since it is solitary incident of the petitioner, he deserves sympathy, is rejected. Now the law, as it stands, is that even one solitary incident may give rise to the disturbance of 'public order'. It is not the multiplicity but the fall out of various criminal acts. Though there is consistency in the various decisions of the apex Court about the interpretation of the expressions of 'law and order' and 'public order' undue insistence on the case law is not going to pay any dividend as each case revolves round its own peculiar facts and has to be viewed in the light of the various attending factors. It is difficult to find a case on all fours with the case in hand.

19. In the instant case, examining the grounds of detention, briefly referred to above, on the touchstone of the legal position as emerging from the aforementioned decisions, we are of the view that the activities relied upon by the Detaining Authority to come to the aforementioned conclusion, cannot be said to be mere disturbance of "law and order". As noted in the grounds of detention, the activities of the petitioner pertains to engage into conspiracy to get a person assassinated who being elected by the people as Chairman of Nagar Panchayat and so creating a menace in the society at large. There is material on record to show that petitioner, being ex-Chairman of Nagar Panchayat, engaged into conspiracy to get the elected Chairman murdered through hired shooters which created panic in the public affecting the normal tempo of life. Shops in the market remained closed. Students also not attended their schools for several days. Ordinary life in the city was paralysed. It will certainly result in disturbance of public order. To assassinate an elected person, while discharging his duties in his office, strikes at the root of the State's authority and is directly connected to 'public order'. This act of petitioner was not directed against a single individual, but against the public at large having the effect of disturbing even tempo of life of the community and thus, breaching the "public order". Thus, we are unable to hold that there was no material before the Detaining Authority to come to the conclusion, it did, to say that the activities of petitioner can be construed as activities prejudicial to the maintenance of "public order," within the meaning of Sub-Section (2) of Section 3 of the NSA. We have, therefore, no hesitation in holding that the instances of petitioner's activities, enumerated in the grounds of detention, clearly show that his activities cover a wide field and fall within the contours of the concept of "public order"and the Detaining Authority was justified in law in passing the impugned order of detention as its confirmation order against the petitioner.

20. As regards the plea of learned counsel for the petitioner that the impugned order is vitiated because it has been passed with a mala fide intention to frustrate the

bail likely to be allowed to the petitioner, we are of the view that there is no substance in the contention. No doubt, when the proceedings of clamping provisions of NSA were initiated, the petitioner was in jail but it is settled by a catena of decisions of the Apex Court that even when a person is in custody, a detention order can validly be passed if the authority passing the order is aware of the fact of his being in custody and he has reason to believe, on the basis of material placed before him, that there is imminent possibility of his being released on bail and that on being so released, he would in all probability indulge in prejudicial activities and to prevent him from doing so, it is necessary to detain him. A detention order cannot be struck down on the ground that the proper course for the authority was to oppose the bail application and if bail is granted notwithstanding such opposition, to question it before a higher Court, as is sought be pleaded by learned counsel for the petitioner. In this regard, criteria was laid down by the Hon'ble Apex Court in the case of **Kamarunnissa and others vs. Union of India (1991) 1 SCC 128** also fortified in **Champion R. Sangma vs. State of Meghalaya (2015) 16 SCC 253,** it was held :-

"13. In case of a person in custody a detention order can validly be passed (1) if the authority passing the order is aware of the fact that he is actually in custody; (2) if he has reason believe on the basis of reliable material placed before him (a) that there is a real possibility of his being released on bail, and (b) that on being so released he would in all probability indulge in prejudicial activity and (3) if it is felt essential to detain him to prevent him from so doing."

21. So far as the argument relating to non supply of grounds of order of detention and further extension thereof is concerned, it is noteworthy to mention that the grounds of detention were communicated to the petitioner at the time of passing the impugned detention order dated 20.11.2019. It was further extended by the State which was communicated to the petitioner in due time. There was no such requirement to furnish grounds of extension to the detenue because the grounds of detention were the same, so no any prejudice was likely to be caused to the petitioner.

22. Having considered the matter in the light of the facts and circumstances, noted above, we are of the opinion that the apprehension entertained by the Detaining Authority, to the effect that petitioner's activities are prejudicial to the maintenance of public order, is genuine and well founded. Thus, we do not find any illegality in the impugned orders, warranting our interference. The writ petition, being bereft of any merit, is ***dismissed*** accordingly. There will, however, be no order as to costs.

(2021)02ILR A53
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.02.2021

BEFORE

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

Habeas Corpus Writ Petition No. 450 of 2020

Master Advait Sharma ...Petitioner
Versus
The State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Vibhu Rai, Mr. Abhinav Gaud

Counsel for the Respondents:
G.A., Sri Arvind Prabodh Dubey, Dr. Rajeev Nanda, Sri Manish Kumar Vikki

A. Constitution of India, 1950-Article 226-application-allowed-petitioner and his wife admittedly are living separately and their minor son is in the custody of his father and grandparents-the rule nisi is made absolute-in the case of detention of child the only person competent to move the court for a writ of habeas corpus would be one who is entitled to the custody of the child-the child is about three and a half years-the applicant becomes entitled to the custody of child as of right because the applicant establishes a prima facie case that the detention is unlawful-however father would be entitled for visitation right.(Para 1 to 56)

B. The HMG Act postulates that the custody of an infant or a tender aged child should be given to his/her mother unless the father discloses cogent reasons that are indicative of and presage the likelihood of the welfare and interest of the child being undermined or jeopardised if the custody is retained by the mother. Section 6(a) of the HMG Act, therefore, preserves the right of the father to be guardian of the property of the minor child but not the guardian of his person whilst the child is less than five years old.(Para 51)

The petition is allowed. (E-5)

List of Cases cited:-

1. Sumedha Nagpal Vs St. of Delhi & ors.,(2000) 9 SCC 745

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

3. Rishik Lavania & anr. Vs St of U.P. & ors.,(2020) SCC Online All 1035.

4. Reetu & anr. Vs St. of U.P & ors., (2020) SCC Online 1136

5. Aisha (Minor) & anr. Vs St of U.P & ors. (2020) SCC Online 1129

6. PNB & ors. Vs Atmanand Singh & ors., (2020) 6 SCC 256

7. Yashita Sahu Vs St of Raj. & ors., (2020) 3 SCC 67

8. Githa Hariharan(Ms) & anr. Vs RBI & anr., (1999) 2 SCC 228

9. Roxann Sharma Vs Arun Sharma, (2015) 8 SCC 318

10. Aharya Baranwal & 3 ors. Vs St. of U.P. & 2 ors. HABC No. 3921 of 2018

11. Master Atharva (Minor) & anr .Vs St. of U.P. & 7 ors., (2020) 143 ALR 332

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

1. Master Advait Sharma, a child of three years and a half, occupies the centre stage of controversy, that is the subject matter of this Habeas Corpus Writ Petition. It about the child's custody that his parents are entangled in a bitter battle. The child's misfortune, circumstanced as he is, is the fallout of an estrangement of his parents, who do not seem to have got along in matrimony. This has all happened in circumstances hereinafter detailed.

2. Advait's parents, Preeti Rai and Prashant Sharma, were married on November the 28th, 2013. Preeti Rai is an I.T. Engineer, employed with a Multinational Corporation. Prashant Sharma is a Sales Manager with a business house. He is currently serving as an Area Manager with Tropicana Juices, a company based at Ghaziabad. Advait was born of the wedlock of Preeti Rai and Prashant Sharma on 05.07.2017. Smt. Sharda Sharma and Chandra Kishore Sharma, who figure in the array of parties to this Habeas Corpus Writ Petition, are Prashant's mother and father, and Advait's grandparents. There is trading

of allegations by the spouses, that carry varying versions to suit each about their case, why they fell apart. But, that does not matter, so far as the present proceedings are concerned. This petition has been brought by Preeti Rai, on behalf of Advait, saying that her minor son is in the unlawful custody of his father and grandparents, wherefrom he ought to be relieved and delivered to her.

3. Preeti Rai was earlier posted in the N.C.R., but she says that she was thrown out of her matrimonial home on 20.04.2019, over issues relating to dowry. She then sought a transfer to Bengaluru, with the intention to stay close to her son, because Advait's grandparents would often take him away to their daughter's place in Bengaluru. However, within a few days of Preeti's arrival in Bengaluru, Advait was relocated to Delhi.

4. The pleadings of parties are replete with virtues claimed for themselves and demonizing the other party, including the in-laws on both sides. That again, ought not to be looked into or considered by this Court much, except to the extent that it is relevant to the issue of the minor's welfare.

5. This petition was admitted to hearing on 09.09.2020, requiring Advait to be produced before the Court on 16.09.2020, bearing all caution in terms of the CoViD-19 protocol. On 16.09.2020, the minor was produced and the parents also appeared. Bearing in mind the age of the couple and the minor's welfare, that would be best secured with his parents' reunited, this Court referred the parties to the Allahabad High Court Mediation and Conciliation Center to attempt a reconciliation. On 17.09.2020, an interim settlement was arrived at between parties, carrying the terms recorded in this Court's order of September the 18th, 2020. This Court had wished best for the minor and his parents. But, that was not to be. On 22.10.2020, when the matter came up again, the Court was informed by Dr. Rajiv Nanda, learned Counsel appearing on behalf of respondent nos. 4 and 5, that the interim settlement recorded before the Mediation and Conciliation Centre had fallen through. This Court, accordingly, ordered on 22.10.2020 that Smt. Preeti Rai and Prashant Sharma shall appear on 05.11.2020 along with Advait. It was at that stage that hearing commenced on 05.11.2020. Hearing concluded on 08.12.2020 and judgment was reserved.

6. Heard Mr. Vibhu Rai along with Mr. Abhinav Gaud, learned Counsel for the petitioner, Dr. Rajiv Nanda along with Mr. Manish Kumar Vikki, learned Counsel appearing on behalf of respondent nos. 4 & 5 and Mr. S.S. Tiwari, learned A.G.A. appearing for the State.

7. Dr. Rajiv Nanda, learned Counsel for the respondents has raised an objection about the maintainability of this Habeas Corpus Writ Petition. He has submitted that a habeas corpus writ petition is not maintainable at the instance of one parent seeking the custody of a child from the other, because the custody cannot be termed unlawful. He submits that the father is the natural guardian under Section 6(a) of the Hindu Minority and Guardianship Act, 19561, and unless it be shown that the minor's welfare is in jeopardy in the father's hands, the father's custody cannot be termed illegal or unlawful. Dr. Nanda submits that in a situation like the one in hand, the mother's remedy is to institute proceedings seeking custody, under Section 25 of the Guardians and Wards Act, 18902,

before the Court of competent jurisdiction. This objection by the learned Counsel for the respondents is sought to be sustained on the following authorities : **Sumedha Nagpal vs. State of Delhi & ors., (2000) 9 SCC 745; Tejaswini Gaud and others vs. Shekhar Jagdish Prasad Tewari and others, (2019) 7 SCC 42; Rishik Lavania and another vs. State of U.P. and others, 2020 SCC OnLine All 1035; Reetu and another vs. State of U.P. and others, 2020 SCC OnLine 1136; and Aisha (Minor) and another vs. State of U.P. and othes, 2020 SCC OnLine 1129.**

8. Apart from these decisions, Dr. Nanda has urged the broad principle of alternative remedy, which, if available, bars a writ petition. To the above end, he has placed reliance on a decision of the Supreme Court in **Punjab National Bank and others vs. Atmanand Singh and others, (2020) 6 SCC 256,** wherein it has been held thus :

"24. *In Hyderabad Commercials [Hyderabad Commercials v. Indian Bank,* 1991 Supp (2) SCC 340], on which reliance has been placed, it is clear from para 4 of the said decision that the Bank had admitted its mistake and liability, but took a specious plea about the manner in which the transfer was effected. On that stand, the Court proceeded to grant relief to the appellant therein, the account-holder. In the present case, however, the officials concerned of the Bank have denied of being party to the stated agreement and have expressly asserted that the said document is forged and fabricated. It is neither a case of admitted liability nor to proceed against the appellant Bank on the basis of indisputable facts.

25. Even the decision in *ABL International Ltd. [ABL International Ltd. v. Export Credit Guarantee Corpn. of India Ltd.,* (2004) 3 SCC 553] will be of no avail to Respondent 1. This decision has referred to all the earlier decisions and in para 28, the Court observed as follows: (SCC p. 572)

"28. However, while entertaining an objection as to the maintainability of a writ petition under Article 226 of the Constitution of India, the court should bear in mind the fact that the power to issue prerogative writs under Article 226 of the Constitution is plenary in nature and is not limited by any other provisions of the Constitution. *The High Court having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition.* The Court has imposed upon itself certain restrictions in the exercise of this power. *(See Whirlpool Corpn. v. Registrar of Trade Marks [Whirlpool Corpn. v. Registrar of Trade Marks, (1998) 8 SCC 1].)* And this plenary right of the High Court to issue a prerogative writ will not normally be exercised by the Court to the exclusion of other available remedies unless such action of the State or its instrumentality is arbitrary and unreasonable so as to violate the constitutional mandate of Article 14 or for other valid and legitimate reasons, for which the Court thinks it necessary to exercise the said jurisdiction."

(emphasis supplied)

9. Dr. Nanda submits that the authority of their Lordships of the Supreme Court in **Atmanand Singh** *(supra)* would squarely be attracted to the facts here, because this petition also involves extremely complex questions of fact, from which alone, inference about the minor's welfare can be drawn. Therefore, the course indicated in **Atmanand Singh** requiring parties to pursue their alternative

remedy ought to be the fate of this habeas corpus writ petition. It must be remarked here that the principle in **Atmanand Singh** is stated on high authority and binds this Court, but that decision was rendered in the context of a writ petition, other than habeas corpus. The principle about alternative remedy, in the opinion of this Court, would not be attracted to a writ of habeas corpus. Habeas corpus is about liberty and in its application to a custody dispute, though brought on a cause of action about custody of the child, it is issued on the parameters of welfare. **Atmanand Singh** was a case relating to a writ, other than habeas corpus. It arose out of a dispute between a customer and the Bank about a money claim. The general principle of alternative remedy applicable to all other kinds of writs, would never apply to a writ of habeas corpus. It is quite another matter that in some cases, the question about the minor's welfare, which a Court seized of a habeas corpus matter may examine, is enmeshed in so much of factual disputations, that it is incapable of resolution in proceedings, decided on affidavits. It is there that parties may be asked to resort to their remedy under the statute.

10. In **Rishik Lavania** *(supra)*, I had occasion to consider this question and the remarks there about a habeas corpus writ petition being not maintainable, were in the context of a capable mother, who held custody with an *ex facie* strong indication about the minor's welfare being secure. Here, there is much cavil on both sides, where the minor's welfare would be better secured; there is also a clear case here to be examined, whether the father with his two aged parents can take care of the minor, who is a young child of three and a half years.

11. The decision in **Reetu** *(supra)* is clearly distinguishable on facts, because it was a case not between two parents. In **Reetu**, I held a habeas corpus writ petition to be maintainable, because it was the case of a mother, who had petitioned for her minor child's custody held by the grandmother and the father's brother. There is nothing in the decision in **Reetu**, which may bar the petitioner's right to maintain a petition for a writ of habeas corpus.

12. **Aisha** *(supra)* was a case where the remarks in paragraph 11 do not exclude the remedy of a habeas corpus, so far as a custody dispute between parents about their child is concerned. It only says that where very intricate questions are involved, the parties may be left free, in the first instance, to go to the Civil Court. This is a question, which is to be seen on the facts of the case, but cannot be utilized to throw out a petition for a writ of habeas corpus in a custody matter between parents at the threshold. In **Aisha**, I held:

"11. The objection raised by the learned counsel for the respondent that this petition is not maintainable as it relates to a custody dispute between two parents, where custody of either cannot be said to be unlawful, in the sense that it is understood in the jurisdiction for a writ of habeas corpus, cannot be accepted. The validity of a minor's custody with a parent can be examined in a petition for a writ of habeas corpus with reference to the law governing the right to that custody. The question of welfare of minor too, can be examined within the scope of these proceedings. The only limitation appears to be that the inquiry should not involve fine and intricate details, the assessment of

which may require such a detailed inquiry which is not traditionally associated with the exercise of the Court's writ jurisdiction. Where a very detailed inquiry is required to be made, the parties ought to be left free in the first instance to go to the Civil Court.

12. Now, in the facts of the present case it has to be seen whether the custody of the mother is apparently unlawful, so as to entitle the father to ask for a writ of habeas corpus."

13. In this context, reference may be made to the decision of the Supreme Court in **Tejaswini Gaud** *(supra),* to which Dr. Nanda has alluded. It has been held in **Tejaswini Gaud,** thus :

"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."

14. In a later decision, the Supreme Court considered the question in **Yashita Sahu vs. State of Rajasthan and others, (2020) 3 SCC 67,** where it was held:

"10. It is too late in the day to urge that a writ of habeas corpus is not maintainable if the child is in the custody of another parent. The law in this regard has developed a lot over a period of time but now it is a settled position that the court can invoke its extraordinary writ jurisdiction for the best interest of the child. This has been done in *Elizabeth Dinshaw v. Arvand M. Dinshaw [Elizabeth Dinshaw v. Arvand M. Dinshaw,* (1987) 1 SCC 42 : 1987 SCC (Cri) 13] , *Nithya Anand Raghavan v. State (NCT of Delhi) [Nithya Anand Raghavan v. State (NCT of Delhi),* (2017) 8 SCC 454 : (2017) 4 SCC (Civ) 104] *and Lahari Sakhamuri v.*

Sobhan Kodali [Lahari Sakhamuri v. Sobhan Kodali, (2019) 7 SCC 311 : (2019) 3 SCC (Civ) 590] among others. In all these cases, the writ petitions were entertained. Therefore, we reject the contention of the appellant wife that the writ petition before the High Court of Rajasthan was not maintainable."

(emphasis by Court)

15. This Court is, therefore, not minded to accept the submission of Dr. Nanda that the present habeas corpus writ petition ought to be thrown out on the ground of maintainability, because the minor is in his father's custody, which, *per se,* is not unlawful. There is no quarrel between parties about the legal proposition that this Court, in considering the claim of parties to the minor's custody, is bound by the principle that welfare of the child is of paramount consideration. Both parties say that Advait's welfare would be best secured with the one claiming it. There is a very different version about adherence to the norms of a responsible spouse or parent coming from each side. It is something that is commonplace and expected.

16. It is asserted on behalf of Preeti that at the time the parties got married, she was working with the British Telecom company at Gurgaon and Prashant was employed with PepsiCo, Lays Division, Delhi. It is her case that Prashant resigned from the PepsiCo and remained jobless from January 2015 to April, 2015. During this period of time, Preeti was taking care of the entire family, comprising Prashant, her mother-in-law and father-in-law, catering to all their financial requirements. Prashant joined another company in November, 2015. It is claimed by Preeti that she was pestered with the demand for a car in dowry. She says that she bought a car on loan, the EMIs whereof she is still repaying. In January, 2017, Prashant left his job, and the entire financial responsibility to run the household fell again on Preeti's shoulders.

17. It is Preeti's further case that for that reason, she could not afford to take leave and stay home, though she was in the family way. It is asserted that on 3rd May, 2017, Prashant virtually forced Preeti to pay a sum of Rs.1 lakh towards his tuition fee at the Indian Institute of Foreign Trade, New Delhi. She made good that demand from her savings in order to salvage her marriage. In the end of June, 2017, Prashant joined the Ultratech Cement, Delhi. On 5th July, 2017, as already said, Advait was born. He was born in the Fortis Hospital, Noida, Gautam Budh Nagar. In the month of September, 2017, Prashant once again left his job with Ultratech Cement. He remained unemployed upto January, 2018. During this period of time, the entire financial liabilities of the household were borne by Preeti. It is asserted by Preeti that Advait was in her custody and care since his birth. He was in good health. It is said that Advait was forcefully taken away to Bengaluru by Smt. Sharda Sharma and Chandra Kishore Sharma, her mother-in-law and father-in-law, respectively. The went to see their daughter, who was then in the family way. They stayed there till the end of October, 2018.

18. It is asserted for a fact that Prashant's sister stays in Bengaluru. It then said that Advait was brought back to Delhi by his grandparents in the month of October and reunited with Preeti for a couple of days. After a short stay of two days in Delhi, the grandparents again took Advait to Gorakhpur without informing

Preeti. She says that she kept quiet out of fear. Chandra Kishore fell ill in the month of November, 2018 due to affliction of the prostate, whereupon both the grandparents, along with Advait, came back to Delhi for treatment.

19. It is said that on 14th June, 2019, Sharda Sharma abruptly left for Bengaluru, taking along Advait without informing Preeti. It is asserted that on 20.04.2019, Prashant ousted Preeti from their matrimonial home. She attempted to pacify the matter, and, failing in that endeavour, sought a transfer to Bengaluru in order to stay near Advait. Her employers approved the transfer and she moved to Bengaluru. It is alleged that Preeti went to the house of her sister-in-law in Bengaluru to meet Advait. She was allowed to meet her minor son once a week. On 1st June, 2019, when Preeti went to her sister-in-law's home, she was not permitted to enter. She was informed that Advait had been taken to Delhi by Sharda Sharma, again without information. On 27.07.2019, Advait was brought back to Bengaluru by Sharda.

20. The salient, amongst these facts, are asserted in paragraph nos. 6, 7, 8 and 13 of the habeas corpus writ petition and paragraph nos.29(a) and 42 of the rejoinder affidavit. The fact about Advait being brought back to Bengaluru on 27.07.2019 is sought to be established by a reference to Annexure no. CA-6 to the counter affidavit dated 19.10.2020 at page 135 of the paper-book, which carries a photostat copy of an airways ticket purchased for Advait by SpiceJet Flight no. SC8719 from Delhi to Bengaluru.

21. It is asserted in paragraph no. 15 of the petition that Advait was admitted to the Fortis Hospital, Noida, Gautam Budh Nagar, while in the custody of respondent nos.4, 5 and 6, on 3rd September, 2019. Preeti, upon learning of Advait's hospitalization, travelled to Delhi on 05.09.2019. She stayed there until Advait was discharged and settled properly at home. She left for Bengaluru on 11.09.2020. It is further said that Advait was again admitted to the Fortis Hospital, Noida, Gautam Budh Nagar, but information about this fact was a secret kept from Preeti. She learnt about Advait's hospitalization late in September, 2019. It is then said that Preeti learnt in the month of December, 2019 that Advait is alone with Smt. Sharda Sharma, as Prashant had left for Bangkok on a trip. She rushed to Delhi and brought Advait to her sister's place in NOIDA. Advait was in good health and stayed with his mother. Prashant, upon his return, took away Advait on 22.12.2019.

22. On 17.03.2020, Preeti returned to Gorakhpur on account of the closure of her office at Bengaluru in consequence of the CoViD-19 outbreak. Shortly thereafter, a nation-wide lock down followed. It is said that during this period of time, Preeti attempted to speak to her child through video call, but the contact was rare. In the month of July, 2020, Preeti and her father called Prashant and expressed their desire to bring Advait to Gorakhpur. They assured Prashant that all necessary precaution would be observed, but Prashant declined the request.

23. On 1st August, 2020, Preeti came over to Delhi and beseeched Prashant to let her take Advait to her sister's place in NOIDA for two days. On the following day, Prashant offered to take Preeti to his house. It is asserted that Preeti agreed, thinking that it may prove a turning point

for the parties. There is an assertion on her behalf to this effect in paragraph no. 20 of the writ petition. There are then some assertions to the effect that on 3rd August, 2020, Preeti went over to Prashant's place, where she was taunted and not permitted to go near Advait by Prashant and his parents. Preeti had to call the Police, who listened to her ordeal and suggested Prashant and his parents to let Advait be with his mother for sometime, until his health was restored. It is claimed that later on, she was thrown out of the house and not permitted inside any more. Preeti was taken by her sister to her home in NOIDA.

24. It is then asserted that Preeti tried to contact Prashant and his parents on 6th August, 2020, but to no avail. On the 9th of August, 2020, Preeti asserts in paragraph no.28 of the writ petition that she visited her husband and in-laws' place in Ghaziabad, where she learnt that they had left on 07.08.2020. On 10th of August, 2020, she returned to her native place in Gorakhpur, when she could not locate the whereabouts of her child (Advait). She thought that Advait might be at Prashant's Sahara Estate House in Gorakhpur, but found the flat there locked too. Instead, on the 12th of August, 2020, Chandra Kishore Sharma, Preeti's father-in-law visited her house in Kauriram, Gorakhpur and threatened her. On the following day i.e. 13th of August, 2020, Preeti was compelled to lodge an FIR against Prashant, Smt. Sharda Sharma, Chandra Kishore Sharma and Ankita Sharma, her husband, mother-in-law, father-in-law and sister-in-law, in that order, giving rise to Case Crime no.935 of 2020, under Sections 498A, 323, 504, 506 IPC and Section 3/4 of the Dowry Prohibition Act, Police Station Shahpur, District Gorakhpur. These facts are asserted in paragraph nos.28 and 29 of the writ petition. A xerox copy of the FIR is on record as Annexure no.5 to the writ petition. It was after the aforesaid event that the present habeas corpus writ petition was instituted on 3rd September, 2020. The proceedings before this Court, and the reference to the Allahabad High Court Mediation and Conciliation Centre, with no fruitful result, are matters that have been referred to in the earlier part of this judgment.

25. There are assertions in the rejoinder affidavit about Preeti being harassed, abused and ill-treated during the period of time that the parties were together, by virtue of the interim-settlement made before the Mediation Centre. There are also allegations about threats extended to Preeti, asking her to withdraw her case with the Police. She also claims to have been threatened over the decision to move this Court. These facts have been asserted largely in the rejoinder affidavit filed on behalf of Preeti.

26. To emphasize once again, this Court is not much concerned about the truth or otherwise of these allegations that have been largely denied in the counter affidavit filed on behalf of Prashant. The counter affidavit alleges largely that Preeti was a cruel wife and a callous mother. It is asserted that she was cruel also to Prashant's mother, father and sister. She spread a canard about Prashant being a womanizer, drunkard and a gambler. She threatened Prashant and his parents with death, imprisonment in a false case, leaving their house or committing suicide. It is made out in the counter affidavit that Preeti's father Chandra Bhan Rai, sister Udita Rai and mother Saroj Rai would quarrel with Prashant, asking him to part ways with his parents.

27. There is a specific allegation that soon after marriage, Preeti got Prashant assaulted by a friend, one Nishith Kumar Sahu, after she invited him over on the pretext of dining together. An FIR dated 23.01.2014 about the incident dated 22.01.2014 has been registered as FIR no. 44/2014, under Sections 323, 341 IPC, Police Station Mayur Vihar Phase-1, East Delhi. It is also asserted that Preeti, during the period of time that she was in the family way, called over Prashant's mother, who extended all support to her, but Preeti attended office regularly, despite a clear advice from doctors to avoid travel, unless extremely necessary.

28. It is made out that on account of exertions indulged in by Preeti, contrary to medical advice, the foetus suffered some kind of deterioration and the still born child was found to be in grave danger during a medical check-up done on 5th July, 2020. Preeti was admitted to the Fortis Hospital, NOIDA on that day and she delivered Advait as a premature baby through a caesarean. There are assertions that Advait has a seriously compromised health. He suffers from the Respiratory Distress Syndrome. There are much allegations made out on behalf of Prashant that Preeti would not feed Advait and weaned him away from herself within six months. It is asserted that Prashant had to call his mother over, because Preeti was not looking after the child.

29. There is also an allegation that Preeti would go to office at 11.30 a.m. and come back at 11.30 in the night. She would ignore Advait and lock herself inside the room. Advait would sleep with his grandmother, Sharda Sharma and Prashant. It is also asserted that Preeti frequently stayed away from home over night. Sometimes, she would go for "office outings" as these have been described, leaving back Advait with Prashant and Smt. Sharda Sharma. It is also asserted that on 18.09.2018, Preeti came back home drunk. When she was confronted about her intoxicated state with Advait around, she lost her temper and abused Prashant and his mother, cursing them and Advait.

30. It is asserted that on 10.10.2018, Preeti misbehaved with her mother-in-law and asked her to leave the house along with Advait. It is asserted that since Preeti declined to take care of Advait and humiliated Prashant's parents, they left Preshant's house on 10.10.2018 for Gorakhpur along with Advait. It is then said that in November, 2018 on the occasion of *Chhath Puja*, the couple went to Gorakhpur. There, Preeti's father, mother and sister came over to Prashant's home and abused Prashant's parents, causing them immense shock. It is claimed that this led to health complications for Chandra Kishore Sharma, who was hospitalized in the Northern Railway Central Hospiral, Paharganj, New Delhi and the Max Hospital, Saket, Delhi for approximately 48 days. It is made out on an emotional note that Prashant took care of his father day and night, performing the pious obligations of a son to take care of his ailing father. It is also asserted that Smt. Sharda Sharma took care of Advait at home, while Preeti did not take leave from the office, to share the travails of the family.

31. About Smt. Sharda Sharma's Bengaluru visit in June, 2019, it is asserted that, that was to take take care of Prashant's sister (Sharda Sharma's daughter), Ankita Sharma, who was then expecting a child. Advait was taken along to Bengaluru, because Preeti was not interested to take

care of Advait. It is then said that sometime in the month of February/ March, 2019, Preeti resigned her job with the British Telecom company and joined another concern at Bengaluru. She did not discuss this change with anyone in the family. She told Prashant around 15th April, 2019 that she would be leaving in 2 - 3 days' time. It is claimed that in Bengaluru, Preeti would come over on the weekends to her sister-in-law's place, but did not show any interest in taking Advait along with her. It is also asserted that Preeti did not reveal her whereabouts in Bengaluru to Prashant or her in-laws.

32. It is also asserted that on June the 25th, 2019, Preeti went to Gorakhpur straight from Bengaluru, but did not bother to come over to Ghaziabad and meet her son, who was there with Prashant and Smt. Sharda. About Advait's hospitalization, it is said that in September, 2019, he fell ill and was admitted in the Paediatric Intensive Care Unit of the Fortis Hospital, Sector 62, NOIDA, from September the 3rd to September the 7th, 2019. Preeti was informed about it. She came over to NOIDA for 3 - 4 days and then went back to Bengaluru to keep her employer's commitments. Advait was looked after by Prashant and Sharda Sharma. Advait again fell ill, requiring admission to the Paediatric Intensive Care Unit at the Fortis Hospital on 16th September, 2019. He was discharged around 19th September, 2019. It is said that despite information about Advait's re-hospitalization, Preeti did not bother to come and visit her son. Instead, she fought Prashant, blaming him about Advait's illness.

33. In the month of December, 2019, Preeti took Advait to her cousin Pratibha Rai's house around December the 18th, 2019 for a period of about three days. She did not take proper care of Advait, because of which he fell ill again. Advait had to be regularly attended to by Dr. Ankit Parakh for almost two months. Advait was administered steroids inhalers and oral steroids. Details of these medicines have been set out in the counter affidavit.

34. In the month of February, 2020, it is claimed by Prashant that Preeti went from Bengaluru to her father's house at Kauriram near Gorakhpur, but did not bother to meet her son, who was in Delhi - N.C.R. In the month of May, 2020, Preeti and her father, Chandrabhan Rai are claimed to have pressurized Prashant to send Advait to Kauriram, Gorakhpur. Prashant asserts that he very politely told them that the prevailing CoViD-19 Pandemic did not make it safe for Advait to travel outside Delhi - N.C.R. There are then assertions in the counter affidavit about the availability of doctors and hospitals, where Advait was required to be attended to during this period of time.

35. The next event that Prashant claims to have happened was on June the 27th, 2020. It is said that in order to harass Prashant and his parents, Preeti and her father conspired and came with a plan to remove Advait from NOIDA and send him away. It is not mentioned in this part of the affidavit, where Advait would be sent; elsewhere it has been mentioned. It has been stated that during this period of time, Advait was not well and was under the management of various doctors from Delhi, NOIDA, Jaipur and Mathura, and, therefore, he could not be sent to Gorakhpur. It is asserted that in furtherance of the conspiracy between Preeti and her father, she called Prashant on 31st July, 2020 and told him that she is in NOIDA at

her sister's place, to wit, M-804, Grand Ajnara Heritage, Clock Tower, Sector 74, NOIDA, for 10 days. She asked Prashant to bring over Advait to her sister's place for a period of 5 - 7 days. Prashant sent Advait to Preeti in order to avoid "escalation of conflict", to borrow the precise expression employed by Prashant in his counter affidavit. After Advait had been at his aunt's place for sometime and Prashant was about to leave, Advait got upset and agitated. He is said to have inconsolably wept being in unfamiliar company. Preeti, thereupon, said that she would come over to the parties' matrimonial home and spend 3 - 4 days with Advait there. It is asserted that once back at the parties' matrimonial home, Preeti got furious on seeing Prashant's parents there. She is said to have been annoyed about the issue why Advait was not acting familiar and playing with her.

36. On 5th August, 2020 after Prashant left for his office, Preeti is claimed to have been instigated by her father and younger sister. Preeti, on instigation by her father and younger sister, is claimed to have abused, fought and threatened Prashant's parents. She threatened with getting them jailed in false dowry and cruelty cases. It is also asserted that Preeti beat up Advait, when he went over to his grandmother's lap. According to Prashant, this disturbed the grandparents and they asked him to report the matter to the Police at the earliest. At this stage, Prashant claims to have called Preeti's father and requested him to make his daughter see good sense and pacify the matter in Advait's interest. In response, Preeti's father also threatened Prashant with a jail term for him and his entire family. It is claimed that there is a call recording about this conversation.

37. It must be remarked that the Court was not inclined to hear it and never called upon the parties to produce it, inasmuch as in the Court's opinion, it would be quite unnecessary. At this stage, it is averred that both sides called the police facility at number 100/ 112. It is claimed that the Police warned Preeti in both instances and asked her to take care of Advait as well as the family. They advised her also that she could pursue her case before a Court of law.

38. It is then asserted that Prashant and his parents were terrified and frightened about Preeti's aggression. They apprehended danger to their life and property. Prashant approached the local police station with a written complaint on 6th August, 2020, but the S.H.O. there refused to acknowledge the complaint. The complaint was then sent to the police station through speed post on 13.08.2020. This complaint was also sent to the Senior Police Officers, the Mahila Thana, as well as the Women's Commission, through email on 7th August, 2020, seeking appropriate action against Preeti. Copies of those complaints, the delivery report and the track report have been annexed as Annexure no. CA-3 to the counter affidavit. It is then averred that the Police did not take any action on Prashant's complaint, nor was any inquiry initiated.

39. It is asserted that during the two months from October - September, 2020, the Police visited Prashant's house as many as five times, all at the instance of Preeti. These frequent visits by the Police followed a sudden fight, initiated by Preeti. These events, which involved escalated aggression, are pleaded to be against the interest and welfare of Advait. It is asserted that after this complaint, on 13th August,

2020, the FIR bearing no. 935 of 2020 was lodged by Preeti at Police Station Shahpur, District Gorakhpur, under Sections 498A IPC and Section 3/4 of the Dowry Prohibition Act. This was followed by institution of the present petition for a writ of habeas corpus. There is a flood of information and detail about the medical treatment of Advait and Prashant's father. It has been made out on behalf of Prashant that Preeti is a bad wife and a bad mother, and that Advait's welfare would not be ensured in her hands, let alone best served.

40. A supplementary affidavit on behalf of respondent nos. 4, 5 and 6, which is in fact a supplementary counter affidavit has also been filed. It details the entire medical history of Advait. There are details of hospitals and doctors, who have been consulted, the diseases diagnosed and the treatments administered. There is a flood of medical information carried in this affidavit. It has also been made out that apart from respiratory problems, Advait also suffers from behavioural problems. It is asserted that he has signs of autism and speech regression, requiring behavioural therapy. There is substantial correspondence from doctors made by email to support a case about these medical problems with Advait. All that is sought to be made out is that Advait is very sick, physically as well as psychologically, and he can be salvaged from that predicament by Prashant and his parents alone. Preeti, who is a careless mother, cannot take care of a sick child.

41. In order to buttress Preeti's projected callous behaviour towards her duties to the family, it has been averred in paragraph no.7 that Preeti is fond of socializing and drinking, and on account of her office parties, socializing, staying out of her matrimonial home, Advait has suffered a lot. A screen shot of a chat dated 10th August, 2017 and the photograph of a hand written note, tucked outside Preeti's room, that she would not come back for the night, has been annexed to the supplementary counter affidavit as Annexure no. SA-2.

42. This Court has gone through all the relevant material on record and interacted with Preeti, Prashant, Prashant's parents, that is to say, Chandra Kishore Sharma and Smt. Sharda Sharma. So far as Advait is concerned, he is still too young to express an intelligent preference about the parent he would like to be with for the most part of the time. During hearing, whatever the Court could observe about Advait was that he appeared to be, in no way, much concerned about the Court proceedings. He moved about the Court with less than typical hesitation. He moved upto the dais, came over to me as the hearing proceeded and fiddled around with papers and other things, that were placed there. The Court is no expert about child behaviour, but would be content to assume that there might be some issues with the child that the experts have diagnosed; but that does not *ipso facto* better qualify Prashant and his parents to take care of Advait or disqualify the mother, Preeti in the matter of ensuring Advait's welfare.

43. The parties all along have been disputatious about every word or fact that the other has said or stated. But, there is one principle of the law, which both sides have very fairly been *ad idem*, to wit, the only consideration, on which custody ought to be entrusted to one or the other parent, is the paramountcy of the child's welfare. This Court can't help but notice the fact that Prashant and his parents have attempted to

prove that Preeti has been an uncaring mother since the day she conceived. If they are to be believed, a case of prenatal neglect and prenatal welfare would have to be examined. This Court is not minded to do that. Statutes are no panacea to answer a complicated human problem, like the welfare of a minor child, but they do serve as guiding principles around which, on the facts of a given case, the perplexed question of a child's welfare between estranged parents has to be determined. Section 6(a) of the Act of 1956 is one such provision of the law. It reads:

"6. Natural guardians of a Hindu minor.- The natural guardians of a Hindu, minor, in respect of the minor's person as well as in respect of the minor's property (excluding his or her undivided interest in joint family property), are-

(a) in the case of a boy or an unmarried girl-the father, and after him, the mother: provided that the custody of a minor who has not completed the age of five years shall ordinarily be with the mother;

(b) in the case of an illegitimate boy or an illegitimate unmarried girl-the mother, and after her, the father;

(c) in the case of a married girl-the husband;

Provided that no person shall be entitled to act as the natural guardian of a minor under the provisions of this section-

(a) if he has ceased to be a Hindu, or

(b) if he has completely and finally renounced the world by becoming a hermit (vanaprastha) or an ascetic (yati or sanyasi).

Explanation.- In this section, the expressions 'father' and 'mother' do not include a stepfather and a step-mother."

44. The provision lays down the Rule that notwithstanding the father being the natural guardian, the custody of a minor, who has not completed the age of five years, ought ordinarily be with the mother. This rule echoes experience of mankind that mothers are best suited to take care of very young children. Since, however, welfare of a child is of paramount consideration, the proviso to Section 6(a) of the Act of 1956, makes a remarkable prescription by employing the word "ordinarily' to qualify the rule. The word "ordinarily' gives full play to the Court's assessment in a given case to find out where the welfare of the minor would be best secured. It must be remarked here before moving ahead that even the natural guardianship of a minor under Section 6(a) of the Act of 1956 is now no longer preferentially held by the father. The mother and the father are at par as natural guardians of the minor, in view of the holding of the Supreme Court in **Githa Hariharan (Ms) and another vs. Reserve Bank of India and another, (1999) 2 SCC 228.** The dispute here is about custody and not about guardianship, which is hardly disputed for both parents.

45. During the hearing, an effort with equal force was made on both sides to show, with reference to specific issues, why welfare of the minor would be best subserved in the hands of one party or the other. Largely, the specific issues, on which the parties have addressed the Court, have come upon a formulation done by Dr. Nanda. These have been answered by Mr. Vibhu Rai on behalf of Preeti. In the opinion of this Court, it may not be necessary to examine under each of the compartments of allied heads, the germane issue about Advait's welfare. In the opinion of this Court, a more holistic view ought to

be taken with reference to all that has been demonstrated by parties. To this Court's understanding, all that has been placed on record about Preeti's engagements in connection with her employment, as evidence about her being an uncaring mother, does not go well with contemporary times. In case, whatever lapses evident, if they can be called that, on Preeti's part while discharging her role as Advait's mother, are to be accepted as indicia of maternal neglect, every working mother, who parts ways with her spouse, would have to be condemned as neglectful. Office engagement, professional commitments, meetings and some socializing connected to work, come with any meaningful career or pursuit, except a limit of avocations. This is the case, both with a man and a woman. What Prashant tries to dub as uncaring behaviour of a mother for Preeti, proceeds on a juxtaposition with the model of a mother, who is a home maker.

46. Decidedly, Preeti is a professional in corporate employment, but that does not make her any less a mother. Contemporary life, with an aspiration for equal participation of men and women, does bring onerous responsibility, both for the man and the woman, and changes too, about the established and accepted patterns of their role in the family, that has hitherto been in vogue for centuries. The man can no longer arrogate to himself the exclusive role of the bread winner and to the woman of the home maker. Now, it is a sharing of both roles by the spouses - both being working individuals, earning their livelihood. Of course, it would be a different case, if it were demonstrated that Preeti is indeed a drunkard or alcoholic or a pathogenic socialite. In this case, this Court does not find any such evidence placed on record on behalf of Prashant.

47. It has not been disputed before this Court that for certain spells of time, Prashant was unemployed and Preeti bore the financial responsibilities of the home. This fact does not show Prashant in poor light, or does it eulogize Preeti. It only demonstrates that so long as the spouses were together, they were sharing their common burden of running the household and the family, according to the emergent circumstances.

48. This Court had the advantage of watching the parties' interact during the hearing. The Court noticed that Advait's father, that is to say, Prashant and his grandparents, Smt. Sharda Sharma and Chandra Kishore Sharma, are a doting father and grandparents to the extent that their affection may become a bane for the child. It hardly needs be gainsaid that the welfare of a child consists not only in the care that he is given while young, but the manner he is groomed to become a responsible citizen. The Court found the over-indulgence by Advait's father and his grandparents, a possible source of hampering his development and grooming him into a young adult. To the contrary, this Court did not notice anything about Preeti's disposition towards her son, which may not auger well for the child's development and overall welfare. It is the precipitate wisdom of generations that a young child's welfare is better ensured in the hands of the mother than the father, or for that matter, anyone else. It is in keeping with this transcendent experience of mankind that the proviso to Section 6(a) of the Act of 1956 reserves to the mother the right to the child's custody until the age of five years. The word "ordinarily' predicates a rule about custody of a young child to be entrusted to the mother, but making allowance in exceptional circumstances for the Court to order otherwise. These

circumstances could be demonstrable delinquency, drug addiction, conviction in connection with offences involving moral turpitude, coupled with behaviour, that renders the mother unfit.

49. In the opinion of this Court, there is a strong presumption about a child's welfare to be better secured in the mother's hand, which can be dispelled only by cogent and glaring evidence about the mother's lack of fitness to discharge her maternal obligations, as already remarked. There is no such circumstance or evidence brought to this Court's notice that may render Preeti unfit to take care of her minor son. This Court is fortified in the view that we take by the decision of the Supreme Court in **Roxann Sharma vs. Arun Sharma, (2015) 8 SCC 318,** where it has been held:

"13. The HMG Act postulates that the custody of an infant or a tender aged child should be given to his/her mother unless the father discloses cogent reasons that are indicative of and presage the likelihood of the welfare and interest of the child being undermined or jeopardised if the custody is retained by the mother. Section 6(a) of the HMG Act, therefore, preserves the right of the father to be the guardian of the property of the minor child but not the guardian of his person whilst the child is less than five years old. It carves out the exception of interim custody, in contradistinction of guardianship, and then specifies that custody should be given to the mother so long as the child is below five years in age. We must immediately clarify that this section or for that matter any other provision including those contained in the G and W Act, does not disqualify the mother to custody of the child even after the latter's crossing the age of five years."

50. This Court took note of this very special role of the mother in **Habeas Corpus Writ Petition No.3921 of 2018, Aharya Baranwal and 3 others vs. State of U.P. and 2 others** decided on 22.05.2019. In **Ahrya Baranwal** *(supra)*, it was held:

"21. Sometimes, a writ of habeas corpus is sought for custody of a minor child. In such cases also, the paramount consideration which is required to be kept in view by a writ-Court is 'welfare of the child'.

22. In Habeas Corpus, Vol. I, page 581, Bailey states;

"The reputation of the father may be as stainless as crystal; he may not be afflicted with the slightest mental, moral or physical disqualifications from superintending the general welfare of the infant; the mother may have been separated from him without the shadow of a pretence of justification; and yet the interests of the child may imperatively demand the denial of the father's right and its continuance with the mother. **The tender age and precarious state of its health make the vigilance of the mother indispensable to its proper care; for, not doubting that paternal anxiety would seek for and obtain the best substitute which could be procured yet every instinct of humanity unerringly proclaims that no substitute can supply the place of her whose watchfulness over the sleeping cradle, or waking moments of her offspring, is prompted by deeper and holier feeling than the most liberal allowance of nurses' wages could possibly stimulate."**

23. It is further observed that an incidental aspect, which has a bearing on the question, may also be adverted to. In determining whether it will be for the best interests of a child to grant its custody to the father or mother, the Court may

properly consult the child, if it has sufficient judgment. **"(emphasis supplied)**

51. I had occasion to consider the question about the right of a mother to the custody of her young child, particularly, in the context of Section 6(a) of the Act of 1956 in **Master Atharva (Minor) and another vs. State of Uttar Pradesh and 7 others, 2020 (143) ALR 332,** where it was held:

"9. A reading of the terms of the proviso to Section 6 shows that quite apart from the question of natural guardianship, the custody of a minor, who has not completed the age of five years, is to be ordinarily with the mother. The only niche, therefore, so far as the statue goes, is the word "ordinary". The word "ordinary" signifies that as a matter of rule, children up to the age of five years are to be left with their mothers, but there could be exceptions as well. Those exceptions could be where the mother is demonstrably leading an immoral life or may have remarried, where in her new home, the child from her earlier alliance has no place, or where the mother is convicted of a heinous offence etc. In the present case, no such circumstance has been indicated, much less pleaded and proved so as to place the mother in that exceptional category where she may be deprived of the custody of her young child, who is still well below the age of five years.

10. It must also be remarked that even after the child turns five, it is not that the mother becomes disentitled. She still would be the best person to tender a child and groom him into an adult. In this connection, reference may be made to the decision of the Supreme Court in Roxann Sharma v. Arun Sharma, (2015) 8 SCC 318, where it has been held:

"13. The HMG Act postulates that the custody of an infant or a tender aged child should be given to his/her mother unless the father discloses cogent reasons that are indicative of and presage the likelihood of the welfare and interest of the child being undermined or jeopardised if the custody is retained by the mother. Section 6(a) of the HMG Act, therefore, preserves the right of the father to be the guardian of the property of the minor child but not the guardian of his person whilst the child is less than five years old. It carves out the exception of interim custody, in contradistinction of guardianship, and then specifies that custody should be given to the mother so long as the child is below five years in age. We must immediately clarify that this section or for that matter any other provision including those contained in the G and W Act, does not disqualify the mother to custody of the child even after the latter's crossing the age of five years."

52. This Court takes note of the fact that Preeti is an IT Engineer, employed with a Multinational Corporation. She is currently posted at Bengaluru. She is, thus, evidently an educated woman and has the necessary maturity and judgment to raise the minor. She also has the necessary means. The minor is not yet school going, but this Court has no doubt that as soon as he turns old enough to go to school, Preeti would do the needful at Bengaluru or wherever she is posted. Also, going by the fact that Preeti is an educated person, there is no reason to doubt that she would secure for Advait necessary medical attention that he needs. Preeti's current posting at Bengaluru is a suitable station for the minor's medical and educational needs, as and when these arise. Also, since Prashant's sister appears to be living in Bengaluru,

there ought to be no difficulty for Prashant or his parents, if they wish to visit Advait, by calling him over to the home of Prashant's sister.

53. It has been urged by Dr. Nanda that Preeti has got a permanent Australian Visa (Class SN - Skilled Nominated Sub-Clause 90) for two years and two months, granted on 16th April, 2019. It has been averred to that effect in paragraph no.3 of the supplementary affidavit. It is also said there that Preeti went to Australia in accordance with one of the conditions of the Visa, without telling Prashant about it. She did so in the months of June - July, 2019. An apprehension was expressed by Dr. Nanda, during the hearing, that Preeti would take away Advait beyond the Indian shores and away to Australia, if she were granted custody. To this, a response has been filed in the form of an affidavit, in support of an Application u/s 340 Cr.P.C., seeking to prosecute Prashant, for making a perjured statement in the supplementary affidavit. It is said in the affidavit dated 07.12.2020 that the copy of the Visa, annexed as SA-1 to the supplementary affidavit, is a forged document and that Preeti never left India, though she holds an Indian Passport. The Visa has been condemned as the copy of a forged document.

54. This Court does not wish to go much into the question, whether the document is forged or not, but it would be in the interest of both parties that Advait, so long as he is in the custody of one of the parties while they stay estranged, ought not to leave the country with one parent alone without the consent of the other. It is also necessary that in the circumstances, apart from visitation rights to meet the minor at Bengaluru, Prashant should also have unsupervised visitation rights of one week at a time, thrice a year, when the child would stay with Prashant alone and the child's grandparents, if they are staying with Prashant.

55. To the above end, Preeti shall ensure that Advait is taken to Prashant for one week at a stretch, thrice a year, and permitted to stay with Prashant, uninterfered with by Preeti. It will be Prashant's responsibility to deliver Advait back to Preeti's custody at the end of each period of one week's stay. It is also made clear that the schedule of these three visits, in one calendar year, shall be mutually agreed upon by parties, subject to the conditions that the week long stay for Advait with his father, shall be not less than thrice a year. So far as the father's visitation to Advait at Bengaluru or wherever Preeti is living is concerned, he would have the right, once a month at Bengaluru, by calling over Advait to his sister's place for seven hours on any Sunday of the Month, between 10:00 a.m. to 5:00 p.m. This arrangement would apply even if Preeti's posting is at a different station, with the modification that the parties would then choose the venue of this monthly visitation mutually.

56. In the circumstances, this Habeas Corpus Writ Petition succeeds and is **allowed.** The *rule nisi* dated 09.09.2020 is made **absolute**. It is ordered that Advait, the minor shall be delivered by his father, Prashant Sharma into the custody of his mother, Smt. Preeti Rai at Ghaziabad, within a week of the date of pronouncement of this judgment, failing which, the Chief Judicial Magistrate, Ghaziabad shall cause the minor to be delivered into the custody of his mother, Smt. Preeti Rai at Ghaziabad through

agency of the Police. Smt. Preeti Rai will remain available at Ghaziabad to receive the minor in her care and custody, in accordance with these directions. The father, Prashant Sharma shall have visitation rights in terms directed hereinabove with corresponding obligations upon Smt. Preeti Rai to facilitate the visitation.

57. Let this order be communicated to the Chief Judicial Magistrate, Ghaziabad, by the Joint Registrar (Compliance), **within next 24 hours.**

(2021)02ILR A71
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.01.2021

BEFORE

THE HON'BLE SURYA PRAKASH KESARWANI, J.
THE HON'BLE SHAMIM AHMED, J.

Habeas Corpus Writ Petition No. 808 of 2020

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

Counsel for the Petitioners:
Sri Ananad Kumar Tiwari

Counsel for the Respondents:
A.G.A.

A. Constitution of India, 1950-Article 226 - Indian Penal Code, 1860-Section 363,366,376 & Juvenile Justice (Care and Protection),2015-Section 94(2), 14, 37-accused filed petition stating that the custody of the corpus in State Women Welfare Society is illegal-while the corpus in her statement u/s 164 stated that her age to be 17 years, the same is in medical report-hence, the accused has no right to ask for the custody as she would fall in the category of "child in need of care and protection" u/s 2(12) and 14(2) of J.J. Act-Hence, the order passed by the Child Welfare Committee placing in a protection Home would be within its power confers u/s 37 of the J.J. Act-detention of the corpus can not be said to be illegal so as to warrant issuance of a writ of habeas corpus-the writ is not maintainable.(Para 3 to 17)

B. A cursory reading of the JJ Act gives a clear indication that a girl child who is in imminent risk of marriage before attaining the age of 18 years of age is a child in need of care and protection u/s 2(14)(xii) of the Act. If this provision is ignored or given a go by, it would put the girl child in a worse off situation because after marriage she could be subjected to aggravated penetrative sexual assault for which she might not be physically, mentally or psychologically ready.(Para 13)

The petition is dismissed. (E-5)

List of Cases cited:

1. Jarnail Singh Vs St. of Har.,(2013) 7 SCC 263

2. Mahadeo Vs St of Mah.(2013) 14 SCC 637

3. St. of M.P. Vs Anoop Singh,(2015) 7 SCC 773

4. Independent Thought Vs U.O.I.,(2017) 10 SCC 800

(Delivered by Hon'ble Surya Prakash Kesarwani, J.
&
Hon'ble Shamim Ahmed, J.)

1. Heard Sri Anand Kumar Tiwari, learned counsel for the petitioners and Sri Patanjali Mishra, learned A.G.A. for the respondents.

2. This Habeas Corpus writ petition has been filed by the petitioner no.2 on behalf of petitioner no.1 for following relief:-

"i.issue a writ, order or direction in the nature of certiorari quashing the order dated 3.9.2020(Annexure No.7 to the writ petition) passed by the learned Bal Kalyan Samiti, district Bareilly in Case Crime No.39 of 2020, under Sections 363, 366, 376 I.P.C. and Section 4 of the Protection of Children from Sexual Offences Act, 2012, Police Station Kyolariya, District Bareilly;

ii. issue a writ, order or direction in the nature of Habeas Corpus commanding the respondents to produce petitioner no.1 before this Hon'ble Court and to set her at liberty."

3. Briefly the facts of the present case are that F.I.R. dated 05.03.2020 being Case Crime No.39 of 2020 under Sections 363, 366 I.P.C. showing the date of incident as 28.02.2020 was registered at P.S. Kyolariya, District Bareilly at the instance of mother of the petitioner no.1. As per F.I.R. version age of the petitioner no.1 is under 16 years. As per educational certificate, the date of birth of the petitioner No.1 is 05.11.2003 and thus, she is aged about 17 years. As per her own statement of the petitioner no.1 dated 31.08.2020 recorded under Section 164 Cr.P.C. her age is 17 years. It appears that subsequently during course of the investigation in the aforesaid F.I.R. Section 376 I.P.C. and Section 4 of POCSO Act were also added. As per medical examination conducted by the Chief Medical Officer, Bareilly dated 07.08.2020, age of the petitioner no.1 is about 17 years. Thus, the petitioner is a minor. F.I.R. under Sections 363/366/376 I.P.C. and Section 4 of POCSO Act is registered against the petitioner no.2. The impugned order dated 03.09.2020 has been passed by Member/Magistrate, Bal Kalyan Samiti, whereby the petitioner no.1 has been given in the custody of Assistant Superintendent, State Woman Protection Home, Bareilly. Aggrieved with this order the petitioner no.2, who is accused in the aforesaid F.I.R., has filed the present Habeas Corpus writ petition for quashing the impugned order and for a direction to produce petitioner no.1 before this Court and to set her at liberty.

4. Learned counsel for the petitioners submits as under:-

(i) The petitioner no.1 may be produced before this Court so that the mother of the petitioner no.2, may meet petitioner no.1 and proper treatment of the petitioner no.1 may be carried and to set her at liberty.

5. Sri Patanjali Mishra, learned A.G.A. supports the impugned order and submits that the petitioner no.2 is an accused in the aforesaid F.I.R. under Section 363, 366, 376 I.P.C. and Section 4 of POCSO Act. The petitioner no.1 is minor and she has been rightly directed to be kept in State Woman Protection Home, Bareilly.

6. We have carefully considered the submissions of the learned counsel for the parties and perused the record of the writ petition.

7. Section 94(2) of the Juvenile Justice (Care and Protection), 2015 (hereinafter referred to as "the J.J. Act") provides for presumption and determination of age, as under:

"(2) In case, the Committee or the Board has reasonable grounds for doubt regarding whether the person brought before it is a child or not, the Committee or the Board, as the case may be, shall

undertake the process of age determination, by seeking evidence by obtaining--

(i) the date of birth certificate from the school, or the matriculation or equivalent certificate from the concerned examination Board, if available; and in the absence thereof;

(ii) the birth certificate given by a corporation or a municipal authority or a panchayat;

(iii) and only in the absence of (i) and (ii) above, age shall be determined by an ossification test or any other latest medical age determination test conducted on the orders of the Committee or the Board:

Provided such age determination test conducted on the order of the Committee or the Board shall be completed within fifteen days from the date of such order."

8. Thus, as per provisions of Section 94(2) of the J.J. Act, the Child Welfare Committee or the Board has reasonable grounds to doubt as to whether the person brought before it, is a child or not, the Committee or the Board, as the case may be, shall undertake the process of age determination by seeking evidence by obtaining, **firstly**, the date of birth certificate from school, or matriculation or equivalent certificate from the concerned examination Board, if available; and **in the absence thereof; secondly,** the birth certificate given by a corporation or a municipal authority or a panchayat; and **thirdly**, in absence of educational certificate or birth certificate as aforementioned, the age shall be determined by an ossification test or any other latest medical age determination **test conducted on the orders of the Committee or the Board.** Thus, as per statutory mandate of Section 94(2) of the J.J. Act, primacy is to be accorded to the date of birth certificate from the school or the matriculation or equivalent certificate from the concerned Examination Board and only in absence thereof, the birth certificate of a corporation or municipal authority or a panchayat can be looked into. When the certificates as provided under sub-clauses (i) and (ii) of sub-Section (2) of Section 94, is not available, only then the medical evidence as provided in sub-clause (iii) is to be taken into consideration. In the present set of facts, as per educational certificate, the date of birth of the petitioner is 05.11.2003.

9. The "juvenile" has been defined in Section 2(35) of the J.J. Act to mean a child below the age of eighteen years. The word "child" has been defined in Section 2(12) of the J.J. Act to mean a person who has not completed eighteen years of age. The phrase "child in conflict with law" has been defined under Section 2(13) of the J.J. Act to mean a child who is alleged or found to have committed an offence and who has not completed eighteen years of age on the date of commission of such offence. Section 2(14) of the J.J. Act defines the phrase "child in need of care and protection", as under:

"(14) "child in need of care and protection" means a child--

(i) who is found without any home or settled place of abode and without any ostensible means of subsistence; or

(ii) who is found working in contravention of labour laws for the time being in force or is found begging, or living on the street; or

(iii) who resides with a person (whether a guardian of the child or not) and such person--

(a) has injured, exploited, abused or neglected the child or has violated any other law for the time being in force meant for the protection of child; or

(b) has threatened to kill, injure, exploit or abuse the child and there is a reasonable likelihood of the threat being carried out; or

(c) has killed, abused, neglected or exploited some other child or children and there is a reasonable likelihood of the child in question being killed, abused, exploited or neglected by that person;or

(iv) who is mentally ill or mentally or physically challenged or suffering from terminal or incurable disease, having no one to support or look after or having parents or guardians unfit to take care, if found so by the Board or the Committee; or

(v) who has a parent or guardian and such parent or guardian is found to be unfit or incapacitated, by the Committee or the Board, to care for and protect the safety and well-being of the child; or

(vi) who does not have parents and no one is willing to take care of, or whose parents have abandoned or surrendered him; or

(vii) who is missing or run away child, or whose parents cannot be found after making reasonable inquiry in such manner as may be prescribed; or

(viii) who has been or is being or is likely to be abused, tortured or exploited for the purpose of sexual abuse or illegal acts; or

(ix) who is found vulnerable and is likely to be inducted into drug abuse or trafficking; or

(x) who is being or is likely to be abused for unconscionable gains; or

(xi) who is victim of or affected by any armed conflict, civil unrest or natural calamity; or

(xii) who is at imminent risk of marriage before attaining the age of marriage and whose parents, family members, guardian and any other persons are likely to be responsible for solemnisation of such marriage;"

10. Section 37 empowers the Child Welfare Committee that on being satisfied through the inquiry that the child before the Committee is a child in need of care and protection, it may, on consideration of Social Investigation Report submitted by Child Welfare Officer and taking into account the child's wishes in case the child is sufficiently mature to take a view, pass one or more of the following orders as provided in clauses (a) to (h) of Sub-Section (1) of Section 37. Section 37 of the J.J. Act is reproduced below:

"37. Orders passed regarding a child in need of care and protection.- *(1) The Committee on being satisfied through the inquiry that the child before the Committee is a child in need of care and protection, may, on consideration of Social Investigation Report submitted by Child Welfare Officer and taking into account the child's wishes in case the child is sufficiently mature to take a view, pass one or more of the following orders, namely:--*

(a) declaration that a child is in need of care and protection;

(b) restoration of the child to parents or guardian or family with or without supervision of Child Welfare Officer or designated social worker;

(c) placement of the child in Children's Home or fit facility or Specialised Adoption Agency for the purpose of adoption for long term or temporary care, keeping in mind the capacity of the institution for housing such children, either after reaching the conclusion that the family of the child cannot be traced or even if traced, restoration of the child to the family is not in the best interest of the child;

(d) placement of the child with fit person for long term or temporary care;

(e) foster care orders under section 44;

(f) sponsorship orders under section 45;

(g) directions to persons or institutions or facilities in whose care the child is placed, regarding care, protection and rehabilitation of the child, including directions relating to immediate shelter and services such as medical attention, psychiatric and psychological support including need-based counselling, occupational therapy or behaviour modification therapy, skill training, legal aid, educational services, and other developmental activities, as required, as well as follow-up and coordination with the District Child Protection Unit or State Government and other agencies;

(h) declaration that the child is legally free for adoption under section 38.

(2) The Committee may also pass orders for--

(i) declaration of fit persons for foster care;

(ii) getting after care support under section 46 of the Act; or

(iii) any other order related to any other function as may be prescribed."

11. Section 37(1)(c) of the J.J. Act empowers the Child Welfare Committee to place a child in Children's Home or fit facility or Specialised Adoption Agency for the purpose of adoption for long term or temporary care, keeping in mind the capacity of the institution for housing such children, either after reaching the conclusion that the family of the child cannot be traced or even if traced, restoration of the child to the family is not in the best interest of the child. The impugned order passed by the Child Welfare Committee is in exercise of powers under Section 37 of the J.J. Act. Under the circumstances, when undisputedly corpus - petitioner is a juvenile within the meaning of Section 2(35) and is in need of care and protection within the meaning of Section 2(14), the impugned order passed by the Child Welfare Committee under Section 37 is in exercise of powers under the J.J. Act, cannot be said to suffer from any illegality.

12. It would be relevant to observe that Hon'ble Supreme Court has consistently taken the view that the principles applicable for determining the age of "juvenile in conflict with law" are to be applied for determining the age of child victim vide **Jarnail Singh Vs. State of Haryana1, Mahadeo Vs. State of Maharashtra2, and State of M.P. Vs. Anoop Singh3, (paras 14 to 18).**

13. In the case of **Independent Thought v. Union of India4,** (paras-95, 96, 97, 107), Hon'ble Supreme Court held as under:

"95. Whatever be the explanation, given the context and purpose of their enactment, primacy must be given to pro-child statutes over IPC as provided for inSections 5and41 IPC. There are several reasons for this including the absence of any rationale in creating an artificial distinction, in relation to sexual offences, between a married girl child and an unmarried girl child. Statutes concerning the rights of children are special laws concerning a special subject of legislation and therefore the provisions of such subject-specific legislations must prevail and take precedence over the provisions of a general law such as IPC. It must also be remembered that the provisions of the JJ Act as well as the provisions of the POCSO

Act are traceable toArticle 15(3)of the Constitution which enables Parliament to make special provisions for the benefit of children. We have already adverted to some decisions relating to the interpretation ofArticle 15(3)of the Constitution in a manner that is affirmative, in favour of children and for children and we have also adverted to the discussion in the Constituent Assembly in this regard. There can therefore be no other opinion regarding the pro-child slant of the JJ Act as well as the POCSO Act.

96. A rather lengthy but useful discussion on this subject of special laws is to be found inL.I.C. v. D.J. Bahadur in paras 52 and 53 of the Report. Briefly, it was held that the subject-matter and the perspective of the statute are determinative of the question whether a statute is a general law or a special law. Therefore, for certain purposes a statute might be a special law but for other purposes, as compared to another statute, it might be a general law. In respect of a dispute between the Life Insurance Corporation and its workmen qua workmen, the Industrial Disputes Act, 1947 would be a special law vis-à-vis theLife Insurance Corporation Act, 1956; but, "when compensation on nationalisation is the question, theLIC Actis the special statute". It was held as follows:(SCC pp.350-51)

"52. In determining whether a statute is a special or a general one, the focus must be on the principal subject-matter plus the particular perspective. For certain purposes, an Act may be general and for certain other purposes it may be special and we cannot blur distinctions when dealing with finer points of law. In law, we have a cosmos of relativity, not absolutes -- so too in life.The ID Actis a special statute devoted wholly to investigation and settlement of industrial disputes which provides definitionally for the nature of industrial disputes coming within its ambit. It creates an infrastructure for investigation into, solution of and adjudication upon industrial disputes. It also provides the necessary machinery for enforcement of awards and settlements. From alpha to omega theID Acthas one special mission -- the resolution of industrial disputes through specialised agencies according to specialised procedures and with special reference to the weaker categories of employees coming within the definition of workmen. Therefore, with reference to industrial disputes between employers and workmen, theID Actis a special statute, and theLIC Actdoes not speak at all with specific reference to workmen. On the other hand, its powers relate to the general aspects of nationalisation, of management when private businesses are nationalised and a plurality of problems which, incidentally, involve transfer of service of existing employees of insurers. The workmen qua workmen and industrial disputes between workmen and the employer as such, are beyond the orbit of and have no specific or special place in the scheme of theLIC Act. And whenever there was a dispute between workmen and management theID Actmechanism was resorted to.

53.What are we confronted with in the present case, so that I may determine as between the two enactments which is the special? The only subject which has led to this litigation and which is the bone of contention between the parties is an industrial dispute between the Corporation and its workmen qua workmen. If we refuse to be obfuscated by legal abracadabra and see plainly what is so obvious, the conclusion that flows, in the wake of the study I have made, is that vis-a-vis "industrial disputes" at the termination of

the settlement as between the workmen and the Corporation, theID Actis a special legislation and theLIC Acta general legislation. Likewise, when compensation on nationalisation is the question, theLIC Actis the special statute. An application of the generalia maxim as expounded by English textbooks and decisions leaves us in no doubt that theID Actbeing special law, prevails over theLIC Actwhich is but general law."

(Emphasis in original)

The scope and amplitude of the two significant pro-child statutes may now be examined in light of the law laid down by this Court includingSections 5and41of the IPC.

(i) The JJ Act

97. A cursory reading of the JJ Act gives a clear indication that a girl child who is in imminent risk of marriage before attaining the age of 18 years of age is a child in need of care and protection (Section 2(14)(xii) of the JJ Act). In our opinion, it cannot be said with any degree of rationality that such a girl child loses her status as a child in need of care and protection soon after she gets married. The JJ Act provides that efforts must be made to ensure the care, protection, appropriate rehabilitation or restoration of a girl child who is at imminent risk of marriage and therefore a child in need of care and protection. If this provision is ignored or given a go by, it would put the girl child in a worse off situation because after marriage she could be subjected to aggravated penetrative sexual assault for which she might not be physically, mentally or psychologically ready. The intention of the JJ Act is to benefit a child rather than place her in difficult circumstances. A contrary view would not only destroy the purpose and spirit of the JJ Act but would also take away the importance ofArticle 15(3)of the Constitution. Surely, such an interpretation and understanding cannot be given to the provisions of the JJ Act."

107. On a complete assessment of the law and the documentary material, it appears that there are really five options before us: (i) To let the incongruity remain as it is -- this does not seem a viable option to us, given that the lives of thousands of young girls are at stake; (ii) To strike down as unconstitutional Exception 2 to Section 375 IPC -- in the present case this is also not a viable option since this relief was given up and no such issue was raised; (iii) To reduce the age of consent from 18 years to 15 years -- this too is not a viable option and would ultimately be for Parliament to decide; (iv) To bring the POCSO Act in consonance with Exception 2 to Section 375 IPC -- this is also not a viable option since it would require not only a retrograde amendment to the POCSO Act but also to several other pro-child statutes; (v) To read Exception 2 to Section 375 IPC in a purposive manner to make it in consonance with the POCSO Act, the spirit of other pro-child legislations and the human rights of a married girl child. Being purposive and harmonious constructionists, we are of opinion that this is the only pragmatic option available. Therefore, we are left with absolutely no other option but to harmonise the system of laws relating to children and require Exception 2 to Section 375 IPC to now be meaningfully read as: "Sexual intercourse or sexual acts by a man with his own wife, the wife not being under eighteen years of age, is not rape." It is only through this reading that the intent of social justice to the married girl child and the constitutional vision of the Framers of our Constitution can be preserved and protected and perhaps given impetus."

14. In the present set of facts, it is not in dispute that as per educational certificate, the date of birth of the corpus is

05.11.2003. Hence, keeping in mind the provisions of Section 94 of the J.J. Act, the age recorded in the educational certificate cannot be discarded in the proceedings under the J.J. Act moreso when corpus in her statement recorded on 31.08.2020 under Section 164, Cr.P.C. has stated that her age is 17 years.

15. Once the corpus has been found to be a child as defined by Section 2(12) of the J.J. Act and allegedly, a victim of a crime, she would fall in the category of "child in need of care and protection" in view of clauses (iii), (viii) and (xii) of sub-Section (14) of Section 2 of the J.J. Act. Hence the order passed by the Child Welfare Committee placing in a protection Home would be within its powers confers under Section 37 of the J.J. Act.

16. For all the reasons stated above, the action of the respondent Nos.1 to 4 is neither without jurisdiction nor illegal nor perverse, keeping in mind the provisions of the J.J. Act, 2015. Therefore, the detention of the corpus cannot be said to be illegal so as to warrant issuance of a writ of habeas corpus. If the petitioners are aggrieved by the order of the Child Welfare Committee, they are at liberty to take recourse to the remedy of an appeal provided under Section 101 of the J. J. Act, 2015.

17. For all the reasons stated, above, **the writ petition is dismissed.**

(2021)02ILR A78
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.01.2021

BEFORE

THE HON'BLE SURYA PRAKASH KESARWANI, J.

THE HON'BLE SHAMIM AHMED, J.

Habeas Corpus Writ Petition No. 814 of 2020

Tanya Pandey ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Shivkumari Chauhan, Sri M.S. Chauhan

Counsel for the Respondents:
A.G.A.

A. Constitution of India,1950-Article 226 - Indian Penal Code,1860-Section 363,366 & Juvenile Justice (Care and Protection),2015-Section 94(2), 14, 37- mother of the accused filed petition stating that the custody of the corpus in Balika Grih Social Welfare Society is illegal-while the corpus in her statement u/s 164 stated that her age to be 16 years-hence, the accused mother has no right to ask for the custody of the corpus-corpus gave birth to a child but she would fall in the category of "child in need of care and protection" u/s 2(12) and 14(2) of J.J. Act-Hence, the order passed by the Child Welfare Committee placing in a protection Home would be within its power confers u/s 37 of the J.J. Act-detention of the corpus can not be said to be illegal so as to warrant issuance of a writ of habeas corpus-the writ is not maintainable.(Para 2 to 17)

B. A cursory reading of the JJ Act gives a clear indication that a girl child who is in imminent risk of marriage before attaining the age of 18 years of age is a child in need of care and protection u/s 2(14)(xii) of the Act. If this provision is ignored or given a go by, it would put the girl child in a worse off situation because after marriage she could be subjected to aggravated penetrative sexual assault for which she might not be physically, mentally or psychologically ready. (Para 13)

The petition is dismissed. (E-5)

List of Cases cited:-

1. Jarnail Singh Vs St. of Har.,(2013) 7 SCC 263

2. Mahadeo Vs St of Mah.(2013) 14 SCC 637

3. St. of M.P. Vs Anoop Singh,(2015) 7 SCC 773

4. Independent Thought Vs U.O.I.,(2017) 10 SCC 800

(Delivered by Hon'ble Surya Prakash Kesarwani, J.
&
Hon'ble Shamim Ahmed, J.)

1. Heard Sri M.S. Chauhan, learned counsel for the petitioner and Sri Patanjali Mishra, learned A.G.A.-I, for respondent nos. 1 to 5.

2. This writ petition has been filed seeking the following reliefs:-

"(A) Issue a writ, order or direction in the nature of Habeas Corpus to set the corpus free at her liberty from illegal detention of respondent no.5.

(B) issue a writ, order or direction in the nature of mandamus commanding the respondents to handover the custody of corpus to the petitioner."

3. This writ petition has been filed on behalf of petitioner (corpus) through Smt. Usha Devi mother of the accused Ravishankar Thakur against whom F.I.R. No.0050 dated 25.04.2020 under Section 363/366 I.P.C. was lodged. During course of the investigation Section 176(3) I.P.C. and Section 5(j)(ii), and 5(1)/6 of the POCSO Act were also added. As per the statement of the corpus recorded on 07.08.2020 under Section 164 Cr.P.C. in which she had stated her age to be 16 years. As per F.I.R. version the age of the corpus is 15 years. The corpus was sent in the custody of Superintendent, Balika Grih Social Welfare Society, district Mau by order dated 31.7.2020 passed by Chairman, Child Welfare Committee. As per education certificate of the corpus, her date of birth is 20.05.2005. On 23.11.2020 the aforesaid order was challenged by the mother of the accused by filing an application before Incharge, CWC, Ballia praying for the custody of the corpus Tanya Pandey This application was rejected by the Chairman by order dated 28.11.2020 on the ground that the corpus Tanya Pandey is minor. The aforesaid rejection order dated 28.11.2020 has not been challenged by the petitioner in the present writ petition. However, a photostat copy of the order has been produced by the learned counsel for the petitioner before the Court, which is kept on record.

4. Learned counsel for the petitioner submits that corpus Tanya Pandey, has given birth to a child on 18.12.2020 and, that therefore, custody of the corpus is illegal and she may be set free at her liberty and her custody may be given to the mother of the accused. He further submits that the child has born after filing the writ petition, therefore, no averment in this regard could be made in the writ petition.

5. Learned A.G.A. submits that the corpus is a child below 16 years as her date of birth is 20.05.2005. In her own statement recorded under Section 164 Cr.P.C. the corpus has stated her age to be as 16 years. Therefore, there is no illegality in the impugned order to keep the corpus in Balika Grih Social Welfare Society, district Mau/ Bal Kalyan Samti, Mau. The mother of the accused has no right to ask for the custody of the corpus to her, particularly, when the accused is in jail. The order passed by the CWC is a judicial order,

which has not been challenged in the present writ petition and even against the said order remedy of appeal lies under Section 101 of Juvenile Justice (Care and Protection of Children) Act, 2015.

6. We have carefully considered the submissions of the learned counsel for the parties and perused the record of the writ petition.

7. Section 94(2) of the Juvenile Justice (Care and Protection), 2015 (hereinafter referred to as "the J.J. Act") provides for presumption and determination of age, as under:

"(2) In case, the Committee or the Board has reasonable grounds for doubt regarding whether the person brought before it is a child or not, the Committee or the Board, as the case may be, shall undertake the process of age determination, by seeking evidence by obtaining--

(i) the date of birth certificate from the school, or the matriculation or equivalent certificate from the concerned examination Board, if available; and in the absence thereof;

(ii) the birth certificate given by a corporation or a municipal authority or a panchayat;

(iii) and only in the absence of (i) and (ii) above, age shall be determined by an ossification test or any other latest medical age determination test conducted on the orders of the Committee or the Board:

Provided such age determination test conducted on the order of the Committee or the Board shall be completed within fifteen days from the date of such order."

8. Thus, as per provisions of Section 94(2) of the J.J. Act, the Child Welfare Committee or the Board has reasonable grounds for doubt as to whether the person brought before it, is a child or not, the Committee or the Board, as the case may be, shall undertake the process of age determination by seeking evidence by obtaining, **firstly**, the date of birth certificate from school, or matriculation or equivalent certificate from the concerned examination Board, if available; **and in the absence thereof; secondly,** the birth certificate given by a corporation or a municipal authority or a panchayat; and **thirdly**, in absence of educational certificate or birth certificate as aforementioned, the age shall be determined by an ossification test or any other latest medical age determination **test conducted on the orders of the Committee or the Board.** Thus, as per statutory mandate of Section 94(2) of the J.J. Act, primacy is to be accorded to the date of birth certificate from the school or the matriculation or equivalent certificate from the concerned Examination Board and only in absence thereof, the birth certificate of a corporation or municipal authority or a panchayat can be looked into. When the certificates as provided under sub-clauses (i) and (ii) of sub-Section (2) of Section 94, is not available, only then the medical evidence as provided in sub-clause (iii) is to be taken into consideration. In the present set of facts, as per educational certificate, the date of birth of the petitioner is 20.05.2005.

9. The "juvenile" has been defined in Section 2(35) of the J.J. Act to mean a child below the age of eighteen years. The word "child" has been defined in Section 2(12) of the J.J. Act to mean a person who has not completed eighteen years of age. The phrase "child in conflict with law" has been defined under Section 2(13) of the J.J. Act to mean a child who is alleged or found to

have committed an offence and who has not completed eighteen years of age on the date of commission of such offence. Section 2(14) of the J.J. Act defines the phrase "child in need of care and protection", as under:

"(14) "child in need of care and protection" means a child--

(i) who is found without any home or settled place of abode and without any ostensible means of subsistence; or

(ii) who is found working in contravention of labour laws for the time being in force or is found begging, or living on the street; or

(iii) who resides with a person (whether a guardian of the child or not) and such person--

(a) has injured, exploited, abused or neglected the child or has violated any other law for the time being in force meant for the protection of child; or

(b) has threatened to kill, injure, exploit or abuse the child and there is a reasonable likelihood of the threat being carried out; or

(c) has killed, abused, neglected or exploited some other child or children and there is a reasonable likelihood of the child in question being killed, abused, exploited or neglected by that person;or

(iv) who is mentally ill or mentally or physically challenged or suffering from terminal or incurable disease, having no one to support or look after or having parents or guardians unfit to take care, if found so by the Board or the Committee; or

(v) who has a parent or guardian and such parent or guardian is found to be unfit or incapacitated, by the Committee or the Board, to care for and protect the safety and well-being of the child; or

(vi) who does not have parents and no one is willing to take care of, or whose parents have abandoned or surrendered him; or

(vii) who is missing or run away child, or whose parents cannot be found after making reasonable inquiry in such manner as may be prescribed; or

(viii) who has been or is being or is likely to be abused, tortured or exploited for the purpose of sexual abuse or illegal acts; or

(ix) who is found vulnerable and is likely to be inducted into drug abuse or trafficking; or

(x) who is being or is likely to be abused for unconscionable gains; or

(xi) who is victim of or affected by any armed conflict, civil unrest or natural calamity; or

(xii) who is at imminent risk of marriage before attaining the age of marriage and whose parents, family members, guardian and any other persons are likely to be responsible for solemnisation of such marriage;"

10. Section 37 empowers the Child Welfare Committee that on being satisfied through the inquiry that the child before the Committee is a child in need of care and protection, it may, on consideration of Social Investigation Report submitted by Child Welfare Officer and taking into account the child's wishes in case the child is sufficiently mature to take a view, pass one or more of the following orders as provided in clauses (a) to (h) of Sub-Section (1) of Section 37. Section 37 of the J.J. Act is reproduced below:

"37. Orders passed regarding a child in need of care and protection.- *(1) The Committee on being satisfied through the inquiry that the child before the Committee is a child in need of care and protection, may, on consideration of Social*

Investigation Report submitted by Child Welfare Officer and taking into account the child's wishes in case the child is sufficiently mature to take a view, pass one or more of the following orders, namely:--

(a) declaration that a child is in need of care and protection;

(b) restoration of the child to parents or guardian or family with or without supervision of Child Welfare Officer or designated social worker;

(c) placement of the child in Children's Home or fit facility or Specialised Adoption Agency for the purpose of adoption for long term or temporary care, keeping in mind the capacity of the institution for housing such children, either after reaching the conclusion that the family of the child cannot be traced or even if traced, restoration of the child to the family is not in the best interest of the child;

(d) placement of the child with fit person for long term or temporary care;

(e) foster care orders under section 44;

(f) sponsorship orders under section 45;

(g) directions to persons or institutions or facilities in whose care the child is placed, regarding care, protection and rehabilitation of the child, including directions relating to immediate shelter and services such as medical attention, psychiatric and psychological support including need-based counselling, occupational therapy or behaviour modification therapy, skill training, legal aid, educational services, and other developmental activities, as required, as well as follow-up and coordination with the District Child Protection Unit or State Government and other agencies;

(h) declaration that the child is legally free for adoption under section 38.

(2) The Committee may also pass orders for--

(i) declaration of fit persons for foster care;

(ii) getting after care support under section 46 of the Act; or

(iii) any other order related to any other function as may be prescribed."

11. Section 37(1)(c) of the J.J. Act empowers the Child Welfare Committee to place a child in Children's Home or fit facility or Specialised Adoption Agency for the purpose of adoption for long term or temporary care, keeping in mind the capacity of the institution for housing such children, either after reaching the conclusion that the family of the child cannot be traced or even if traced, restoration of the child to the family is not in the best interest of the child. The impugned order passed by the Child Welfare Committee is in exercise of powers under Section 37 of the J.J. Act. Under the circumstances, when undisputedly corpus - petitioner is a juvenile within the meaning of Section 2(35) and is in need of care and protection within the meaning of Section 2(14), the impugned order passed by the Child Welfare Committee under Section 37 is in exercise of powers under the J.J. Act, cannot be said to suffer from any illegality.

12. It would be relevant to observe that Hon'ble Supreme Court has consistently taken the view that the principles applicable for determining the age of "juvenile in conflict with law" are to be applied for determining the age of child victim vide **Jarnail Singh Vs. State of Haryana1, Mahadeo Vs. State of Maharashtra2, and State of M.P. Vs. Anoop Singh3, (paras 14 to 18).**

13. In the case of **Independent Thought v. Union of India4,** (paras-95,

96, 97, 107), Hon'ble Supreme Court held as under:

"95. Whatever be the explanation, given the context and purpose of their enactment, primacy must be given to pro-child statutes over IPC as provided for inSections 5and41 IPC. There are several reasons for this including the absence of any rationale in creating an artificial distinction, in relation to sexual offences, between a married girl child and an unmarried girl child. Statutes concerning the rights of children are special laws concerning a special subject of legislation and therefore the provisions of such subject-specific legislations must prevail and take precedence over the provisions of a general law such as IPC. It must also be remembered that the provisions of the JJ Act as well as the provisions of the POCSO Act are traceable toArticle 15(3)of the Constitution which enables Parliament to make special provisions for the benefit of children. We have already adverted to some decisions relating to the interpretation ofArticle 15(3)of the Constitution in a manner that is affirmative, in favour of children and for children and we have also adverted to the discussion in the Constituent Assembly in this regard. There can therefore be no other opinion regarding the pro-child slant of the JJ Act as well as the POCSO Act.

96. A rather lengthy but useful discussion on this subject of special laws is to be found inL.I.C. v. D.J. Bahadur in paras 52 and 53 of the Report. Briefly, it was held that the subject-matter and the perspective of the statute are determinative of the question whether a statute is a general law or a special law. Therefore, for certain purposes a statute might be a special law but for other purposes, as compared to another statute, it might be a general law. In respect of a dispute between the Life Insurance Corporation and its workmen qua workmen, the Industrial Disputes Act, 1947 would be a special law vis-à-vis theLife Insurance Corporation Act, 1956; but, "when compensation on nationalisation is the question, theLIC Actis the special statute". It was held as follows:(SCC pp.350-51)

"52. In determining whether a statute is a special or a general one, the focus must be on the principal subject-matter plus the particular perspective. For certain purposes, an Act may be general and for certain other purposes it may be special and we cannot blur distinctions when dealing with finer points of law. In law, we have a cosmos of relativity, not absolutes -- so too in life.The ID Actis a special statute devoted wholly to investigation and settlement of industrial disputes which provides definitionally for the nature of industrial disputes coming within its ambit. It creates an infrastructure for investigation into, solution of and adjudication upon industrial disputes. It also provides the necessary machinery for enforcement of awards and settlements. From alpha to omega theID Acthas one special mission -- the resolution of industrial disputes through specialised agencies according to specialised procedures and with special reference to the weaker categories of employees coming within the definition of workmen. Therefore, with reference to industrial disputes between employers and workmen, theID Actis a special statute, and theLIC Actdoes not speak at all with specific reference to workmen. On the other hand, its powers relate to the general aspects of nationalisation, of management when private businesses are nationalised and a plurality of problems which, incidentally, involve transfer of service of existing

employees of insurers. The workmen qua workmen and industrial disputes between workmen and the employer as such, are beyond the orbit of and have no specific or special place in the scheme of theLIC Act. And whenever there was a dispute between workmen and management theID Actmechanism was resorted to.

53.What are we confronted with in the present case, so that I may determine as between the two enactments which is the special? The only subject which has led to this litigation and which is the bone of contention between the parties is an industrial dispute between the Corporation and its workmen qua workmen. If we refuse to be obfuscated by legal abracadabra and see plainly what is so obvious, the conclusion that flows, in the wake of the study I have made, is that vis-a-vis "industrial disputes" at the termination of the settlement as between the workmen and the Corporation, theID Actis a special legislation and theLIC Acta general legislation. Likewise, when compensation on nationalisation is the question, theLIC Actis the special statute. An application of the generalia maxim as expounded by English textbooks and decisions leaves us in no doubt that theID Actbeing special law, prevails over theLIC Actwhich is but general law." (Emphasis in original)

The scope and amplitude of the two significant pro-child statutes may now be examined in light of the law laid down by this Court includingSections 5and41of the IPC.

(i) The JJ Act

97. A cursory reading of the JJ Act gives a clear indication that a girl child who is in imminent risk of marriage before attaining the age of 18 years of age is a child in need of care and protection (Section 2(14) (xii) of the JJ Act). In our opinion, it cannot be said with any degree of rationality that such a girl child loses her status as a child in need of care and protection soon after she gets married. The JJ Act provides that efforts must be made to ensure the care, protection, appropriate rehabilitation or restoration of a girl child who is at imminent risk of marriage and therefore a child in need of care and protection. If this provision is ignored or given a go by, it would put the girl child in a worse off situation because after marriage she could be subjected to aggravated penetrative sexual assault for which she might not be physically, mentally or psychologically ready. The intention of the JJ Act is to benefit a child rather than place her in difficult circumstances. A contrary view would not only destroy the purpose and spirit of the JJ Act but would also take away the importance ofArticle 15(3)of the Constitution. Surely, such an interpretation and understanding cannot be given to the provisions of the JJ Act."

107. On a complete assessment of the law and the documentary material, it appears that there are really five options before us: (i) To let the incongruity remain as it is -- this does not seem a viable option to us, given that the lives of thousands of young girls are at stake; (ii) To strike down as unconstitutional Exception 2 to Section 375 IPC -- in the present case this is also not a viable option since this relief was given up and no such issue was raised; (iii) To reduce the age of consent from 18 years to 15 years -- this too is not a viable option and would ultimately be for Parliament to decide; (iv) To bring the POCSO Act in consonance with Exception 2 to Section 375 IPC -- this is also not a viable option since it would require not only a retrograde amendment to the POCSO Act but also to several other pro-child statutes; (v) To read Exception 2 to Section 375 IPC in a purposive manner to make it in consonance

with the POCSO Act, the spirit of other pro-child legislations and the human rights of a married girl child. Being purposive and harmonious constructionists, we are of opinion that this is the only pragmatic option available. Therefore, we are left with absolutely no other option but to harmonise the system of laws relating to children and require Exception 2 to Section 375 IPC to now be meaningfully read as: "Sexual intercourse or sexual acts by a man with his own wife, the wife not being under eighteen years of age, is not rape." It is only through this reading that the intent of social justice to the married girl child and the constitutional vision of the Framers of our Constitution can be preserved and protected and perhaps given impetus."

14. In the present set of facts, it is not in dispute that as per educational certificate, the date of birth of the corpus is 20.05.2005. Hence, keeping in mind the provisions of Section 94 of the J.J. Act, the age recorded in the educational certificate cannot be discarded in the proceedings under the J.J. Act moreso when corpus in her statement recorded on 07.08.2020 under Section 164, Cr.P.C. has stated that her age is 16 years.

15. Once the corpus has been found to be a child as defined by Section 2(12) of the J.J. Act and allegedly, a victim of a crime, she would fall in the category of "child in need of care and protection" in view of clauses (iii), (viii) and (xii) of sub-Section (14) of Section 2 of the J.J. Act. Hence the order passed by the Child Welfare Committee placing in a protection Home would be within its powers confers under Section 37 of the J.J. Act.

16. For all the reasons stated above, the action of the respondent Nos.1 to 5 is neither without jurisdiction nor illegal nor perverse, keeping in mind the provisions of the J.J. Act, 2015. Therefore, the detention of the corpus cannot be said to be illegal so as to warrant issuance of a writ of habeas corpus. If the petitioner is aggrieved by the order of the Child Welfare Committee, she is at liberty to take recourse to the remedy of an appeal provided under Section 101 of the J. J. Act, 2015.

17. For all the reasons stated, above, **the writ petition is dismissed.**

(2021)02ILR A85
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 22.02.2021

BEFORE

THE HON'BLE ALOK MATHUR, J.

Habeas Corpus No. 8820 of 2020

Shigorika Singh ...Petitioner
Versus
Dr. Abhinandan Singh & Ors. ...Respondents

Counsel for the Petitioner:
Chandra Shekhar Sinha

Counsel for the Respondents:
Govt. Advocate, Dr. Abhinandan Singh, Kuldeep Srivastava, Padma Verma, Sunit Kumar

A. Constitution of India, 1950-Article 226-application-allowed-petitioner (mother) and her husband admittedly are living separately and their minor daughter was living in the custody of mother and fathere was used to visit her-one day he drove away his daughter with the car-mother requested to sent back her daughter to her but he refused-aggrieved mother preferred writ -the rule nisi is made absolute- the applicant becomes entitled

to the custody of child as of right because the applicant establishes a prima facie case that the detention is unlawful-however father and grandparents would be entitled for visitation right.(Para 1 to 33)

B. While considering whether the father in taking the minor out of the custody of his mother would be guilty u/s 364 IPC, it cannot be held guilty for abduction as it cannot be said that the child had been removed from the custody of natural guardian but the conduct of the accused persons in taking away the child without consent of the mother amounted to cruelty as defined u/s 498-A IPC. Such an act undoubtly disrupts the peaceful life of the minor and militates against his/her healthy mental growth.hence, the act of the father is illegal.(Para 27)

The petition is allowed. (E-5)

List of Cases cited:-

1. Yashita Sahu Vs. St. of Raj., (2020) 3 SCC 67

2. Elizabeth Dinshaw Vs Arvand M. Dinshaw , (1987) 1 SCC 42; 1987 SCC(Cri) 13)

3. Nithya Anand Raghavan Vs St. (NCT of Delhi) (2017) 8 SCC 454 :(2017) 4 SCC (Civ.) 104

4. Lahari Sakhamuri Vs Sobhan Kodali (2019) 7 SCC 311: (2019) 3 SCC (Civ.) 590

5. Kanika Goel Vs St. of (NCT of Delhi) (2018) 9 SCC 578: (2018) 4 SCC (Civ.) 411

6. Vijai Kumar Sharma & ors. Vs St. of U.P. & ors. (1991) I DMC 244

7. Nil Ratan Kundu Vs Abhijit Kundu,(2008) 9 SCC 413

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

1. The flames emanating from bitter marital discord have reached this Court by means of instant writ petition filed by the mother for seeking custody of a minor daughter, from her husband.

2. It has been submitted by Sri Chandra Shekhar Sinha learned counsel for petitioner that Dr Ayushi Singh, petitioner no.2 (hereinafter referred to as "M') was married to opposite party no.1 Dr. Abhinandan Singh, (hereinafter referred to as "F') on 14/02/2014 according to Hindu rites and rituals at Lucknow. A daughter, petitioner no.1 (hereinafter referred to as "D') was born out of the wedlock, who's date of birth is disputed as according to "M', it is 08/08/2016 while according to "F', it is 08/08/2015. "M' has stated that serious differences between them commenced soon after the marriage including harassment and physical torture by "F' and his family members on her as well as her parents and brother. She was dropped by "F' to her maternal home on 25/12/2018 along with her minor daughter, and since then they are living together with the parents of "M'. "F' thereafter used to visit the maternal house of "M' to meet "D', and such visits were never objected by "M' or her parents. On 10/01/2020 "F' visited the maternal home of "M' between 7-8 PM and told "M' that his father wants to meet "D' and that he is sitting in the car. "F' took "D' from the custody of "M' and went to the car where his father was sitting and drove away with "D'. "M' who was following "F', on seeing him drive away with her daughter raised an alarm but by that time "F' had left with "D'. Subsequently, on several occasions, "M' requested "F' to return "D', but it was of no avail, and in the aforesaid circumstances she has preferred the present writ petition seeking a direction in nature of habeas corpus to "F' to give custody of "D' to "M'.

3. "D' has been admitted by the efforts of both the parents to a prestigious girl's school in Lucknow, La Martinere College, where she is presently studying.

4. It has been submitted by Sri Chandra Shekar Sinha, learned counsel appearing for the petitioner, that after the separation between "M' and "F', the minor daughter "D' is living at her maternal home since 25/12/2018. "F', the father had full visitation rights and was regularly visiting "D' and no obstruction was ever created. He has further submitted that the minor daughter was in the custody and guardianship of her mother and there was no dispute in this regard between "M' and "F'. The act of forcibly taking away "D' out of the custody of "M' would amount to abduction and cannot be termed as legal, and therefore submits that the writ of habeas corpus would lie to reunite the minor daughter with her mother.

5. It has been stated that "M' has completed Bachelor of Dental Sciences (BDS) course in 2013, and is presently pursuing MDS course from Lucknow, while "F' has also completed MBBS course in 2013 and is presently pursuing MD (Neuro Psychiatry) course from Mahatma Gandhi Medical College, Pondicherry. "D' is staying at Lucknow along with the grandfather and grandmother. The grandmother often stays at Delhi with the sister of "F', and therefore "D' is being looked after by her grandfather.

6. It has further been submitted by "M' that troubles in the marriage erupted from the very first day when "F' came home in an inebriated condition, and subsequently on their honeymoon in Fiji and Hong Kong where he consumed large quantities of liquor and started physically and mentally torturing "M'. She has given further details of the physical torture by "F' and also the fact that he is suffering from "Mental and Behavioral Disorder". It has further been stated that the said illness reached a very high level and therefore "F' was admitted to various nursing homes as well as King George Medical University from 08/03/2018 to 14/03/2018 and further was also admitted for 15 days in "Nirwan De-addiction Centre" in Lucknow as he was habitual of heavy consumption of alcohol. In this regard, it has been stated in the writ petition that the aforesaid facts need to be verified after summoning the record from the de-addiction Centre. It has also been stated that "F' was under treatment from "National Institute of Mental Health and Neurosciences" (NIMHANS) Bangalore, but "M' could not get further details of the treatment due to doctor-patient confidentiality.

7. Sri I.B. Singh, Senior Advocate appearing for "F' has raised a preliminary objection that the present petition is not maintainable as there exist an efficacious alternative remedy before the civil courts under section 6 of The Guardians and Wards Act, 1890. In reply to the allegation that "D' was taken away forcibly and without consent of "M', it has been stated that when "F' reached the maternal house of 'M' on 10/01/2020 he found that "D' was suffering from high fever as well as shivering and respiratory distress. She was immediately taken to one Dr M.K.Singh, who diagnosed her with "bronco Pneumonia". He has further submitted that this clearly shows that "M' was not taking proper care of her daughter and in support of his allegations he has annexed the medical report and findings of Dr M.K.Singh. "M' has denied the said allegations about the ailments of her minor daughter and stated that she herself is a Doctor and would not be negligent about her own daughter. It was further submitted

that Dr M.K.Singh is closely related (real Phupha) to "F' and the prescriptions are doctored.

8. Regarding the date of birth of "D', it has been stated by "F', that she was born on 08/08/2015 in a hospital named as Shakun Maternity Home, Lucknow and at the time of filing of the affidavit in this petition, "D' was just 4 years and 11 months old. "F' has denied that he is a heavy drinker and also that he or his family has ever mentally or physically tortured "M'. It has also been stated that "M' does not have financial resources to take care of their daughter.

9. The relationship between the two families has come to such a point that cross FIRs have been lodged against each other, serious efforts to resolve the dispute through the process of mediation by the High Court has failed, and even during the hearings, the counsels of both the parties clearly stated that there was no scope of any settlement at this stage.

10. I have heard the counsel of the parties and perused the record. Preliminary objection has been raised by "F' stating that the present writ petition for habeas corpus seeking the custody of the minor daughter would not maintainable inasmuch as there exists an efficacious alternative remedy under the Guardians and Wards Act, 1890. It has been stated that in exercise of writ jurisdiction for relief of habeas corpus, it has to be demonstrated that the custody of the detenue is illegal. It has been submitted that the father is the natural guardian of the minor girl, and therefore the custody cannot be held to be illegal and therefore such a prayer as sought for by the petitioners cannot be granted.

11. The question as to whether the High Court can issue a writ of habeas corpus for seeking custody of a minor child is no longer *res integra* and has been dealt with by the Hon'ble Supreme Court in various judgments.

12. In the case of **Yashita Sahu v. State of Rajasthan, (2020) 3 SCC 67** the Supreme court has held:-

"10. It is too late in the day to urge that a writ of habeas corpus is not maintainable if the child is in the custody of another parent. The law in this regard has developed a lot over a period of time but now it is a settled position that the court can invoke its extraordinary writ jurisdiction for the best interest of the child. This has been done in ***Elizabeth Dinshaw v. Arvand M. Dinshaw [Elizabeth Dinshaw v. Arvand M. Dinshaw, (1987) 1 SCC 42 :*** *1987 SCC (Cri) 13],* ***Nithya Anand Raghavan v. State (NCT of Delhi) [Nithya Anand Raghavan v. State (NCT of Delhi), (2017) 8 SCC 454 :*** *(2017) 4 SCC (Civ) 104] and Lahari Sakhamuri v. Sobhan Kodali* ***[Lahari Sakhamuri v. Sobhan Kodali, (2019) 7 SCC 311 :*** *(2019) 3 SCC (Civ) 590] among others. In all these cases, the writ petitions were entertained. Therefore, we reject the contention of the appellant wife that the writ petition before the High Court of Rajasthan was not maintainable.*

11. We need not refer to all decisions in this regard but it would be apposite to refer to the following observations from the judgment in ***Nithya Anand Raghavan [Nithya Anand Raghavan v. State (NCT of Delhi), (2017) 8 SCC 454 :*** *(2017) 4 SCC (Civ) 104] : (SCC pp. 479-80, paras 46-47)*

"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)."

12. Further, in ***Kanika Goel v. State (NCT of Delhi) [Kanika Goel v. State (NCT of Delhi), (2018) 9 SCC 578 :*** *(2018) 4 SCC (Civ) 411] , it was held as follows : (SCC p. 609, para 34)*

*"34. As expounded in the recent decisions of this Court, the issue ought not to be decided on the basis of rights of the parties claiming custody of the minor child but the focus should constantly remain on whether the factum of best interest of the minor child is to return to the native country or otherwise. The fact that the minor child will have better prospects upon return to his/her native country, may be a relevant aspect in a substantive proceedings for grant of custody of the minor child but not decisive to examine the threshold issues in a habeas corpus petition. For the purpose of habeas corpus petition, the Court ought to focus on the obtaining circumstances of the minor child having been removed from the native country and taken to a place to encounter alien environment, language, custom, etc. interfering wit*h his/her overall growth and grooming and whether continuance there will be harmful."

13. In light of the aforesaid decisions, it is clear that the writ of Habeas Corpus in the facts of the present case would be maintainable and the preliminary objection taken by "F' deserve to be rejected.

14. This brings us directly to the merits of the matter which require a more detailed examination of the facts placed before this court, and determine as to what would be in the best interest of the child.

15. "M' and "F' stayed together after marriage till 25/12/2018 and subsequently "D' and "M' were living in the maternal home of "M'. "F' continuously visited and met "D'. It is not the case of the "F' that he was ever denied visitation rights by "M'. "D' was admitted to "Footprints' for pre-schooling in June 2019 and was subsequently admitted to La Martinere Girls College, Lucknow. It is on 10/01/2020 that "F' during one of his visits to meet "D' at the maternal house of "M' by deploying subterfuge took "D' out of the custody of "M', without her consent or informing "M'. It is stated that "F' discovered that "D' was suffering from high

fever and therefore took to a doctor whose medical report has been annexed herewith. "M' has made fervent pleas to "F' to return "D', but he did not show any inclination.

16. In the aforesaid facts and circumstances of the case the moot question is whether the detention of "D' by "F' can be held to be improper, illegal or without authority of law so as to invoke the writ jurisdiction of this court for grant of writ of habeas corpus.

17. Due consideration must be given to section 6 of the Hindu Minority and Guardianship Act,

"6. Natural guardians of a Hindu minor.--The natural guardians of a Hindu minor; in respect of the minor's person as well as in respect of the minor's property (excluding his or her undivided interest in joint family property), are--

(a) in the case of a boy or an unmarried girl--the father, and after him, the mother: provided that the custody of a minor who has not completed the age of five years shall ordinarily be with the mother;

(b) in the case of an illegitimate boy or an illegitimate unmarried girl--the mother, and after her, the father;

(c) in the case of a married girl--the husband: Provided that no person shall be entitled to act as the natural guardian of a minor under the provisions of this section-- (

a) if he has ceased to be a Hindu, or

(b) if he has completely and finally renounced the world by becoming a hermit (vanaprastha) or an ascetic (yati or sanyasi). Explanation.--In this section, the expressions "father" and "mother" do not include a step-father and a step-mother."

18. According to section 6(a), the father and mother are the natural guardians of a minor, but the mother is the preferred guardian where the minor is below the age of 5 years. In the writ petition the age of "D' has been shown to be 3 ½ years. In the counter affidavit it has been stated that the age of "D' is 4 years and 11 months, and in its support the birth certificate of Shakun Maternity Home has been annexed indicating the date of birth to be 08/08/2015. This fact has been contested in the rejoinder affidavit where the date of birth has been asserted to be 08/08/2016 and in support of the same birth certificate issued by Nagar Nigam has been annexed.

19. Considering the rival claims concerning the date of birth, irrespective of the versions presented by either "M' or "F', "D' is admittedly below the age of 5.

20. In the present case the age of "D' is of relevance, for the applicability of section 6(a) of the Hindu Minority and Guardianship Act, 1956, which postulates that the custody of an infant or a child of tender age, should be given to his/her mother unless the father discloses cogent reasons which indicate that if the guardianship of the child is given to the mother, the child's welfare could be in jeopardy. The said provision carves out an exception of custody, in contradiction to guardianship, and then specifies that the custody should be given to the mother so long as the child is below 5 years of age.

21. In the present case the uncontested facts are as follows:-

1. The age of "D' at the time of filing of the writ petition was below 5 years.

2. "M' and "D' were living together since their marriage in February

2014 till December 2018 when they separated.

3. After the separation, "D' and "M' were living together at the parental home of "M', till 10/01/2020 when "D' was taken away by "F' without consent of "M'.

4. During the period of separation, "F' regularly visited and met "D' at the parental home of "M'.

5. "M' is pursuing her MDS from Lucknow while "F' is pursuing MD (Neuro Psychiatry) from Pondicherry.

6. "D' is living with her grandparents at Lucknow and is studying in La Martinere Girls College, Lucknow.

7. "D' appeared before this court and stated that she was equally happy and comfortable with her mother as well as with her grandparents.

22. In the aforesaid circumstances, it is established and accepted by all the parties that the mother and daughter were living together after their separation. On 10.01.2020 the daughter was taken out of the custody of the mother by the father without her consent. This taking out of the custody of the mother, without any judicial intervention is clearly arbitrary and illegal and cannot have the sanction of law. In case, "F' wanted the custody of "D' and was of the opinion that "M' was not taking care of "D' or that she was negligent in her upbringing, then it was open for him to move an appropriate application under the Guardian and Wards Act, 1890, or Hindu minority and Guardianship Act and should have placed all the facts before the court, awaiting the outcome of the same, rather than forcefully and unilaterally taking the custody of "D'. When the statute provides for a mechanism for the resolution of a dispute, then it was necessary for "F' to invoke the same, and without taking recourse to law and in taking the custody of "D', the acts of "F' are held to be absolutely illegal and without the sanction of law.

23. Considering the facts of the case, in light of the provisions contained in section 6 and 25 of the Hindu Minority & Guardianship Act it becomes clear that, the right of the father to be the guardian of the minor is preserved, but it carves out an exception of interim custody, in contradiction of guardianship, and specifies that custody should be given to the mother so long as the child was below 5 years of age. It is open for the father to rebut the presumption and prove that mother is somehow incapacitated from acting as the Guardian even when the girl child was below 5 years. The father in his counter affidavit has not placed any substantial material from which it can be established that the mother is unsuitable in any regard.

24. The other aspect which deserves to be noticed is that when the father had acquiesced to the custody of his daughter with her mother, coupled with the fact that he constantly met his daughter during this period and he never objected to the said arrangement, therefore, in such circumstances, he cannot unilaterally be permitted to change the settled position and take the custody of his minor daughter without the consent of the mother. This apart from being illegal and arbitrary, can also be very traumatic for the child who is already witnessing the acrimonious relationship between her parents. In case if this unilateral act of taking into custody of the minor is permitted, it may lead to a very unsavory situation where the Guardian in whose custody the minor is, would be reluctant to even permit visitation rights to the other guardian, as there will always remain a real and apparent threat of

deprivation of the custody by the other guardian.

25. With regard to restitution of custody of minor who is removed from the custody of a guardian, section 25 of the Guardians and Wards Act 1890, provides as under:-

"(1) If a ward leaves or is removed from the custody of a guardian of his person, the Court, if it is of opinion that it will be for the welfare of the ward to return to the custody of his guardian, may make an order for his return and for the purpose of enforcing the order may cause the ward to be arrested and to be delivered into the custody of the guardian.

(2) For the purpose of arresting the ward, the Court may exercise the power conferred on a Magistrate of the first class by section 100 of the Code of Criminal Procedure, 1882 (10 of 1882)1.

(3) The residence of a ward against the will of his guardian with a person who is not his guardian does not of itself terminate the guardianship."

26. In the facts of the present case, it was always open for the father to move an appropriate application for being appointed as a guardian and could have also moved an appropriate application under section 25 of Guardians and Wards Act 1956 for being securing custody of "D'. In the counter affidavit filed by "F', he has raised objection regarding the maintainability of the petition stating that "M' should follow the procedure established by law. "F' who has himself, without consent of "M' taken "D' out of the lawful custody of her mother, cannot be permitted to raise such an argument, especially, when he himself chose not to follow the procedure established by law, and unilaterally took "D' out of the lawful custody of "M'.

27. This court in the case of ***Vijai Kumar Sharma and others vs State of U.P. and others I(1991)DMC 244*** while considering whether the father in taking a minor out of the custody of his mother would be guilty under Section 364 of the Indian Penal Code, this Court held that the father cannot be held guilty for abduction as it cannot be said that the child had been removed from the custody of the natural guardian but held that the conduct of the accused persons in taking away the child without consent of the mother amounted to cruelty as defined under section 498A IPC. Such an act undoubtly disrupts the peaceful life of the minor and militates against his/her healthy mental growth, and therefore this court exercising the jurisdiction of *parens patriae* where it is the bounden duty of the Court to protect the interest of the minor, and accordingly the act of "F' in taking "D' out of custody of "M' is held to be illegal.

28. The Hon'ble Supreme Court while considering this aspect in the case of ***Nil Ratan Kundu v. Abhijit Kundu, (2008) 9 SCC 413 at page 425*** has observed

"*42. In Rosy Jacob v. Jacob A. Chakramakkal [(1973) 1 SCC 840] , this Court held that the object and purpose of the 1890 Act is not merely physical custody of the minor but due protection of the rights of the ward's health, maintenance and education. The power and duty of the court under the Act is the welfare of the minor. In considering the question of welfare of a minor, due regard has of course to be given to the right of the father as natural guardian, but if the custody of the father*

cannot promote the welfare of the children, he may be refused such guardianship. The Court further observed that merely because there is no defect in his personal care and his attachment for his children, which every normal parent has, he would not be granted custody. Simply because the father loves his children and is not shown to be otherwise undesirable does not necessarily lead to the conclusion that the welfare of the children would be better promoted by granting their custody to him. The Court also observed that children are not mere chattels, nor are they toys for their parents. The absolute right of parents over the destinies and the lives of their children, in the modern changed social conditions, must yield to the consideration of their welfare as human beings so that they may grow up in a normal balanced manner to be useful members of society and the guardian court in case of a dispute between the mother and the father, is expected to strike a just and proper balance between the requirements of the welfare of the minor children and the rights of their respective parents over them."

29. The mother in the petition has stated that she has taken good care of "D' as any mother would, and also admitted her to Pre-Schooling Institute "Footprints" where "D' performed very well. That apart from the mother who is entitled to the custody of minor daughter till the age of 5 years, does not dis-entitle her to continue with the custody even after attaining the age of 5 years where it can be shown that it is in the best interest and welfare of the child. In the counter affidavit, "F' has levelled certain allegations, none of which could persuade this court from coming to a conclusion that "M' was in any manner dis-entitled or incapacitated from being given the custody of "D'. The medical prescriptions attached with the counter affidavit wherein it has sought to be established that "D' was suffering from "bronco pneumonia" also does not inspire much confidence, as the consulting Doctor is closely related to "F', the fitness certificate is undated, and even otherwise it is difficult to fathom that the mother who is herself is a doctor would not venture to medically neglect her minor daughter.

30. "M' being a qualified doctor, and also pursuing her MDS in Lucknow and is living with her parents can very well look after the interests and welfare of "D'. "M' who is pursuing her MDS would also be receiving stipend/salary during this period from which she can adequately support "D'.

31. This court also notices the fact that the custody of "D' is actually with Mr Anil Singh, her grandfather at Lucknow and not with "F' as he is away, studying in Pondicherry. Even during the court hearings Mr Anil Singh has attended the hearings in absence of "F'. Even when the court required presence of "D', she was brought to Court by Mr Anil Singh. Mr Anil Singh, who is the grandfather of "D' does not have any legal right to the custody of "D' and cannot be entitled to continue with the custody of "D' as, firstly he has not approached this court claiming guardianship of "D', and secondly the mother being a natural guardian is legally entitled to the custody of "D'.

32. This court is of the considered opinion that one parent single-handedly deciding the physical and emotional environment of a child might not result as the best option for the child. If an arrangement was agreed upon by the parents and if one of them is unhappy with such an arrangement, they must approach

the court and not stealthily take away the child. There should not be an absolute right of either parent deciding the destiny of the child, importance has to be given to the best interest of the child.

33. Considering the above facts and circumstances, this Court is of the considered opinion that the custody of "D' with "F' and his father Mr Anil Singh is held to be illegal, and consequently, the writ petition is **allowed** with a direction that the custody of "D' should be immediately handed over to "M'.

34. It is clarified that this order shall not preclude any of the parties to exercise their statutory right as provided for under the Guardians and Wards Act or Hindu Minority and Guardianship Act, 1956.

35. Looking into the fact that "D' has remained in the custody of "F' and his father Mr Anil Singh, it is provided that "F' shall have visitation rights to meet "D' on every Saturday or Sunday at the convenience of "M'. He shall take "D' at 10 AM on the given day and return her by 4.00 PM on the same day. In case custody of "D' is not restored by 4.00 PM as provided, then on the request of "M' respondent No.5 is directed to immediately intervene and restore the custody of "D' to "M'.

36. Mr Anil Singh may also meet "D' on any one day on alternative weekends, as per convenience of "M', in the presence of "M'. "M' shall also permit and make necessary arrangements for video conferencing for five minutes every alternative day with "F' or his father.

(2021)02ILR A94
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 29.01.2021 & 29.01.2021

BEFORE

THE HON'BLE PANKAJ NAQVI, J.
THE HON'BLE VIVEK AGARWAL, J.

Criminal Misc. Writ Petition No. 10974 of 2020
with
Criminal Misc. Writ Petition No. 13521 of 2020
with
Criminal Misc. Writ Petition No. 14300 of 2020

Jeeshan @ Jaanu & Anr. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Abou Sofian Usmani, Sri Upendra Upadhyay, Sri Saumitra Dwivedi, Sri Vinay Saran (Amicus)

Counsel for the Respondents:
A.G.A.

Criminal Law-Petitioners-real brothers and claim to be tax payees-aggrieved by published list of top 10 criminals for the year 2020 and opening of history sheet-Policy issued after video conferencing convened by the Chief Minister-to prepare list of top 10 criminals at each police station-to keep tab on their activity-policy is not illegal-but putting such list on fly sheet board is substantive ultravires-and against Regulation 287.

W.P. allowed. (E-7)

List of Cases cited:-

1. Maneka Gandhi Vs U.O.I., AIR 1978 SC 59,

2. Re Banners Placed at Roadside in the City of Lucknow Vs St. of U.P. (2020) 4 ADJ 386

3. Mehmood Nayyar Azam Vs St. of Chhatt. & ors. , (2012) 8 SCC 1

4. R. Rajagopal alias R.R. Gopal & anr. Vs St. of T.N. (1994) 6 SCC 632

5. Bhavesh Jayanti Lakhani Vs St. of Mah. & ors., (2009) 9 SCC 551

6. Malak Singh & ors. Vs St. of Punj. & Haryana & ors., (1981) 1 SCC 420

7. Abdul Rahman Vs Abdul Rahim, (1924) ILR 46 (All) 884

8. Umesh Kumar Vs St. of Andhra Pradesh & ors., (2013) 10 SCC 591

9. Kailash Chandra Sharma etc. etc. Vs St. of Raj. & ors. as reported in (2002) 6 SCC 562

10. U.O.I. Vs Navin Jindal & anr., (2004) 2 SCC 510

11. Narendra Kumar Maheshwari Vs U.O.I. & ors., (1990) SCC Supl. 440,

12. Syndicate Bank Vs Ramchandran Pillai, (2011) 15 SCC 398,

13. Navtej Singh Johar & ors. Vs U.O.I. through Secretary Ministry of Law and justice & oth. onnected matters – (2018) 10 SCC 1

14. K.S.Putta swamy (Retd) Vs U.O.I. & ors. (2019) 1 SCC 1,

15. National Human Rights Commission Vs St. of Arunachal Pradesh – (1996) 1 SCC 742

16. Prakash Singh & ors. Vs U.O.I. & ors., (2006) 8 SCC 1

17. Indian Express Newspapers (Bombay) Pvt. Ltd. Vs U.O.I., AIR 1986 SC 515

18. Nawab Khan Abbas Khan Vs St. of Guj., AIR 1974 SC 1471

19. Council of Civil Services Union Vs Minister for the Civil Service, (1984) 3 All ER 935

20. Kharak Singh Vs St. of U.P., AIR 1963 SC 1295

21. Francis Coralie Mullin Vs The Administrator, Union Territory of Delhi & ors., AIR 1981 SC 746

22. K.S. Puttaswamy (Retd.) Vs U.O.I. – (2017) 10 SCC 1

23. St. of Mah. Vs Saeed Sohail Sheikh – (2012) 13 SCC 192

24. Bhim Singh Vs St. of J&K – (1985) 4 SCC 677

25. Sandeep Kumar Bafna Vs St. of Mah. (2014) 16 SCC 623

26. Sunil Batra Vs Delhi Administration & ors. (1978) 4 SCC 494,

27. Prem Shankar Shukla Vs Delhi Administration (1980) 3 SCC 526,

28. Sunil Gupta Vs St. of M.P. (1990) 3 SCC 119,

29. Francis Coralie Mullin Vs Administrator, Union Territory of Delhi & ors. (1981) 1 SCC 608

30. Bandhua Mukti Morcha Vs U.O.I., (1984) 3 SCC 161,

31. Bhim Singh Vs St.of J & K & ors.(1985) 4 SCC 677

32. Khedat Mazdoor Chetna Sangath Vs St. of M.P, (1994) 6 SCC 260

33. Mohd Nayyar Azam Vs St. of Chhatt., (2012) 8 SCC 1

34. Joginder Kumar Vs St. of UP & ors., (1994) 4 SCC 260

35. D.K. Basu Vs St. of W.B., (1997) 1 SCC 416

36. M. Nagraj Vs U.O.I, (2006) 8 SCC 212

37. Selvi Vs St. of Kerala, (2010) 7 SCC 263

38. Shabnam Vs U.O.I., (2015) 6 SCC 702

39. Jeeja Ghosh Vs U.O.I., (2016)7 SCC 761

40. K.S. Puttaswamy & ors. Vs U.O.I. & ors., (2017) 10 SCC 1

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

Heard Sri Upendra Upadhyay, Siya Ram Verma and Sri Shiv Bahadur Singh, learned counsel for the petitioners, Sri Vinod Diwaker, learned A.A.G. for the State assisted by Sri Deepak Mishra and Ms. Manju Thakur, learned A.G.A. and Sri Vinay Saran, learned Amicus assisted by Sri Saumitra Dwivedi.

These three petitions raise a common issue of violation of Right to Privacy on account of list of top-10 criminals displayed at different Police Stations namely, Khuldabad, District-Prayagraj, Police Station-Bithoor, District-Kanpur Nagar and at Police Station-Karchhana, District-Prayagraj.

Brief facts of each petition

1. Petitioners in C.M.W.P. No. 10974 of 2020 are real brothers engaged in business and claim to be income tax payees. They are aggrieved with a list published at Police Station-Khuldabad, showing their names as top-10 criminals for the year 2020. Petitioner no. 1- Jeeshan @ Jaanu is at serial no. 3 and petitioner no. 2 at the top of list of top-10 criminals at Police Station-Khuldabad, (Annexure-2) to the writ petition. Petitioner no. 1 is also aggrieved with the opening of his history sheet on 20.08.2020.

(1A) Petitioners grievance is that they are relatives of Ex-Member of Parliament from Allahabad Constituency and due to political vendetta, they are being harassed by the police authorities by illegally publishing their names in the list of top-10 criminals of Police Station-Khuldabad.

(1B) As per the contention of petitioner no. 1, police has shown nine cases against him, out of which, he has yet not been charge-sheeted in four cases while two cases are lodged at the behest of Prayagraj Development Authority regarding irregularities in the constructions.

(1C) Case of petitioner no. 2 is that in the year 2007, three cases were registered against him simultaneously at Police Station-Dhoomanganj, District-Prayagraj.

(1D) Vide order dated 29.10.2013 passed by the Court of learned Additional Sessions Judge, Court No. 2, Allahabad, petitioner no. 2 has been acquitted in Case Crime No. 287 of 2007. In another Case Crime No. 120 of 2007, he is on bail, granted by the Court of Sessions Judge, Allahabad while in third case, i.e. Case Crime No. 113 of 2007, he was granted bail by the High Court.

(1E) Two new cases have been registered against petitioner no. 2 in the year 2019 and 2020 purely on political motivation. In one of the cases, he has been granted anticipatory bail while in another, police authorities have been restrained from taking any coercive action against the petitioner. Another fresh case has been registered against him in 2020 at Police Station-Khuldabad under Section 27 of the Arms Act.

(1F) It is submitted that only one case is registered against each of the petitioners at Police Station-Khuldabad and yet on the basis of a single case their names have been included in the list of top-10 criminals of Police Station-Khuldabad.

(1G) It is petitioner's contention that the act of the authorities of State is violative of Article 21 of the Constitution of India inasmuch as Right to Life includes

the right to live with human dignity. Placing reliance on the judgment of the Hon'ble Supreme Court in ***Maneka Gandhi vs. Union of India, AIR 1978 SC 59,*** it is pointed out that Right to Life also means that the State cannot curtail the dignity of a citizen in an arbitrary manner.

(1H) Petitioner's contention is that personal enmity is being taken to illogical ends, so as to harass them by violating their fundamental rights and malafidely declaring them to be top-10 criminals of Police Station-Khuldabad, so as to tarnish their image and dent their dignity in public and harass their entire family. In above backdrop, a prayer has been made for issuance of a writ, order or direction in the nature of mandamus directing the respondents to delete the name of the petitioners from the list of top-10 criminals of Police Station-Khuldabad, District-Prayagraj with a further prayer to direct the police authorities to close the history sheet of petitioner no. 1 and not to harass them.

Brief facts in C.M.W.P. No. 13521of 2020

2. Petitioner claims himself to be an Advocate, practicing at District-Kanpur Dehat. Petitioner's contention is that he being a legal professional, appears for litigants facing criminal prosecution, as a result of which, police personnel posted at Police Station-Bithoor, District-Kanpur Nagar have developed enmity. This enmity became aggravated when petitioner refused to support the brother of his opponent in the election of Gram Pradhan, Gram Panchayat-Baikunthpur, District-Kanpur Nagar. On 11.03.2018, an FIR was registered at the behest of petitioner against his rivals as Case Crime No. 66 of 2018, in which his opponents have been charge-sheeted.

(2A). According to the petitioner, he is being falsely implicated in different cases by including his name in the list of top-10 criminals of Police Station-Bithoor, District-Kanpur Nagar, (Annexure 1), where his name is mentioned at serial no. 8.

(2B). Petitioner's contention is that he has nothing to do with criminal activities yet he is being falsely implicated. It is submitted that in pending Case Crime No. 64 of 2018, under Sections 147, 148, 149, 452, 307, 323, 504, 506 IPC and Section 3(1)(10) of SC/ST Act, cognizance has already been taken and matter is pending before the Court of learned IInd Additional Sessions Judge (SC/ST Act), Kanpur Nagar, yet on the basis of a single case, inclusion of the petitioner's name in the list of top-10 criminals of Police Station-Bithoor, District-Kanpur Nagar is arbitrary and illegal.

Brief facts in C.M.W.P. No. 14300 of 2020

3. Petitioner's contention is that he is into the business of a concrete and sand, his firm is registered, along with GST number. Petitioner claims to be an income tax payee.

(3A). It is submitted that out of rivalry between two groups, false FIR was lodged in the year 2011, in which final report was submitted on 29.08.2011, discharging petitioner and final report was accepted by the Court. Petitioner's case is that again in the year 2019, a false case has been registered against him and his entire family has been roped in under Sections 323, 504, 506 IPC, and also under Section 3(1)(da) and 3(1)(dha) of Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 at Police Station-Karchhana, District-Prayagraj. In this case, Investigating Officer has given a clean chit to the petitioner and final report too has

been accepted by the Court, yet another FIR was registered against him on 27.05.2020 under Section 379 IPC , Sections 4 and 21of Mines and Minerals (Regulation and Development) Act, 1957 and Rules 3, 57, 7 of U.P. Minor Minerals (Concession) Rules, 1963.

(3B). It is submitted that High Court has been pleased to quash the FIR against the petitioner and others in regard to all offences except offence under Section 379 IPC, as can be verified from order passed in C.M.W.P. No. 6027 of 2020. Placing reliance on said judgment, it is submitted that name of the petitioner has been wrongly included at serial no. 4 in the list of top-10 criminals pasted at Police Station-Karchhana, District-Prayagraj, a copy of which is enclosed as Annexure-13, to the petition.

(3C). It is submitted that petitioner had sought information as to on what grounds his name has been included, but information sought under Right to Information Act, 2005 has not been provided. It is submitted that no notice under Section 41 Cr.P.C. has been issued to the petitioner, yet on account of certain election rivalry and political affiliations, petitioner has been falsely included in the list of top-10 criminals.

(3D). Petitioner's case is that from 2011 to 2020, only three cases have been registered against him, yet in violation of his fundamental rights, his name is being scandalized and propagated without following procedure established by law. Petitioner has not yet been convicted in any of the criminal cases and therefore, a prayer has been made to remove/delete his name at serial no. 4 from the list of top-10 criminals with a further prayer to take action against respondent no. 4 directing the authorities to initiate appropriate proceedings against the Station House Officer for arbitrarily and malafidely including his name in the list of top-10 criminals.

(3E). It is submitted that on inquiry, police authorities are not in a position to disclose as to what is the criteria for preparation of list of top 10 criminals of a police station or of district and under what authority of law it is being published.

(3F). A common thread running through all the three petitions is so called action of the police authorities in displaying names of the petitioners along with others though they are undertrials, having different vocations like business, advocacy or politics, but their image is being tarnished and dignity dented by the police by canvassing their names as top-10 criminals of the district or the police station concerned, as the case may be.

(3G). This act of the respondent authorities is assailed on the ground that publication/displaying/disclosing of the names of petitioner infringes upon right to privacy and right to live with dignity which brings disrepute.

4. Learned counsel for the petitioners led by Sri Vinay Saran, Amicus submits that Right to Privacy is recognized as a sacred fundamental right under Article 21 of the Constitution of India. He submits that publication of the name of petitioners as well as their criminal history is a clear violation of Right to Privacy and the right to live with human dignity, which is a facet of Article 21 of the Constitution. He submits that dignity of a citizen is of utmost importance and police authorities cannot tinker with the same.

5. Learned Amicus places reliance on the order of Allahabad High Court in case of ***In re Banners Placed at Roadside in the City of Lucknow vs. State of U.P. (2020) 4***

ADJ 386, wherein it was held that without there being any rational nexus between the object and means adopted to achieve them, there cannot be any violation of either the Right to Life guaranteed under Article 21 of the Constitution or the human rights covered under the United Nations Declaration of Human Rights, and our Municipal Law so also Right to Privacy recognized under the International Covenant on Civil and Political Rights and other International and Regional Treaties.

6. Reliance is also placed on the judgment of the Supreme Court in case of ***Mehmood Nayyar Azam vs. State of Chhattisgarh and Others, (2012) 8 SCC 1,*** wherein it has been held that

"any form of torture or cruel, inhuman or degrading treatment would fall within the ambit of Article 21 of the Constitution, whether it occurs during investigation, interrogation or otherwise. It is further held that the right to life of a citizen cannot be put in abeyance on his arrest. The precious right guaranteed by Article 21 of the Constitution of India cannot be denied to convicts, undertrials, detainue and other prisoners in custody, except according to the procedure established by law by placing such reasonable restrictions as are permitted by law. This judgment further deals with the aspects of inhuman treatment having many a facet. It can cover such acts which have been inflicted with an intention to cause physical suffering or severe mental pain. It would also include a treatment when inflicted causes humiliation and compels a person to act against his will or conscience. Torture is not merely physical but may even consist of mental and psychological torture calculated to create fright to submit to the demands of the police. Any treatment meted out to an accused while he is in custody which causes humiliation and mental trauma corrodes the concept of human dignity. The majesty of law protects dignity of a citizen in a society governed by law."

7. Reliance is also placed on the judgment of the Supreme Court in R. Rajagopal alias ***R.R. Gopal and another v. State of Tamil Nadu (1994) 6 SCC 632,*** Jeevan Reddy, J. speaking for the Court observed that in recent times right to privacy has acquired constitutional status. The Apex Court held that

"the right to privacy is implicit in the right to life and liberty guaranteed to the citizens of this country by Article 21. It is a "right to be let alone". A citizen has a right "to safeguard the privacy of his own, his family, marriage, procreation, motherhood, child-bearing and education among other matters".

8. Reliance was also placed on the judgment in ***Bhavesh Jayanti Lakhani vs. State of Maharashtra and Others, (2009) 9 SCC 551***, wherein it was held that:

"right to privacy is a part of the right to 'life' and 'personal liberty' enshrined under Article 21 of the Constitution. Once the facts in a given case constitute a right to privacy, Article 21 is attracted. The said right cannot be curtailed 'except according to the procedure established by law'."

9. Learned Amicus submits that disclosure of criminal antecedents and history sheet is governed by U.P. Police Regulations. Chapter XX of U.P. Police Regulations deals with the registration and surveillance of bad characters. Regulation 223 states about the village crime note book, which is a confidential record, kept at

police station. Regulation 223 envisages that officer incharge of the police station is responsible for case study of such village crime note book. Part V of case crime note book consist of history sheet, which is again a personal record of a criminal under surveillance.

10. Regulation 240 deals with history sheet of Class-A 'offenders considered capable of reform' and Class-B 'offenders considered incapable of reform' and provides that it may be opened either on the basis of suspicion, on conviction or acquittal.

11. It is submitted that Regulation 240 will be applicable to the facts of the present set of cases where history sheet can be opened on the basis of suspicion, however, Regulation 250 provides that the list of bad characters in history sheets are confidential records and it is the responsibility of the Station House Officer to ensure that persons other than authorized under Regulation 240 namely, the Station House Officer, the Circle Officer and the Superintendent of Police/Senior Superintendent of Police and no other person has access to them.

12. Placing reliance on the judgment of Supreme Court in ***Malak Singh and Others vs. State of Punjab and Haryana and Others, (1981) 1 SCC 420*** and the judgment of Allahabad High Court in ***Abdul Rahman vs. Abdul Rahim, (1924) ILR 46 (All) 884,*** it is submitted that even history sheets and village crime note books are not public documents, therefore, publishing names of the petitioners as top-10 criminals is neither envisaged under the U.P. Police Regulations nor it can be read into the policy of the State dated 06th July, 2020. It is submitted that there is nothing in the policy to reveal that even policy envisages publication of any such list of top-10 criminals on the notice board or flysheet board of a police station.

13. Placing reliance on the judgment of Supreme Court in ***Umesh Kumar vs. State of Andhra Pradesh and Others, (2013) 10 SCC 591,*** it is submitted that Right to Life includes right to ones reputation, freedom from defamation. It is submitted that right to reputation is held to be a personal right protected under Article 21. It is submitted that

"reputation is a sort of right to enjoy the good opinion of others and it is a personal right and an injury to reputation is a personal injury. Thus, slander and defamation are injurious to reputation. Reputation has been defined in dictionary as "to have a good name; the credit, honor, or character which is derived from a favourable public opinion or esteem and character by report". Personal rights of a human being include the right of reputation. A good reputation is an element of personal security and is protected by the Constitution equally with the right to the enjoyment of life, liberty and property. International Covenant on Civil and Political Rights 1966 recognizes the right to have opinions and the right of freedom of expression under Article 19 is subject to the right of reputation of others. Reputation is "not only a salt of life but the purest treasure and the most precious perfume of life." Placing reliance on this judgment, it is submitted that even if the circular/guidelines issued by the DGP on 06th July, 2020 is taken as it is, then also the guidelines does not permit publication of names of criminal/accused/history sheeters on the flysheet board of a police station.

(13A). Placing reliance on the judgment of the Supreme court in **Natural Resources Allocation, in Re, Special Reference No.1 of 2012 - (2012) 10 SCC 1**, it is submitted that while determining violability of a legislation or executive action on the touchstone of Article 14 of the constitution, test that is to be applied is that State action, to escape the scrutiny of Article 14 has to be fair, reasonable and non-discriminatory, in pursuit of promotion of healthy competition and equitable treatment. State action must conform to norms, which are rational, informed with reasons and guided by public interest. Executive action should have clearly defined limits and should be predictable. Man on the street should know why a decision has been taken in favour of a particular person. Lack of transparency in decision making process would render it arbitrary.

14. Shri Vinod Diwakar, learned Additional Advocate General for the State of Uttar Pradesh in turn supports the impugned policy dt.06.07.2020 and submits that Chapter I Regulation 1 of the Uttar Pradesh Police Regulations provides that the Inspector General is the head of the police department and the Adviser of the Governor-in-Council in all questions of police administration. All orders from the Governor-in-Council to a member of police force are issued through him, except in cases of urgency when copies of any orders issued directly to subordinate officers are sent to him. Thus placing reliance on such provisions of Regulation 1, it is submitted that orders passed by the Director General of Police is a valid order and has a binding force on all the personnel of the police department subordinate to the Director General of Police.

15. Learned A.A.G. submits that policy/circular even if not law, yet State can on the basis of intelligible criteria publish names of the accused. Learned counsel for the State placed reliance on the judgment of the Supreme Court in the case of **Kailash Chandra Sharma etc. etc. Vs. State of Rajasthan and others** as reported in **(2002) 6 SCC 562** specifically drawing attention to para 11 of the judgment, wherein circular dated 10.06.1998 providing for bonus marks to residents of the concerned district and the rural areas within that district was put to test. On the touchstone of Article 14 read with Article 16 of the Constitution it was held that impugned circular is the product of the policy decision taken by the State Government. Even then, as rightly pointed out by the High Court, such decision has to pass the test of Articles 14 and 16 of the Constitution. If the policy decision, which in the present case has undoubted effect of deviating from normal and salutary rule of selection based on merit is subversive of the doctrine of equality, it cannot sustain. It should be free from the vice of arbitrariness and conform to the well-settled norms both positive and negative underlying Articles 14 and 16, which together with Article 15 form part of the Constitutional code of equality.

16. Reliance has also been placed on the decision of the Supreme Court in **Union of India Vs. Navin Jindal and another, (2004) 2 SCC 510,** which provides that Flag Code is not a statute and can not regulate fundamental right to fly national flag, however, the guidelines as laid down under the Flag Code deserve to be followed to the extent it provides for preservation of dignity and respect for the national flag. Reliance is also placed on the decision of the Supreme Court in **Narendra Kumar Maheshwari Vs. Union of India and others, (1990) SCC Supl. 440**, wherein importance of subordinate and delegated legislation has been discussed and it has

been held that "it has to be borne in mind that State instrumentalities should be committed to the endeavours of the constitutional aspiration to secure justice, inter alia, social and economic, and also under Article 39 (b) & (c) of the Constitution to ensure that the ownership and control of the material resources of the community are so distributed as to best subserve the common good and that the operation of the economic system does not result in concentration of wealth and means of production to the common detriment. Yet, every instrumentality and functionary of the State must fulfill its own role and should not trespass or encroach/entrench upon the field of others. Progress is ensured and development helped if each performs his role in common endeavour.

17. Reliance is also placed on the judgment of the Supreme Court in **Syndicate Bank Vs. Ramchandran Pillai, (2011) 15 SCC 398,** wherein it was held that

"If any executive instructions are to have the force of statutory rules, it must be shown that they were issued either under the authority conferred on the Central Government or a State Government or other authority by some Statute or the Constitution. Guidelines or executive instructions which are not statutory in character, are not 'laws', and compliance thereof can not be enforced through courts. Even if there has been any violation or breach of such non-statutory guidelines, it will not confer any right on any member of the public, to seek a direction in a court of law, for compliance with such guidelines." Placing reliance on this judgment of ***Syndicate Bank (supra),*** *it is submitted that policy or guidelines are not justiciable and therefore petitioners can not claim any right claiming violation of the guidelines.*

18. Reliance is also placed on the judgment of the Supreme Court in **Navtej Singh Johar and others Vs. Union of India through Secretary Ministry of Law and justice and other connected matters - (2018) 10 SCC 1**, wherein in para 637.2, twin-test of classification under Article 14 has been reiterated which provides that ;

(i) there should be a reasonable classification based on intelligible differentia; and,

(ii) this classification should have a rational nexus with the objective sought to be achieved.

19. Learned A.A.G. submits that accused have no right to privacy as society needs to be aware of the criminals and their antecedents. Dissemination of information to antecedents of criminals does not amount to any discrimination. He submits that police regulation 287 provides for a notice board to be set up in a conspicuous place at every police station for displaying proclamation and public notice. He submits that when Police Regulation 287, itself provides for a notice board for putting up proclamations and public notices, then pasting names of top 10 criminals of a police station or a district can not be faulted with. He further submitted that even Interpol has a policy of listing top 10 most wanted criminals/fugitives, thus, publishing such a list on the flysheet of a police station can not be termed as arbitrary or illegal.

20. Learned A.A.G. placed reliance on the concept of dignity as propounded by Immanuel Kant, to submit that even he accepted that human dignity is not an unfettered right and an accused cannot claim any immunity from publication of his name on the display board of a police

station seeking protection under the cover of dignity.

21. It is submitted that policy/guidelines framed by the State government and circulated on 06.07.2020 demonstrates a resolve of the State to show zero tolerance to crime. It is submitted that the Police Act of 1961, permits opening of history sheets and it further permits display of such history sheets on display board maintained by each police station. It is submitted that law laid down by Supreme court in **K.S.Puttaswamy (Retd) Vs. Union of India and others as** reported in **(2019) 1 SCC 1,** has its own limitations in regard to securing right to privacy. Placing reliance on para 98 of the judgment, which quotes from another judgment of Supreme Court in **National Human Rights Commission Vs. State of Arunachal Pradesh - (1996) 1 SCC 742,** that

"We are a country governed by the Rule of Law. Our Constitution confers certain rights on every human being and certain other rights on citizens. Every person is entitled to equality before the law and equal protection of the laws.", it is submitted that if criminals have any right, then citizens too have their rights; Rights of citizens can not be jeopardized in the name of extending protection to the criminals.

22. Learned A.A.G. submits that policy can not be quashed merely for the asking and further as per concept of rule of law propounded by Dicey, maintenance of law and order is the prime responsibility of the functionaries of police, therefore, publishing list of top 10 criminals can not be faulted with. Policy is unquestionable, therefore, petitions be dismissed.

23. Having heard learned counsel for the parties and after going through the records, it is apparent that policy/guidelines issued by the Director General of Police is not in the exercise of executive powers of the Governor conferred under Article 162 of the Constitution. The policy/guideline is neither issued in the name of or by the order of Governor nor it has any force of law.

24. However, a close scrutiny of the policy and its aim and object can be inferred from the opening lines of the circular dated July 6, 2020, which lays down the background in which it has been issued. Backdrop is a video conference convened by the Chief Minister to discuss law and order situation especially in the context of loss of lives of seven police personnel in an ambush between police personnel and miscreants recently at Village Bikru of Kanpur Nagar.

25. Para 2 of the policy/circular provides for preparation of a list of top 10 criminals at the level of each police station and district so to keep it updated to help police in keeping a tab on active hardened and functional criminals. In fact, most of the provisions in the circular are in consonance with law laid down by the Supreme Court in **Prakash Singh and others Vs. Union of India and others, (2006) 8 SCC 1,** which extensively dealt with the subject of police reforms and the exercises which are required to be taken to insulate police machinery from political and executive interference so as to make it more efficient, effective and strengthen rule of law. Thus, when tested on this touchstone, circular/guidelines/policy of the State cannot be said to be arbitrary, but any action taken by the police personnel in excess of the authority bestowed upon them through the circular/policy/regulations or Police Act is definitely required to be tested

on the touchstone of Articles 14, 15 and 16 of the Constitution of India.

26. Issues which need to be examined in the present context are as under :-

(i) Whether policy/circular is ultra vires of the provisions contained in Constitution of India especially Articles 14, 15 and 21 of the Constitution, Police Act, 1861 or U.P. Police Regulations?

(ii) Whether the policy/circular grants right to the police authories to publish names of so called criminals/accused persons on the flysheet board of the concerned police station ? and

(iii) Whether publication of names of such accused persons violates the right to privacy and dignity?

27. **Re Question (i)** :- As far as challenge to the policy/circular is concerned, it is well settled that validity of any subordinate legislation can be challenged on the following four grounds as have been laid down in **Indian Express Newspapers (Bombay) Private Limited Vs. Union of India, AIR 1986 SC 515 :-**

(i) It is possible that the courts might invalidate statutory instrument on the grounds of unreasonableness or uncertainty, vagueness or aribitrariness; but the writer's (1) [1964] 1 Q.B.. 214 view is that for all practical purposes such instruments must be read as forming part of the parent statute, subject only to the ultra vires test.

(ii) The courts are prepared to invalidate bye- laws, or any other form of legislation, emanating from an elected, representative authority, on the grounds of unreasonableness uncertainty or repugnance to the ordinary law; but they are reluctant to do so and will exercise their power only in clear cases.

(iii) The courts may be readier to invalidate bye-laws passed by commercial undertakings under statutory power, although cases reported during the present century suggest that the distinction between elected authorities and commercial undertakings, as explained in Kruse v. Johnson, might not now be applied so stringently.

(iv) As far as subordinate legislation of non- statutory origin is concerned, this is virtually obsolete, but it is clear from In re French Protestant Hospital [1951] ch. 567 that it would be subject to strict control."

28. A subordinate legislation is amenable to challenge on the above four grounds besides excessive delegation would be another ground for challenge. It may also be challenged as being manifestly arbitrary and unreasonable. Besides, it may be challenged for non- conformity with the parent statute, in reference to which it is made or any other plenary law.

29. The grounds of challenge to an administrative or quasi judicial action are substantive and procedural ultra vires. It would be a case of substantive ultra vires if it transgresses the limits set by the parent statute; is repugnant to its other substantive provisions or its general purpose or is repugnant to any other plenary statute. It would suffer from the vice of procedural ultra vires if the procedure prescribed by publication, consultation, laying or any condition precedent for enacting it or the manner of performance is not followed.

30. It is trite that all instrumentalities, which have powers and authority conferred on them by the Constitution or the Statute, must act within the limits of such powers. Otherwise their actions would be ultra vires i.e. outside their powers and hence invalid.

If the authority acts outside or in excess of the authority conferred on it, then it would be a case of substantive ultra vires.

31. It is seen that many statutes clothe an authority with discretionary powers, however, discretion is to be exercised judiciously and not whimsically. According to "Aharon Barak', Discretion really exists, only when there is a choice between more than one reasonable and legal alternative. Two reasonable persons can come to two opposite conclusions without either of them being unreasonable.

32. As per Tom Bingham, "The Rule of law", Allen Lane (an imprint of Penguin Books) 2010, the authority vested with discretion is expected to exercise the discretion judiciously. It should not abuse the discretion nor abdicate it. What matters is that decisions should be based on stated criteria and that they should be amenable to legal challenge, although a challenge is unlikely to succeed if the decision was one legally and reasonably open to the decision maker. The rule of law does not require that official or judicial decision makers should be deprived of all discretions, but it does require that no discretion should be unconstrained so as to be potentially arbitrary. No discretion may be legally unfettered.

33. Other grounds for annulling an order include fraud, malice or malafide, non application of mind, promissory estoppel and legitimate expectation.

34. When power is exercised in breach of law, it is a fraud on power. Malice has two facets, namely; malice in law and malice in fact. Malice in law, is to do with something not permitted by law even if it is done with best motives. Malice in fact, is when power is exercised for an improper motive.

35. In **Nawab Khan Abbas Khan Vs. State of Gujarat, AIR 1974 SC 1471,** it has been held that when an order encroaches fundamental rights without due process of law it is still-born and liable to be ignored.

36. In view of the aforesaid discussion, when circular/policy dt.06.07.2020 is considered then policy per se does not appear to suffer from vice of ultra vires, because the aim and object of the policy is to keep the police updated of the activities of the criminals with a view to keep a better control on law and order situation. No facet of fraud, malice or non application of mind has been brought out by the learned counsel's for the petitioners including learned Amicus to assail the policy/circular and therefore while answering Reference Question No.(i) I have no hesitation to hold that policy/circular in its content or language does not suffer from lack of competence. When tested within the four corners of the law laid down in the case of **Indian Express Newspapers (supra),** policy can not be said to be the arbitrary, illegal or ultra vires of either the Constitution or the Police Act or the Police Regulations.

37. **Re Question (ii)** : After having held that policy/ circular is not ultra vires I may hasten to add that there is no provision in the circular to publish list of identified top 10 criminals and mafia elements either on the flysheet board of the concerned police station or anywhere else.

38. When there is no provision in the circular to publish list of identified top 10 criminals and mafia elements either on the

flysheet board of the concerned police station in public domain or anywhere else, the action of the authorities of the State in publishing such names will fall within the case of substantive ultra vires, as the action of the functionaries of the State is beyond the powers and authority conferred on them by the Constitution or the Statute and their act is even beyond the limits and powers transcribed by the circular from which respondent State functionaries claim to draw their authority to make such publication.

39. As has been discussed above, quoting Lord Bingham, "All officials at all levels must exercise the powers conferred on them in good faith, fairly, for the purpose for which the powers are conferred, without exceeding the limit of such powers and not unreasonably. This is indeed fundamental and lies at the very heart of the rule of law.

40. Lord Diplock in **Council of Civil Services Union Vs. Minister for the Civil Service, (1984) 3 All ER 935,** propounded principles of judicial review of administrative action. They are, illegality which is the main substantive areas of ultra vires, where law is breached; irrationality which is succinctly referred to as Wednesbury unreasonableness, it applies to a decision which is so outrageous in its defiance of logic and procedural impropriety which is failure to follow the prescribed statutory procedure or rules of natural justice.

41. As per the law laid down by the Constitution Bench in **Natural Resources Allocation (supra),** it has been held that Article 14 of the constitution mandates that the State action, be it legislative or executive has to be fair, reasonable, non-discriminatory, transparent, non-capricious, unbiased, without favouritism or nepotism. State action must conform to the norms, which are rational, informed with reasons and guided by public interest. Executive action should have clearly defined limits and should be predictable. The man on the street should know why the decision has been taken in favour of a particular person. Lack of transparency in decision making process would render it arbitrary. Fundamental principle of executive governance is based on realisation that sovereignty rests in the people. Every limb of the constitutional machinery is obliged to be people oriented. Every holder of public office is accountable to the People. Question of unfettered discretion in the executive just does not arise. Public authorities are ordained to act reasonably and in good faith and upon lawful and relevant grounds of public interest.

42. Though, it is argued that publication of names of criminals on the flysheet board of the concerned police station is permissible in the case of proclaimed offenders and even police regulation authorizes preparation of different registers which have been mentioned in the policy/circular issued by the Director General of Police, issued on April, 10, 2011 and it is further submitted that State can publish names of proclaimed offenders or persons under surveillance, but there is no provision for displaying such names in public domain except that of proclaimed offenders on the flysheet board of the concerned police station. Chapter XX of the Police Regulations deals with the aspect of registration and surveillance of bad characters, Regulation 223 provides for maintenance of, "Village crime book', terming it to be a confidential record to be kept at every police station containing

information about the crime and criminals of each village in the circle.

43. Regulation 228 deals with the history sheets and deals with Class A and Class B history sheets. It specifically provides that history sheets are personal records of criminals under surveillance. Regulation 250 provides that history sheets are confidential records and though they are kept in the village crime note book, the Station House Officer is directed to see that unauthorized persons do not obtain access to them.

44. Regulation 215 deals with the procedure in case of absconded offenders and the purpose of maintaining register of absconded offenders Regulation 218 provides that at every police stastion a register shall be maintained in form No.214 is to bring the names and full particulars of all absconded offenders only.

45. Regulation 287, on which lot of emphasis has been placed by Learned AAG, provides for a notice board but makes it clear that this notice board shall be set up in a conspicuous place at every police station for proclamations and public notices. It reads as under :-

"287.Notice Board - *A notice board shall be set up in a conspicuous place at every police station for proclamation and public notices. Officer in charge shall remove or renew notices as occasion arises. If any of the sections of the Gambling Act except Section 13 and 17, have been extended to any place within the limits of the station circle, a notice stating the boundaries of the place should be kept on the board and renewed as often as it becomes illegible."*

46. Thus, Regulation 287 authorises publication of proclamations and public notices only on the notice board.

47. Section 82 (1) of the Code of Criminal Procedure 1973 as amended up to date provides for the conditions in which a proclamation can be issued by any court for an absconding person and further sub section (2) of Section 82 gives statutory mandate to publication of a proclamation in the manner provided under sub section (2) of Section 82 Cr.P.C.

48. "Accused" is a person against whom an allegation is made that he has committed an offence or who is charged with an offence, whereas a convict is a person found guilty of an offence. Both these definitions have been extracted from the Legal Glossary, published by the Government of India by the Department of Law, Justice and Company Affairs and Department of Legislature and Rajbhasha.

49. Two things emanates from this discussion, namely; Police Regulation 287 does not authorize publication of anything other than a proclamation issued under authority of a judicial officer authorized to issue such proclamation besides public notices only. It does not authorize publication of anything else other than what has been provided under Police Regulation 287. Therefore, publication of top 10 list is not permissible even on a careful and liberal consideration of Police Regulation 287. Thus, referring to Question No.(ii) in Reference, it is held that neither the policy/circular nor any of the provisions contained in police regulation, Police Act or Cr.P.C., authorizes authorities of the police to publish names of so called criminals/accused persons on the flysheet board of concerned police station, unless a

proclamation is obtained against them following the procedure established by law.

50. **Re Question (iii)** "Epictetus", a Greek Philosopher, born in 50 AD in Turkey famously quoted that "Men are disturbed not by things but by the view which we take of them", has succinctly dealt with concept of desire in the following words :

Our desires and aversions are mercurial rulers. They demand to be pleased. Desire commands us to run off and get what we want. Aversion insists that we must avoid the things that repel us. Typically when we don't get what we want, we are disappointed, and when we get what we don't' want, we are distressed.

51. This quote extracted from the book, "The Art of Living" by Sharon Lebell, reflects the dilemma of the authorities of the State reflecting their desire to name and shame certain individuals owing to their aversions towards them.

52. Hon'ble Supreme Court in **K.S.Puttaswamy (supra)**, has highlighted the pivotal position of an individual as a focal point of the constitution. Fundamental rights are "basic' and act as protective wall against State power. This judgment focusing on an aspect of privacy as a right to life has in fact insulated an individual from exercise of authority either by the legislation or the State so to prevent a person being made an object of ridicule or scorn. There can not be any hostile discrimination. Preamble of our constitution deals with the concept of fraternity assuring the dignity of individual and the unity and integrity of the nation.

53. The sanctity of privacy, lies in its functional relationship with dignity. This judgment lays down that privacy of an individual is an essential aspect of dignity. Privacy represents the core of the human personality, which is part of broader concept of liberty. Dignity is an entitlement of a constitutionally protected interest in itself. Dignity and freedom are intertwined and facilitate each other.

54. Concept of privacy is not new to us. The Supreme Court developed various rights - interests, similar to privacy, i.e. right of free enjoyment, right to sleep, right to human dignity, right to have justice etc. enlarging the concept of personal liberty under Article 21 of the constitution. In **Kharak Singh Vs. State of U.P., AIR 1963 SC 1295**, for the first time, Supreme Court considered the right to privacy in a case of police surveillance and domiciliary visits at night by the police personnel.

55. In ***Francis Coralie Mullin Vs. The Administrator, Union Territory of Delhi and others, AIR 1981 SC 746,*** the Supreme Court referred to the views of judges of the Supreme Court of U.S. to conclude that fundamental rights of a person continue to embed in him despite detention and hence, a convict is also entitled to the rights guaranteed under Article 21. It held that fundamental right to life is the most precious human right and hence be interpreted in an expansive spirit that will intensify its significance by enhancing the dignity and worth of individual and his life. The Court went to the extent of analyzing the meaning of "life' to determine what entails the right to life. The Court recommended it to be not merely restricted to animal existence but meaning more than just physical survival. It is inclusive of all those limbs and faculties by which life is enjoyed. The Court held that even partial damage to such limb or faculty

as a deprivation, whether it be permanent or temporary or continuing would be the invasion of his life/liberty. It also held that the right to life includes the right to live with human dignity and to fulfil the bare necessities of life. This interpretation encompassing the right to protection against torture or cruel, inhuman or degrading treatment which is enunciated in Article 5 of the Universal Declaration of Human Rights and also guaranteed by Article 7 of the International Covenant on Civil and Political Rights is implicit in Article 21 of the Constitution.

56. In this context, it is held that right to life being an undeniable right can only be abridged according to the procedure established by law and therefore a detenu cannot move freely outside the jail however would be entitled to have interviews with family members and friends and no procedure curtailing this right can stand the test of reasonable, fair and just under Article 14 and 21 of the Constitution.

57. This judgment is a polite reminder to the law enforcing agencies that even convicts and detenu are not to be relegated to animal existence. Thus, ratio of judgment is that when fundamental rights of detenu and convict is intact, then there is no question of it being curtailed for an accused by naming and shaming him, so to relegate him to animal existence.

58. This again bring us to the question of what is human dignity? Answering this question, Author Gaymon Bennett dealt with the aspect of human dignity as figures in the universal declaration of human rights, in his book titled, "Technicians of Human Dignity", Book Subtitle: "Bodies, Souls and the Making of Intrinsic Worth", Book Author(s): Gaymon Bennett, published by Fordham University Press (Page 142), as under :-

"What is human dignity then? Whatever else it may be, human dignity is that which is inherent and it is that which can be, and must be, recognized. It is the kind of thing that one can have faith in. It does not need to account for itself by pointing beyond itself to a feature of human nature, reason, or the divine. It is not derivative of these features, nor is it cultivated or produced. It is, rather, what defines humans as part of the human family. Moreover, and in addition to all this, it is the source of political goods. The recognition of dignity issues in freedom, justice, and peace, and its violation brings with it outrage and disunity.

A number of years ago, legal scholar Klaus Dicke published an essay that, among other things, offers a meditation on the significance of the fact that human dignity in these passages is set forth in a strictly formal manner. This formalism, Dicke suggested, was elaborated in a threefold manner. First, dignity was figured as a given. Second, it was figured without explicit substantive definition--at least insofar as the question of origins is concerned. Third, it was figured as the source and guarantee of human good. Human dignity, as a given, is also a moral mandate and places an absolute obligation on conscience and thereby political action. However, in the course of the declaration, human dignity does not remain a matter of pure form. Where explicit substantive definition might be lacking, tacit and operational definition quickly fills in. It fills in by way of something like retrodiction. In the declaration, human dignity is declaimed as the ground for human rights. What proves to be the case, however, is that human

rights, which are subsequently elaborated, effectively define the substance of human dignity. Dignity is only a guarantee of goods to the extent that the rights that adhere in it are assured. Dignity and rights share a mutually formative and constraining relation, and that relation defines what it means to be human, politically speaking. Among other things, all of this means that, in the declaration, a heterogeneous and novel anthropology is synthesized.

Several aspects about this anthropology are particularly crucial. First, the human is that being whose dignity is immanent and inherent. It is immanent in that dignity does not point beyond itself to another source. It is inherent in that dignity is coincident with being human, per se, and is therefore an essential truth about human being. And insofar as it is coincident with the actuality of being human, dignity is self-referential. I do not mean to say that the delegates to the CHR proclaimed dignity to be self-referential; the debate over sources indicates that most delegates conceived of dignity as grounded in origins of one sort or another. In the course of these debates dignity was not taken to be self-referential. Nevertheless, human dignity, as formulated in the declaration, simply refers to itself; it is self-grounding. This is a first crucial anthropological artifact of the pragmatic and procedural solution to the problem of origins: self-referentiality and self-grounding.

The second artifact concerns the mode of reasoning proper to a self-referential dignity. Terms such as "recognition," "faith," and of course "declaration" are not incidental but rather indicate that the speech-acts that can be taken to be true about human dignity are those produced and authorized in a declamatory fashion. I think it is reasonable to suggest that this conception of the human, this immanent form of dignity, would not have been put in play and would not have come to be commonplace in discussions of human rights if any of the alternatives in the debate over the question of the source of dignity had been found acceptable: reason, God, nature, or the like. Neither these terms nor the modes of reasoning recommending them carried the day. Instead, human dignity was simply declaimed. Consequently, the human was enshrined as that being whose truth could be conceived through a mode of reasoning that was neither theological nor scientific, neither demonstrative nor verificational, but declamatory. The second anthropological artifact of the declaration is that the human is that being whose dignity must simply be declaimed.

The third artifact concerns the mode of jurisdiction appropriate to, even prescribed by, human dignity. The declaration states that human dignity is inherent, and, as inherent, it is the guarantee of human goods. It is morally non-negotiable. As a guarantee of human goods it functions as both absolute and transcendental. It is therefore inviolable: violations of dignity result in outrageous and barbarous acts. It is also demanding: given the fact of past barbarism and the constant threat of further outrage, human dignity prescribes what must be done. And what is it that must be done? Insofar as human dignity is inherent and absolute, it is not susceptible to the play of minimization and maximization. It does not derive from a capacity or a characteristic that could be variable or cultivated. Human dignity does not require the daily conduct of conduct either toward the governmental ends of wealth and security or toward ethical ends

of virtue and justice (although dignity will certain provide the metric according to which governance and ethics might be rightly aligned). Rather, dignity requires protection, reorientation, and redress. Dignity must be protected against violation. Dignity must reorient those practices that threaten to violate it. And dignity commands us to redress those situations where dignity has been compromised."

59. In 1890, Samuel Warren and Louis D.Brandies in an article published in Harward Law Review, titled "the Right to Privacy", 4 HLR 193-220 (1890) defined right to privacy as right to be let alone as under :-

"Thus, in very early times, the law gave a remedy only for physical interference with life and property, for trespass vi et armis. Then the "right to life" severed only to protect the subject from battery in its various forms; liberty meant freedom from actual restrain; and the right to property secured to the individual his lands and his cattle. Later there came recognition of man's spiritual nature, of his feelings and his intellect. Gradually the scope of these legal rights broadened; and now the right to life has come to mean the right to enjoy life - the right to be let alone...."

60. According to Alan Furman Westin, a Professor of Public Law and Government Emeritus, Columbia University, "Privacy and Freedom", (1970) New York, at 7, privacy is the claim of individuals, groups or institutions to determine for themselves when, how and to what extent information about them is communicated to others. Privacy is the voluntary and temporary withdrawal of a person from the general society through physical or psychological means, either in a state of solitude or small-group intimacy or, when among larger groups, in a condition of anonymity or reserve.

61. John Rawls in his celebrated book "Justice as fairness : A Restatement" has enumerated three basic points under Chapter - Principles of Justice. First basic point is that justice as fairness is framed for a democratic society. A democratic society not only profess but wants to take seriously the idea that citizens are free and equal and tries to realize that in its main institutions. The second point is that primary subject of political justice is taken as the basic structure of society i.e. political and social institutions are viewed from an angle as to how they fit together into one united system of cooperation. The third point is that justice as fairness is a form of political liberalism. These three basic tenets presupposes two principles of justice :-

(i) Each person has the same indefeasible claim to a fully adequate scheme of equal basic liberties, which scheme is compatible with the same scheme of liberties for all; and

(ii) Social and economic inequalities are to satisfy two conditions :

(a) They are to be attached to offices and positions open to all under conditions of fair equality of opportunity;

(b) They are to be the greatest benefit of the least- advantaged members of society.

62. From this point of view, when I view privacy and dignity, then in **K.S.Puttaswamy (supra),** in para 109 referring to the earlier judgment of **K.S.Puttaswamy (Retd.) Vs. Union of India - (2017) 10 SCC 1,** it has been held :

109. A close reading of this judgment brings about the following features:

109.1. Privacy has always been a natural right: The correct position in this behalf has been established by a number of judgments starting from Gobind Vs. State of M.P. Various opinions conclude that:

109.1.1. Privacy is a concomitant of the right of the individual to exercise control over his or her personality.

109.1.2. Privacy is the necessary condition precedent to the enjoyment of any of the guarantees in Part III.

109.1.3. The fundamental right to privacy would cover at least three aspects -

(i) intrusion with an individual's physical body,

ii) informational privacy, and

(iii) privacy of choice.

109.1.4. One aspect of privacy is the right to control the dissemination of personal information. And that every individual should have a right to be able to control exercise over his/her own life and image as portrayed in the world and to control commercial use of his/her identity."

508.13. In view of the above, the Court discussed the contours of right to privacy, as laid down in K.S. Puttaswamy, principle of human dignity and doctrine of proportionality. After taking note of the discussion contained in different opinions of six Hon'ble Judges, it stands established, without any pale of doubt, that privacy has now been treated as part of fundamental right. The Court has held that, in no uncertain terms, that privacy has always been a natural right which given an individual freedom to exercise control over his or her personality. The judgment further affirms three aspects of the fundamental right to privacy, namely:

(i) intrusion with an individual's physical body,

(ii) informational privacy and

(iii) privacy of choice.

508.17.....Insofar as principles of human dignity are concerned, the Court, after taking note of various judgments where this principle is adopted and elaborated, summed up the essential ingredients of dignity jurisprudence by noticing that the basic principle of dignity and freedom of the individual is an attribute of natural law which becomes the right of all individuals in a constitutional democracy. Dignity has a central normative role as well as constitutional value. This normative role is performed in three ways:

508.17.1. it becomes basis for constitutional rights;

508.17.2. it serves as an interpretative principle for determining the scope of constitutional rights; and,

508.17.3. it determines the proportionality of a statute limiting a constitutional right. Thus, if an enactment puts limitation on a constitutional right and such limitation is disproportionate, such a statute can be held to be unconstitutional by applying the doctrine of proportionality.

508.18. As per Dworkin, there are two principles about the concept of human dignity, First principle regards an "intrinsic value' of every person, namely, every person has a special objective value which value is not only important to that person alone but success or failure of the lives of every person is important to all of us. It can also be described as self respect which represents the free will of the person, her capacity to think for herself and to control her own life. The second principle is that of "personal responsibility', which means every person has the responsibility for success in her own life and, therefore, she must use her discretion regarding the way of life that will be successful from her point of view.

508.19. Sum total of this exposition can be defined by explaining that as per the aforesaid view dignity is to be treated as "empowerment' which makes a triple demand in the name of "respect' for human dignity, namely:

508.19.1. respect for one's capacity as an agent to make one's own free choices;

508.19.2. respect for the choices so made; and

508.19.3. respect for one's need to have a context and conditions in which one can operate as a source of free and informed choice.

63. In the above context some paragraphs from the judgment of the Supreme Court in **State of Maharashtra Vs. Saeed Sohail Sheikh - (2012) 13 SCC 192** are worth reproducing, which are as under :

39. In a country governed by the rule of law police excesses whether inside or outside the jail cannot be countenanced in the name of maintaining discipline or dealing with anti-national elements. Accountability is one of the facets of the rule of law. If anyone is found to have acted in breach of law or abused his position while exercising powers that must be exercised only within the parameters of law, the breach and the abuse can be punished. That is especially so when the abuse is alleged to have been committed under the cover of authority exercised by people in uniform. Any such action is also open to critical scrutiny and examination by the Courts. 40. Having said that we cannot ignore the fact that the country today faces challenges and threats from extremist elements operating from within and outside India. Those dealing with such elements have at times to pay a heavy price by sacrificing their lives in the discharge of their duties. The glory of the constitutional democracy that we have adopted, however, is that whatever be the challenges posed by such dark forces, the country's commitment to the Rule of Law remains steadfast. Courts in this country have protected and would continue to protect the ideals of the rights of the citizen being inviolable except in accordance with the procedure established by law."

The word "goodfaith" is defined in Section 52 of IPC as under:-

"Good faith".--Nothing is said to be done or believed in "good faith" which is done or believed without due care and attention.

64. The authorities of the police are required to act in goodfaith and not negligently and motivatingly.

65. In **Bhim Singh Vs. State of Jammu and Kashmir - (1985) 4 SCC 677,** Supreme Court has held that

"Police Officers who are the custodians of law and order should have the greatest respect for the personal liberty of citizens and should not flout the laws by stooping to such bizarre acts of lawlessness. Custodians of law and order should not become depredators of civil liberties. Their duty is to protect and not to abduct."

66. Supreme Court in **Sandeep Kumar Bafna Vs. State of Mahashtra** as reported in **(2014) 16 SCC 623** has laid down the law as under :-

7. Article 21 of the Constitution states that no person shall be deprived of his life or personal liberty except according to procedure established by law. We are

immediately reminded of three sentences from the Constitution Bench decision in P.S.R. Sadhanantham vs Arunachalam (1980) 3 SCC 141, which we appreciate as poetry in prose - "Article 21, in its sublime brevity, guards human liberty by insisting on the prescription of procedure established by law, not fiat as sine qua non for deprivation of personal freedom. And those procedures so established must be fair, not fanciful, nor formal nor flimsy, as laid down in Maneka Gandhi case. So, it is axiomatic that our Constitutional jurisprudence mandates the State not to deprive a person of his personal liberty without adherence to fair procedure laid down by law."

67. Starting from Gayman Bennett to Samuel Warren and Louis D.Brandies and other scholars throughout have emphasized on the aspect of dignity as an inherent guarantee to human beings. It being non-negotiable and fundamental. This has been accepted by not only authors of erudition and has been imbibed to be an integral part of Article 21 of the Constitution. K.S. Puttaswamy also treats it as a natural right. It accepts that right to privacy cannot be impinged without a just, fair and reasonable law. It has to fulfill the test of proportionality i.e., (i) existence of a law, (ii) must serve a legitimate State aim and (iii) should be proportionate. But when these tests are applied to the present facts situation, then it is apparent that State has failed to respect both the aspects of privacy and dignity while trying to display their weller or tact in displaying the names of so called top 10 criminals under a police station or of a district.

68. Submission of learned Additional Advocate General General to the effect that even Immanuel Kant accepted that human dignity is not an unfettered right, it is only a quote out of context. Kant's ethics theory is organised around the motion of a "categorical imperative", which is a universal ethical principle stating that one would always respect the humanity in others, and that one should only act in accordance with rules that could hold for everyone. Even George Wilhelm Friedrich Hegel propounded hegelianism, which is the philosophy of G.W.F. Hegel and can be summed up in one line namely, "the rational alone is real".

69. Hegel was greatly influenced by Immanuel Kant and in this backdrop, when submission of the Learned AAG is examined, then in fact the judgments on which he relied, all support the view that State or its instrumentalities are to respect fundamental rights, pass the test of Articles 14 and 16 of the Constitution and the object of any subordinate or delegated legislation cannot be but to make an endeavour to secure justice. Simultaneously, all the actions of the State should be fair, reasonable, non-discriminatory, transparent, non-capricious, unbiased, without favoritism or nepotism in pursuit of promotion of healthy competition and equitable treatment. Thus, there is no quarrel to the proposition that no act of the State unless authorized by a statute or clothed with any constitutional provisions takes away the right to privacy and dignity in any manner whatsoever.

70. In the above backdrop, it is apparent that neither socially nor politically it is desirable to curtail human dignity, which is infringed when names of accused persons are displayed on the flysheet board of the police station concerned or anywhere else without there being any proclamation issued against them under Section 82

Cr.P.C. Thus, this practice of putting the names on the flysheet board is derogatory to the concept of human dignity and privacy and therefore Reference Question No. iii is answered in affirmative that publication of names of accused persons violates their right to privacy and dignity.

71. Once it is held that the act of the authorities of the police is illegal, a logical question arises as to whether petitioners need to be compensated by the State for flagrant violation of their right to privacy and dignity. In my opinion, Yes, they do need to be compensated and the State can not go scot-free. Merely, saying that it is discharging its sovereign functions of governance by making society aware about crime and criminals, they cannot escape their responsibility for their failure to learn to understand constitutionally sanctified protections extended to individuals to preserve their fundamental right of privacy and dignity. The immediate question which arises next is, as to what should be the quantum of compensation. I would have proceeded to determine the compensation but as this aspect has neither been argued nor raised but has been putforth as a corollary to the discussion made holding that publication of names of the petitioners amounts to violation of right to privacy and dignity, I leave it to the petitioners to approach competent court in appropriate proceedings to claim compensation for the wrongs done by the State.

72. Before parting, I would like to place on record my appreciation for valuable services rendered by Sri Vinay Saran, learned Amicus assisted by Sri Saumitra Dwivedi.

73. The petitions are **allowed.** The Court grant the following reliefs:-

(i) The policy/circular dated 06.07.2020 is intra vires Articles 14, 15 and 21 of the Constitution.

(ii) The DGP, UP is directed to forthwith remove the names/identities of Top-10 criminals along with their criminal antecedents from the flysheet board from all the police stations. He is also directed to ensure that a circular in the light of this judgment is sent to all the police heads of the districts so as to ensure strict compliance.

(iii) The circular shall also provide that any violation of this judgment would not only invite disciplinary action but also criminal prosecution under appropriate provisions including payment of compensation from the erring official.

(iv) The benefit of this judgment will not be available to proclaimed offenders and fugitives in law.

Court No. - 29

Case :- CRIMINAL MISC. WRIT PETITION No. - 10974 of 2020

Petitioner :- Jeeshan @ Jaanu And Another

Respondent :- State Of U P And 4 Others

Counsel for Petitioner :- Abou Sofian Usmani,Upendra Upadhyay

Counsel for Respondent :- G.A.

with

Case :- CRIMINAL MISC. WRIT PETITION No. - 13521 of 2020

Petitioner :- Balveer Singh Yadav

Respondent :- State Of U.P. And 2 Others

Counsel for Petitioner :- Siya Ram Verma

Counsel for Respondent :- G.A.

with

Case :- CRIMINAL MISC. WRIT PETITION No. - 14300 of 2020

Petitioner :- Doodh Nath Yadav

Respondent :- State of U.P. And 3 Others

Counsel for Petitioner :- Amit Kumar Tiwari,Shiv Bahadur Singh

Counsel for Respondent :- G.A.

Hon'ble Pankaj Naqvi,J.

Hon'ble Vivek Agarwal,J.

(PANKAJ NAQVI, J.)

I have gone through the judgment of my learned brother with whom I am in complete agreement including the reliefs granted. However, as the issue raised is of considerable public importance involving the dignity of an individual, I have penned my thoughts, but have refrained from adverting to the factual matrix, as the same has been elaborately discussed by my esteemed brother.

Whether the State has a right to disclose the identity and criminal antecedents of an accused in the public domain is an issue involved in this petition?

1. Sri Vinod Diwakar, the learned Addl. Advocate General assisted by Sri Deepak Mishra and Ms. Manju Thakur, the learned AGA for the State justified the disclosure as need of the hour as according to them the nature of crime and criminality is constantly changing and unless the State is conferred with such a power, crime and criminals cannot be controlled putting the lives of citizens at risk.

2. Sri Upendra Upadhyay, Sri Siya Ram Verma and Sri Shiv Bahadur Singh, learned counsel for the petitioners in the respective petitions and Sri Vinay Saran, the learned Amicus assisted by Sri Saumitra Dwivedi vehemently opposed the defence of the State on the premise that the above public disclosure undermines the dignity of an accused as a human being constitutionally protected under Article 21 and the State under the garb of its police power cannot invade such a right.

3. Immanuel Kant defined dignity as *"A quality of intrinsic, absolute value, above any price and thus excluding any equivalence."1*

Ruth Bader Ginsberg has maintained the idea of essential human dignity, that we are all people entitled to respect from our Government as persons of full human stature, and must not be treated as lesser creatures. 2

According to French Philosopher Charles Renouvier- *"Republic is a state which best reconciles the interest and the dignity of each individual with the interests and dignity of everyone."*

Neomi Rao an American Jurist in an illuminating article titled "Three Concepts of Dignity" (NOTRE DAME REVIEW (Vol- 86-2011)) has emphasized **first** and foremost on inherent birth of each individual as an essential facet of dignity. Dignity inheres in every human being. It is not dependent on intelligence, morality or social status. *Intrinsic dignity* is a presumption of human equality, each person is born with the same quantity of dignity. **Secondly,** substantive forms of dignity may require living in a certain way, eg, self control, courage and modesty. **Substantive** conception of dignity is also associated with social welfare rights or protection by the State from poverty and violence. This dignity is not inherent in an individual as it is capable of being lost or gained. **Thirdly,** Constitutional Courts often associate dignity with recognition and

respect. This recognition requires individuals to demonstrate concern for each other, which is compatible with the concept of fraternity and dignity.

5. Post World War-II the atrocities committed by the Nazi regime led to the emergence of modern Constitutional democracies, where prime importance was given to protection of basic human rights with special emphasis on dignity, in their Constitutions.

The preamble of Universal Declaration of Human Rights (UDHR), 1948 mentions dignity as under -

"Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world, ..."

Article 1 of UDHR

"All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood." **Article -12** thereof respects honour and reputation:

International Covenant on Civil and Political Rights (ICCPR), 1966 to which India is a signatory provides that in accordance with the principles proclaimed in the Charter of United Nations, recognition of inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world. Article 17 provides that the obligation imposed by this Article requires the State to adopt legislative and other measures to give effect to the prohibition against such interferences and attacks as well as to the protection of the rights.

The framers of the Indian Constitution while drafting the same were conscious that justice, liberty and equality would be futile if the Constitution is unable to protect and preserve the dignity of an individual. To achieve the goals enshrined in the preamble of the Constitution, the framers gave utmost importance to the existence and enforcement of fundamental rights of the individual.

6. The concept of dignity of an individual is not endowed either on account of the Constitution or the laws rather it inheres in an individual as a human being, which commences the moment he is born and continues even after death. This is how dignity is acknowledged as a manifestation of human rights. The preamble of the Constitution contains a solemn promise to secure the dignity of the individual as its framers were aware that the Constitution is an outcome of a long arduous struggle, which must value the dignity of an individual, independent of his social status.

7. The Protection of Human Rights Act, 1993 defines "human rights" as inclusive of dignity. Section 2(1)(d) thereof reads as under--

2(1)(d) - " human rights" means the rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in the international covenants and enforceable by courts in India.

8. Dignity means self-respect. It cannot be gainsaid that once self-respect is affected, dignity is compromised. Dignity of an individual is inalienable and is not dependent on the status and class of an individual as it originates from the person being a human being and continues even after death.

9. The Apex Court taking a cue from Articles 14, 19 and 21, has translated over a period of time, the concept of life and personal liberty in myriad ways, expanding its scope so as to include respect for dignity of an individual as an integral part of the Constitution. A few instances are -

(I) Death convicts not to be kept in solitary confinements in view of Article 21 as convicts are not wholly denuded of their fundamental rights.3

(II) For handcuffing of accused while in transit from jail to Court, reasons must be recorded by the police authorities for handcuffing.4

(III) Right of an accused to consult his / her lawyer in jail premises in the presence of a jail officer, who is not to be present within audible distance5

(IV) Minimum requirements for workers in order to enable them to live with dignity and no State has the right to take any action, which deprives a person of the enjoyment of basic essentials.6

(V) Police officers should have greatest regard for the personal liberty of an individual as they are custodians of law and order, they should not flout the law as their duty is to protect the individuals.7

(VI) Activists arrested, paraded throughout the town and beaten up by police - The Court held that it must intervene in the interest of justice, human dignity and democracy. It further held that "if dignity or honour vanishes, what remains of life."8

(VII) Exhaustive guidelines laid down to be followed by the police, while effecting the arrest of an accused keeping in view the dignity of the accused.9

(VIII) Practice of custodial torture, rape and death in police custody as being in naked violation of human dignity came to be deprecated, coupled with several directions to protect the rights of accused along with vicarious liability of the State for compensation, if found to be culpable for the infringement of fundamental rights of the accused.10

(IX) Human dignity was held to be an intrinsic value of every human being by virtue of his existence and it is the duty of the State not only to protect the human dignity but to facilitate it by taking positive steps.11

(X) Accused during investigation cannot be subjected to Narco Analysis / Polygraph/ Brain Electrical Activation Profile (BEAP) without his consent, else it would be violative of Article 20(3) and 21 of the Constitution.12

(XI) Many rights of accused are derived from his dignity as a human being.13

(XII) The Constitutional value of human dignity has a central normative role. Human dignity as a constitutional value is the factor that unites the human rights into one whole.14

10. I, now proceed to deal with the case of **Mohd Nayyar Azam Vs. State of Chhattisgarh, (2012) 8 SCC 1,** as its facts are akin to the present case.

Azam was a doctor working for the marginalised section of the society, who

incurred the wrath of the local coal mafia, the police and persons, whose interest was affected. He came to be arrested and while he was kept in the lock up at the police station, he was not only abused and assaulted, but the SHO and ASI took his photograph compelling him to hold a photograph on which the following was written: ***"Mai Dr. M.N. Azam chal-kapati, chor aur badmash hun",*** which translated in English would mean that **"I, Dr. M.N. Azam, am a cheat, fraud, thief and a rascal".** Subsequently the said photograph was circulated at large. The Apex Court, inter alia, took the view that the conduct of the police in getting the petitioner photographed with a placard containing the malicious statement did amount to humiliation and mental trauma in police custody corroding human dignity. I derive support from the following paragraphs of ***Nayyar*** (supra)--

"38. It is imperative to state that it is the sacrosanct duty of the police authorities to remember that a citizen while in custody is not denuded of his fundamental right under Article 21 of the Constitution. The restrictions imposed have the sanction of law by which his enjoyment of fundamental right is curtailed but his basic human rights are not crippled so that the police officers can treat him in an inhuman manner. On the contrary, they are under obligation to protect his human rights and prevent all forms of atrocities.

We may hasten to add that a balance has to be struck and, in this context, we may fruitfully quote a passage from D.K. Basu (supra):

There can be no gainsaying that freedom of an individual must yield to the security of the State. The right of preventive detention of individuals in the interest of security of the State in various situations prescribed under different statutes has been upheld by the Courts. The right to interrogate the detenus, culprits or arrestees in the interest of the nation, must take precedence over an individual's right to personal liberty. ..... The action of the State, however, must be "right, just and fair". Using any form of torture for extracting any kind of information would neither be 'right nor just nor fair' and, therefore, would be impermissible, being offensive to Article 21. Such a crime-suspect must be interrogated-indeed subjected to sustain and scientific interrogation-determined in accordance with the provisions of law. He cannot, however, be tortured or subjected to third degree methods or eliminated with a view to elicit information, extract confession or derive knowledge about his accomplices, weapons etc. His constitutional right cannot be abridged except in the manner permitted by law, though in the very nature of things there would be qualitative difference in the method of interrogation of such a person as compared to an ordinary criminal.

39. ....

40. ....

41. Presently, we shall advert to the aspect of grant of compensation. The Learned Counsel for the State, as has been indicated earlier, has submitted with immense vehemence that the Appellant should sue for defamation. Our analysis would clearly show that the Appellant was tortured while he was in custody. When there is contravention of human rights, the inherent concern as envisaged in Article 21 springs to life and enables the citizen to seek relief by taking recourse to public law remedy.

11. A welfare State is governed by rule of law. The approach of the Apex

Court in respecting and upholding the dignity of an individual, whether he be an accused or a convict, is both pragmatic and sensitive.

Sensitization is an important aspect of policing as the Police being in the forefront to maintain law and order are expected to strictly uphold the rule of law. A police force sans sensitivity could play havoc with the life and liberty of an individual including his / her dignity. Dignity is neither class centric nor an elitist concept. It inheres in all individuals as human beings. Article 21 encompasses all shades of dignity as a necessary concomitant of liberty. Life without dignity would amount to mere animal existence in the opinion of the Apex Court. Fundamental rights of an accused while in custody or not are never wholly denuded, they stand abrogated only to the extent he is unable to enjoy them on account of his incarceration. The State has no right whatsoever to indulge in any act, which dents the dignity of an individual, as once dignity is lost, it cannot be retrieved.

12. The circular of D.G, Police, U.P dated 6.7.2020 envisaging a criteria to select Top-10 criminals in a district and in each police station is in exercise of power to maintain surveillance, to which no illegality could be attached. I also hold the circular dated 6.7.2020 to be lawful and valid. However, there is nothing in the circular which enables the police to disclose the identity of an accused and his criminal antecedents in public gaze. It could not be disputed by the learned Addl. Advocate General that a police station is a public place as any member of public is entitled to right of entry. The State sought to justify the disclosure with a view to alert and caution its citizens as to the activities of the accused. The State also relied on an order of the Apex Court, i.e, ***Ram Babu Singh Thakur v. Sunil Arora and Ors,*** **2020 SCC Online SC 178,** where it permitted the Election Commission of India to disclose the criminal antecedents of a candidate contesting elections under the Representation of People Act, 1951 in public domain.

13. I am not impressed with either of the pleas. A welfare State, governed by rule of law must adhere to all constitutional norms. All actions of the State must be prompted in public interest and not be an outcome of preconceived prejudices. It does not behove a State to dent the dignity of an individual howsoever horrific his conduct may be. All that the State is constitutionally empowered to do is to conduct fair and unbiased investigation against an accused, prosecute him in a court of law by providing adequate opportunity to defend himself. I need not reiterate that a convict too is entitled to the enforcement of at least those fundamental rights or basic human rights which affect his life and liberty including dignity as a human being under Article-21.

14. The order of the Apex Court in Election case was in the context of the power of Election Commission to hold free and fair election, to elect a democratic government, which is one of the basic structures of the Constitution. If the elector is made aware of the alleged criminal antecedents of a candidate, the voter would be in a better position to take an informed decision to vote. Here in the present case no laudable object is achieved with the disclosure of identity of the accused and his alleged criminal antecedents in public domain.

15. The recent decision in ***K.S. Puttaswamy and Ors. vs. Union of India (UOI) and Ors,* (2017) 10 SCC 1** only reinforces the view that the privacy of an individual is inextricably linked with dignity which inheres in Article-21.

Dr. D.Y. Chandrachud, J.

" Para-119-- To live is to live with dignity. The draftsmen of the Constitution defined their vision of the society in which constitutional values would be attained by emphasising, among other freedoms, liberty and dignity. So fundamental is dignity that it permeates the core of the rights guaranteed to the individual by Part III. Dignity is the core which unites the fundamental rights because the fundamental rights seek to achieve for each individual the dignity of existence. Privacy with its attendant values assures dignity to the individual and it is only when life can be enjoyed with dignity can liberty be of true substance. Privacy ensures the fulfilment of dignity and is a core value which the protection of life and liberty is intended to achieve."

Justice S.A. Bobde

"Para-411 - It is difficult to see how dignity - whose constitutional significance is acknowledged both by the Preamble and by this Court in its exposition of Article 21, among other rights - can be assured to the individual without privacy. Both dignity and privacy are intimately intertwined and are natural conditions for the birth and death of individuals, and for many significant events in life between these events. Necessarily, then, the right of privacy is an integral part of both 'life' and 'personal liberty' Under Article 21, and is intended to enable the rights bearer to develop her potential to the fullest extent made possible only in consonance with the constitutional values expressed in the Preamble as well as across Part III."

Justice A.M. Sapre

"Para-542 - The keynote of the Preamble was to lay emphasis on two positive aspects - one, "the Unity of the Nation" and the second "Dignity of the individual". The expression "Dignity" carried with it moral and spiritual imports. It also implied an obligation on the part of the Union to respect the personality of every citizen and create the conditions in which every citizen would be left free to find himself/herself and attain self-fulfillment.

543. The incorporation of expression "Dignity of the individual" in the Preamble was aimed essentially to show explicit repudiation of what people of this Country had inherited from the past. Dignity of the individual was, therefore, always considered the prime constituent of the fraternity, which assures the dignity to every individual. Both expressions are interdependent and intertwined.

544. In my view, unity and integrity of the Nation cannot survive unless the dignity of every individual citizen is guaranteed. It is inconceivable to think of unity and integration without the assurance to an individual to preserve his dignity. In other words, regard and respect by every individual for the dignity of the other one brings the unity and integrity of the Nation."

16. Surveillance is expected to be secretive and discreet so that the person

concerned does not know that he is under surveillance. It is an important power of police with a view to keep both criminals and crimes at bay. Once the identity of a person under surveillance is made known to public not only the purpose of surveillance stands frustrated, but the State and its officers also become vicariously liable for infringing the dignity of an individual. U.P. Police Regulations may not be having statutory support as they are only guidelines for efficient working of the police, but when Rule 250 provides that history-sheets are confidential records and the Station Officer must see that unauthorized persons do not have access to them then how can the police be permitted to violate its own rules under the garb of controlling crime by naming and shaming persons?

17. Prof. James Witman of Yale Law School has described shaming as a practice as "intuitively barbaric" when society shows its contempt or disgust towards individual wrongdoing by subjecting the perpetrator to a form of peculiar vulnerability, which can deprive him or her of dignity or personhood."15

Similarly, Prof. James Carey has warned against the use of rituals of shame for they are "dangerous moments in the life of democracies, when the power of the State, public opinion or both is inscribed on the body of the targetted individuals.16

18. Human dignity has become an inseparable part of constitutionalism and human rights. The beauty of Article-21 is that its protection is available to all persons. What could be more horrifying for our generation than to witness a psychopath terrorist, on a shooting spree in the lanes of Mumbai, ultimately nabbed by the police, put on trial, provided a counsel at State expense, resulting in conviction and sentenced to death but still buried with dignity. This is how our Constitutional Courts and Constitutional morality have extended dignity even to a dead person irrespective of his class/ caste/ religion without being swayed by the gravity of offence. The Constitutional Courts are obliged under all circumstances to uphold the dignity of an individual.

19. I, in the ultimate analysis, am of the view that the circular of DG (Police) dated 6.7.2020 cannot be faulted, but the action of its officers in disclosing the identity of petitioners in police stations in public gaze is absolutely unwarranted and uncalled for as being violative of Article 21 of the Constitution.

The writ petitions are **allowed.**

(2021)02ILR A122
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 08.02.2021

BEFORE

THE HON'BLE RITU RAJ AWASTHI, J.
THE HON'BLE MANISH MATHUR, J.

P.I.L. Civil No. 24271 of 2020

Amarjit Samuel Datt ...Petitioner
Versus
U.O.I. & Ors. ...Respondents

Counsel for the Petitioner:
Abhishek Singh, Prashant Kumar

Counsel for the Respondents:
C.S.C., A.S.G.

A. Constitution of India,1950-Article 226-application-installation of mobile tower

and 4G Base Transmitting Station at the adjacent plot of the residence of the petitioner-the issues raised in the writ petition are by and large the same as have been framed by the court while deciding the case of *Smt. Asha Mishra*-the petition is dismissed in terms of the judgment of *Smt. Asha Mishra*.(Para 3 to 11)

B. Studies undertaken both in India as well as by other international organization have unanimously opined that the emissions from these equipments are minuscule and do not warrant the anxiety or fear which is sought to be generated by this petition.(Para 8, 9)

The petition is dismissed. (E-5)

List of Case cited:-

Smt. Asha Mishra Vs St. of U.P. & ors. (2017) 1 UPLBEC 261.

(Delivered by Hon'ble Ritu Raj Awasthi, J.
&
Hon'ble Manish Mathur, J.)

1. Heard learned counsel for the petitioner as well as Mr. J.N. Mathur, learned Senior Advocate assisted by Mr. Aakash Prasad, learned counsel for the opposite party no.7 and Mr. S.B. Pandey, learned Assistant Solicitor General of India assisted by Mr. Ambrish Rai, learned Central Government Counsel for opposite party nos. 1 to 4 and the learned Standing Counsel for the opposite party nos. 5 and 6.

2. The writ petition has been filed seeking the following reliefs:-

i) Issue a writ of mandamus or a writ, order or direction in the nature of mandamus com*manding the opposite parties to remove the installation and operation of Mobile Tower and 4G Base Transmitting Station (BTS) by the opposite party no.7 at the plot of the opposite party no.8.*

ii) Issue a writ of mandamus or a writ, order or direction in the nature of mandamus commanding the opposite parties to publish the result or conclusion of the study on the possible impact of EMF radiation exposure from mobile tower and hand set on life and related initiative conducted by opposite party no.1.

iii) Issue a writ of mandamus or a writ, order or direction in the nature of mandamus commanding the opposite parties to include the "Non-Ionizing Electromagnetic Radiation" as pollutant under Environment (Protection) Act, 1986 and insert a schedule therein detailing the safety norms/guidelines.

iv) Any other appropriate writ order or direction this Hon'ble Court may deem just and necessary in the facts and circumstances of the case may also be passed; and

v) to allow this writ petition with costs."

3. Learned counsel for petitioner submits that opposite party no.7 has erected mobile tower and 4G Base Transmitting Station at the adjacent plot of the residence of the petitioner. It is located in the densely populated area and the emission of radiation from the tower has adverse effect on the health of the petitioner and his family members and the people living nearby.

4. It is also submitted that no uniformed policy is being followed for installation of the mobile towers and the advisory on use of mobile towers considering the impact on wildlife including birds and bees, has not been considered as well as the questions raised in this regard before the Parliament and the

answers given by the Ministry of Telecommunication has also not been considered. It is submitted that the petitioner had filed the instant writ petition in the nature of Public Interest Litigation, however subsequently the writ petition has been treated in the Miscellaneous Bench jurisdiction as the petitioner has come forward showing that the petitioner himself is aggrieved with the action of the opposite parties in installation of 4G Base Transmitting Station and mobile tower on the plot adjacent to the house of the petitioner.

5. Mr. J.N. Mathur, learned Senior Advocate appearing for the opposite party no.7, on the other hand, submits that the controversy raised in the writ petition has been considered and decided by a judgment of Division Bench of this Court in the case of ***Smt. Asha Mishra Vs. State of U.P. and others;*****2017 (1) UPLBEC 261,** which has been consistently followed in subsequent judgments and orders of this Court. He has placed a compilation of the judgments passed in this regard by this Court. The compilation placed before the Court is taken on record.

6. Learned counsel for petitioner tried to submit that the judgment passed by this Court in the case of ***Smt. Asha Mishra*** **(Supra)** is distinguishable from the case of the petitioner on the ground that in that case under challenge was the installation of mobile towers and 4G Base Transmitting Towers being established in the entire State of U.P. whereas in the present case the petitioner has specifically pleaded that the opposite party no.7 has installed mobile tower and 4G Base Transmitting Station adjacent to the residence and area of the petitioner which is densely populated. It is also submitted that the Court has not considered the earlier orders passed by the Division Bench of this Court on 29.1.2015 in Writ-C No. 1626 of 2015; Chhedilal Vs. Union of India and others wherein the writ petition was disposed of with direction that the mobile towers shall not be established on the land in dispute in contravention of the guidelines issued by the Government from time to time.

7. It is to be noted that the Division Bench of this Court headed by the then Hon'ble Chief Justice while deciding the case of ***Smt. Asha Mishra*** **(Supra)** has framed the issues which have fallen for consideration. The said issues have been noted in Paragraphs 5 of the judgment. For convenience Paragraph 5 of the judgment is reproduced below:-

"5. Upon a review of the material placed before us and the submissions advanced we find that the following broad issues fall for our consideration:

"I. Whether the contention of the petitioners including those related to the deleterious effect of EMF radiation upon human health and safety is liable to be sustained;

II. Whether the seventh respondent is in compliance with the statutory and regulatory framework presently in vogue;

III. Whether the Court in exercise of its jurisdiction under Article 226 would be justified in granting the reliefs as sought; and

IV. Further directions if any."

8. The answer to these issues start from Paragraphs 19 onwards. The Court has answered each and every issue in the judgment. Paragraphs 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31 and 32 of the said judgment are reproduced below:-

"19. Having traversed and noticed the vast field of scientific material gathered by different committees and organisations, the precedents rendered on the subject we now proceed to deal with the issues raised before us on merits.

F. ON MERITS

I. Whether the contention of the petitioners including those related to the deleterious effect of EMF radiation upon human health and safety is liable to be sustained?

20. The primary contention of the petitioners as noted above is based upon a perceived present and imminent danger to human health and safety caused by EMF radiation. The report of Prof. Girish Kumar forms the fundamental bedrock upon which these submissions are based. We however find that this is not the first time that this report has been utilized or pressed into service for laying a challenge to the roll out and establishment of mobile towers. In fact this very report was noted by the Division Bench of the Court at Lucknow in Shriram Singh Jauharia when taking note of the said report the Bench constituted a committee to examine the conclusions and undertake a comprehensive review on the subject of EMF radiation and the ill effects of mobile telephony on human health. As the record would reveal and as would be evident from the findings of the committee that we have extracted above, the conclusion arrived at was that there was no material which justified the conclusions arrived at by Prof. Kumar. The Committee, in fact went to the extent of characterizing the perceived threats as voiced by Prof. Kumar as being a misrepresentation. Once that be the state of the record we find that the report of Prof. Kumar does not advance the case of the petitioners any further.

21. However since the issue raised in the petitions related to public health and safety and bearing in mind the command of Article 21 we delved even further to consider whether there was any material, which justified the invocation of our constitutional powers to injunct the seventh respondent from establishing the mobile towers or BTS's.

22. We felt constrained to burden this judgment with various extracts of the findings and recommendations of DOT, the Parliamentary Standing Committee as well as the WHO in order to establish that a plethora of material gathered by experts clearly negatives the perceived and alleged imminent threat and danger to health as was sought to be canvassed before us. All the experts have unanimously voiced their opinion that the present body of scientific research does not justify the threat to health and life as is sought to be portrayed by some quarters including the petitioners before us.

23. On the above state of the record we find no merit in the challenge raised by the petitioners on this score. Bearing in mind the present conclusions and findings on the subject as expressed by experts across the board we find that there exists no justification for the submission of a present and imminent danger or threat to human health from the radiation emitted by mobile towers and BTS's. We further note that the studies undertaken both in India as well as by other international organizations have unanimously opined that the emissions from these equipments are minuscule and do not warrant the anxiety or fear which is sought to be generated in this batch of petitions. Our conclusion so recorded is of course not intended to relieve DOT or the Union Government from its obligation of continuing a scientific review of the subject. However in light of what we have found above, we rule against the petitioners insofar as Issue No. I is concerned.

Issue No. 2 Whether the seventh respondent is in compliance with the

statutory and regulatory framework presently in vogue?

24. We find that the petitioners have clearly failed to establish on the basis of any material on record that the seventh respondent was in breach of the statutory requirements placed and enforced by DOT. In order to be assured independently, we as a matter of abundant caution called upon the TERM Cell to carry out a technical audit of all the proposed sites. The report of the TERM Cell placed before us upon affidavit did not find any of the sites to be in violation of the statutory and regulatory norms governing the field. We further note that as per the regulatory provisions prevalent, none of the mobile towers or BTS's of the seventh respondent would be entitled to be energized for commercial operations unless and until the self certification process is complied with and requisite papers filed before the TERM Cell. We therefore and in light of the above, find no ground which may warrant a restraint upon the establishment of the mobile towers and BTS's being established by the seventh respondent.

Issue No. III. Whether the Court in exercise of its jurisdiction under Article 226 would be justified in granting the reliefs as sought?

25. The submissions of learned counsel for the petitioners advanced on these petitions on more than one aspect would require us to travel into the realm of testing policy measures as well as evaluation of scientific material gathered by experts. The Court in exercise of its powers of judicial review undertakes an exercise of testing actions of the State on the touchstone of our Constitution and the laws of the land. Articles 21 and 38 clearly mandate the State to take measures to ensure the safety, health and well being of all citizens. Its measures and actions must be aimed at alleviating the living conditions of all citizens and the environment of the nation as a whole. The Court in exercise of its constitutional mandate is therefore obliged to enquire into and test all actions of the State bearing in mind the breath and content of Articles 21 and 38. However at the same time, it cannot loose sight of certain inherent limitations placed upon the exercise of this power. The Court is not an arena for scientific debate nor is it a forum for the testing of conflicting scientific studies and findings of experts. That is surely not its province. The Courts exercise their power of judicial review to test a lis or a cause necessarily against legal norms or legal parameters. Legal norms and legal parameters do not, nay, cannot be left to rest upon competing or nebulous scientific research or opinion.

26. We may in this connection usefully refer to two causes, which travelled to the Supreme Court for an amplification of what we have held. The first was a challenge to the construction of the Tehri Dam. The second more recent and of far greater import than the subject which falls for our determination - the use of nuclear energy. N.D. Jayal Vs. Union of India10 dealt with a challenge to the establishment of the Tehri Dam. The Supreme Court dealing with the challenge held: -

"20. This Court cannot sit in judgment over the cutting edge of scientific analysis relating to the safety of any project. Experts in science may themselves differ in their opinions while taking decisions on matters related to safety and allied aspects. The opposing view points of the experts will also have to be given due consideration after full application of mind. When the Government or the authorities concerned after due consideration of all viewpoints and full application of mind

took a decision, then it is not appropriate for the court to interfere. Such matters must be left to the mature wisdom of the Government or the implementing agency. It is their forte. In such cases, if the situation demands, the courts should take only a detached decision based on the pattern of the well settled principles of administrative law. If any such decision is based on irrelevant consideration or non-consideration of material or is thoroughly arbitrary, then the court will get in the way. Here the only point to consider is whether the decision-making agency took a well informed decision or not. If the answer is "yes", then there is no need to interfere. The consideration in such cases is in the process of decision and not in its merits."

27. Dealing with the challenge to the establishment of a nuclear power plant in G. Sundarrajan Vs. Union of India11 the Supreme Court ruled: -

"15. India's national policy has been clearly and unequivocally expressed by the legislature in the Atomic Energy Act. National and international policy of the country is to develop control and use of atomic energy for the welfare of the people and for other peaceful purposes. NPP has been set up at Kundankulam as part of the national policy which is discernible from the Preamble of the Act and the provisions contained therein. It is not for courts to determine whether a particular policy or a particular decision taken in fulfillment of a policy, is fair. The reason is obvious, it is not the province of a court to scan the wisdom or reasonableness of the policy behind the statute.

200. Much hue and cry has been raised by some sections of the people about the possible impact of radiation from KKNP Units 1 and 2, a point which has been addressed by AERB, NPCIL, MoEF and all the Expert Committees constituted to go into the impact and effect of radiation from the units not only on humans but also on ecology. The Experts Committees are of the unanimous opinion that there will not be any deleterious effects due to radiation from the operation of KKNP, and that adequate safety measures have already been taken. We cannot forget that there are many potential areas of radiation reflected in many uses of radioactive materials. Radioactive materials are used in hospitals, surgeries and so on. Mobile phone use, though minor, also causes radiation. In a report of the Department of Telecommunication "Mobile Communication -- Radio Wave and Safety" released in October 2012, it has been stated that a human body is exposed to more electromagnetic field radiation in case of a call from mobile phone in comparison to the radiation from a mobile tower.

201. We have, therefore, to balance "economic scientific benefits" with that of "minor radiological detriments" on the touchstone of our national nuclear policy. Economic benefit, we have already indicated has to be viewed on a larger canvas which not only augment our economic growth but alleviate poverty and generate more employment. NPCIL, while setting up the NPP at Kundankulam, have satisfied the environmental principles like sustainable development, corporate social responsibility, precautionary principle, inter-/intra-generational equity and so on to implement our National Policy to develop, control and use of atomic energy for the welfare of the people and for economic growth of the country. Larger public interest of the community should give way to individual apprehension of violation of human rights and right to life guaranteed under Article 21.

205. This Court in Chameli Singh v. State of U.P. [(1996) 2 SCC 549] held that in an organized society, the right to

live as a human being is not ensured by meeting only the animal needs of man, but secured only when he is assured of all facilities to develop himself and is freed from restrictions which inhibit his growth. Right to shelter includes adequate living space, safe and decent structure, clean and decent surroundings, sufficient light, pure air and water, electricity, sanitation and civil amenities like road, etc. so as to have easy access to his daily avocation.

206. Nuclear power plant is being established not to negate right to life but to protect the right to life guaranteed under Article 21 of the Constitution. The petitioner's contention that the establishment of nuclear power plant at Kundankulam will make an inroad into the right to live guaranteed under Article 21 of the Constitution, therefore has no basis. On the other hand, it will only protect the right to life guaranteed under Article 21 of the Constitution for achieving a larger public interest and will also achieve the object and purpose of the Atomic Energy Act. "

28. Bearing in mind the principles which must guide the exercise of the power of judicial review as enunciated by the Supreme Court we are of the opinion that this Court while exercising its jurisdiction under Article 226 would clearly not be justified in proceeding on the basis of the conclusions of an author of a scientific study which itself has not found acceptance amongst its peers.

29. Our reluctance to accede to the submissions advanced by the learned counsel for the petitioners also stemmed from the factual backdrop of the present proceedings. There was no conclusive material which was brought to our attention which may have even remotely be read as evidencing, underlining or supporting the perceived threat to human health voiced by the petitioners. Further we note that the seventh respondent is in the process of rolling out and establishing its 4G network on the basis of licenses and permissions granted by the Union Government which are not under challenge before us. It is also not established from the record that the seventh respondent is in breach of the conditions of its license or that its installations violate the regulatory framework put in place by the Union and State governments.

30. The present policy regime as approved by the Union Government grants authority to the seventh respondent to establish a 4G mobile telephony and data network in accordance with the license issued to it. Mobile telephony is an enterprise which is duly permitted and has the sanction of the State. The subject of the so called and alleged effects of its usage on public health is a debate which continues both at the national as well as the international level. The fact however remains that as on date there is no conclusive material or scientific study which may justify or be read as conclusive proof of the canvassed ill effects of EMF radiation on human health. We are also mindful of the fact that DOT has adopted and put in place national standards which peg the maximum emission levels at 1/10th of the international norm prescribed by ICNIRP. This in our opinion should have been sufficient to allay the fears and anxieties of the petitioners. Moreover the scientific experts in the field have found no justification in the findings recorded by Prof. Girish Kumar. The report of the Committee comprised of eminent persons who are experts in their field is liable to be accorded judicial deference. We accordingly find no ground which would warrant the issuance of the writs as prayed for.

Issue No IV Further directions

31. Though having found no justification for the imposition of a prohibition or restraint upon the installation of mobile towers and BTS's there remain certain issues which in our opinion do require notice. As per the admitted stand of the Union, the TERM Cells carry out a random inspection of 10% of the mobile tower sites falling within their respective jurisdictions. No periodicity of inspections appears to be fixed. There also does not appear to be in place a system for verification of the self-certification which is filed by the prospective service provider. The other area of concern appears to be, as was evident from the common refrain of all the petitioners, the lack of a complaint redressal mechanism or at least the absence of an effective, robust and transparent grievance redressal machinery.

32. The absence of determinative scientific data does not lead us to hold that the technology and its perceived effect on health and well being does not require a continuous monitoring or sustained scientific study or research. It is evident from the body of material placed before us that internationally a close watch is being maintained on the effects of EMF radiation. All studies indicate that presently there appears to be no definitive scientific material or data which may warrant EMF radiation being classified as endangering health. However the state of the research can at present, as we have noted above, be best described as being still nebulous and tenuous. This is perhaps the reason for research in the field being continued and ongoing. The standards adopted in our country are stated to be more stringent than those suggested by the WHO. However the fixation of a standard is but one aspect of the oversight mechanism which must necessarily be put in place. The more important and fundamental issue appears to be the requirement of a system which ensures the adherence to the standards fixed. This aspect, in our opinion, cannot be left to depend solely upon a 10% random annual check carried out by TERM Cells. "

9. After answering the issues the Court has also considered the question of Grievance Redressal Mechanism while delivering the aforesaid judgment and in this regard has issued certain directions which are given in Paragraph 33. Paragraph 33 of the judgment is reproduced below:-

"33. The other aspect as noted above relates to the grievance redressal mechanism. From the submissions advanced and the material placed before us we find that there does exist the need for the establishment of a grievance redressal and information dissemination mechanism which may take note of complaints and allay the various doubts which stand raised in respect of the subject in question. The absence of an effective machinery was also noted by the Parliamentary Standing Committee which found the reply of DOT to be unsatisfactory and reiterated its recommendations for the system being made more robust and responsive. Bearing in mind the serious concerns raised in respect of the above two issues, we proceed to issue the following directions: -

1) DOT will expeditiously and not later than within 2 months from the date of this judgment frame guidelines for the TERM Cells carrying out periodical inspection of mobile towers and BTS stations falling within their respective jurisdictions;

2) DOT while framing the guidelines shall also consider and if thought feasible incorporate appropriate provisions for inspection of all or such

percentage of cell towers as may be deemed appropriately by the TERM Cells;

3) DOT shall also consider and implement a mechanism where the testing of cell sites is not left to depend upon the self certification procedure of the service provider solely;

4) The directions issued shall mandate the TERM Cells to disclose their findings of compliant and non-compliant mobile towers and BTS's for the information of the general public;

5) The TERM Cells shall also make known to the general public the action taken against erring and non-compliant mobile towers and BTS establishments;

6) DOT shall ensure that the particulars of TERM Cells including the particulars of its Nodal Officer for different regions are made known to the members of the general public;

7) DOT shall establish a complaint cell in the various regions details of which are given wide publicity in the area concerned, to receive and address public complaints relating to mobile towers and BTS;

8) DOT shall also issue necessary directions to ensure that the complaint cell duly looks into, enquires and disposes of such complaints within a reasonable period of time."

10. It is to be noted that this judgment has been followed by this Court in deciding the controversy involved with respect to the installation and operation of mobile towers and 4G Base Transmitting Stations in the subsequent writ petitions and all those writ petitions have been dismissed in terms of the judgment passed in the case of ***Smt. Asha Mishra*** **(Supra)**.

11. So far as the contention of learned counsel for the petitioner that the case of the petitioner is different from the case of ***Smt. Asha Mishra*** **(Supra)** and as such that judgment is not to be considered while deciding the present controversy involved in this writ petition is concerned, we are of the considered view that pith and substance of the issues raised in the writ petition are by and large the same as have been framed by the Court while deciding the case of ***Smt. Asha Mishra*** **(Supra)** and as such the judgment of ***Smt. Asha Mishra*** **(Supra)** covers the controversy involved in the instant writ petition.

12. It is also to be noted that so far as the contention of counsel for the petitioner that the advisory on the use of mobile towers considering the impact on wildlife including birds and bees are not followed is concerned, it is to be observed that they are only advisory and not mandatory in nature.

13. So far as the contention of learned counsel for the petitioner that the question raised in the Parliament and the answers to those questions given by the Ministry of Telecommunication have not been considered are concerned, we are of the considered view that the discussion made in the Parliament are not to be considered while deciding the case in a judicial Court.

14. So far as the contention of learned counsel for the petitioner that the judgment of this Court in the case of *Chhedilal (Supra)* is concerned, we are constrained to observe that the said judgment does not lay any *ratio decidendi.* It only says that the erection of mobile towers shall be made as per the guidelines issued by the Government from time to time.

15. Learned counsel for the petitioner has not been able to show that the erection and operation of the impugned mobile tower and 4G Base Transmitting Station by the opposite party no.7 is in contravention of any order or direction of the State Government or any other authority.

16. In this view of the matter, the writ petition lacks merit and is ***dismissed.***

(2021)02ILR A131
REVISIONAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 08.02.2021

BEFORE

THE HON'BLE RAJNISH KUMAR, J.

S.C.C. Revision No. 5 of 2020

Sanjeev Kumar Sibbal ...Revisionist
Versus
Pramod Kumar Tiwari ...Opposite Parties

Counsel for the Revisionist:
Vivek Kumar Rai, Ajai Kumar, Vinod Kumar Pandey

Counsel for the Opposite Parties:
A.M. Tripathi, Rakesh Pandey

A. Criminal Law - Code of Criminal Procedure, 1973-Section 401/397 - Provincial Small Causes Court Act, 1887-Section 25-application-arrears of rent and ejectment-revisionist had entered into agreement for tenancy of a shop-notice were issued for written statement and disposal- revisionist filed an application for permission to deposit the due rent-but the trial court not permitted and application under Order 15, Rule 5 CPC. Rejected on the ground that the revisionist had not deposited the interest of 9% while depositing the rent-defendant failed to present a written statement of defence within 30 days, application under Order 8 Rule 1 CPC also allowed-it was filed beyond 90 days, the maximum period provided for filing written statement-provision made in Order 8 Rule 1 are directory in nature and period may be extended by the court in case sufficient reason is shown in writing-impugned order set aside giving an opportunity to the revisionist to submit explanation for delay in support of application for condonation of delay.(Para 2 to 27)

B. Civil Law - Code of Civil Procedure, 1908 - Order 15 Rule 5, Sub-rule(1) - obliges the defendant to deposit, at or before the first hearing of the suit, the entire amount admitted by him to be due together with interest thereon at the rate of 9 percent per annum and further, whether or not he admits any amount to be due, to deposit regularly throughout the continuation of the suit the monthly amount due within a week from the date of its accrual. In the event of any default in making any deposit, " the court may subject to the provision of sub-rule(2) strike off his defence." The word "may" in sub rule (1) merely vests power in the court to strike off the defence, it does not oblige it to do so in every case of default. Before making an order for striking off the defence, it must consider any representation made by the defendant in that behalf and in the absence of representation, the court considers whether defence should be struck off or not on the basis of material on record.(Para 15 to 25)

The revision is Partly allowed. (E-5)

List of Cases cited:-

1. M/S Mangat Singh Trilochan Singh Thru. Mangat Singh(Dead) by L.Rs. & ors. Vs Satpal,(2003) AIR SC 4300

2. Bimal Chand Jain Vs Gopal Agarwal,(1981) SC 1657

3. Anil Kumar Mayor Vs IIIrd ADJ, Saharanpur & ors,(2008) 3 ARC 580

4. Mrs. S. Abel Vs The D.J. & ors.(1980) AIR Alld. 300

5. Meena (Smt.) & Anr. Vs Smt. Pramodani Awasthi, (2016) 2 ARC 379

6. Om Prakash Gupta Vs D.J. & anr. (2019) 1 ARC 826

7. Salem Advocate Bar Assc. Vs UOI,(2005) 6 SCC 344

8. Kailash Vs Nanhku & ors.(2005) 4 SCC 480

9. Kanwar Singh Saini Vs High Court of Delhi,(2012) 4 SCC 307

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

1. Heard Sri Vivek Kumar Rai, learned counsel for the revisionist and Sri Rakesh Pandey, learned counsel for the respondent.

2. The instant revision has been filed under Section 25 of the Provincial Small Causes Court Act, 1887 against the order dated 07.01.2020 passed by the Additional District Judge / Special Judge/ Prevention of Corruption Act, 5th, Lucknow in SCC Suit No.42 of 2019; Pramod Kumar Tiwari Vs. Sanjeev Kumar Sibbal by means of which the application no.C-22 of the revisionist/defendant (here-in-after referred as revisionist) for condonation of delay in filing written statement has been rejected and the application of the opposite party / plaintiff (here-in-after referred as opposite party) under Order-8, Rule-10 of Civil Procedure Code (here-in-after referred as C.P.C) and application under Order-15, Rule-5 of C.P.C. have been allowed and defence of revisionist has been struck off.

3. The brief facts of the case, for adjudication of instant revision, are that the opposite party and the revisionist had entered into an agreement for tenancy on 01.04.2018 in regard to shop No.B-80 situated at Sri Ram Tower, 13-Ashok Marg, Lucknow for a period w.e.f. 01.04.2018 to 28.02.2019 at a monthly rent of Rs.50,000/- per month. The opposite party has filed a suit for arrears of rent and ejectment. The suit was filed on 03.07.2019. The notices were issued fixing 08.08.2019 for written statement and disposal. The revisionist appeared on 08.08.219 and filed an application for permission to deposit the due rent. The revisionist was permitted to deposit the entire due rent till 31.08.2019 on his own risk. In pursuance thereof the revisionist deposited an amount of Rs.3,00,000/- towards the rent w.e.f. 01.03.2019 to 31.08.2019. Thereafter on application of the revisionist, with the permission of the trial court, the rent of September and October, 2019 was deposited on 24.12.2019. The revisionist again preferred an application on 03.01.2019 for permission to deposit the rent of November and December, 2019, which has not been disposed of till date.

4. In regard to filing of written statement it has been stated that the copy of the plaint alongwith documents was not served and after getting the copy of plaint, the written statement alongwith an application for condonation of delay was filed on 04.01.2020 marked as C-22. In the meantime, the opposite party had filed two applications; one application No.C-15 under Order-8, Rule-10 C.P.C. and another application No.C-16 under Order-15, Rule-5 C.P.C for striking of defence. The revisionist had filed the objections to the same thereafter the application nos.C-15, C-16 and C-22 have been considered and decided by means of the impugned order dated 07.01.2020. Being aggrieved the present revision has been filed.

5. Submission of learned counsel for the revisionist was that the revisionist had entered into a tenancy agreement with the opposite party for the shop in question. During the period of agreement, the opposite party had forcefully tried to evict the revisionist on 26.08.2018 therefore the revisionist has filed a suit for permanent injunction bearing Regular Suit No. 2001 of 2018. The revisionist had continuously paid the rent and the rent receipts were issued by the opposite party up to 01.02.2019 which have been annexed with the suit by the opposite party. The notice for termination of tenancy was not served on the revisionist. The suit was filed on 03.07.2019. On notice, the revisionist appeared on 08.08.2019 and on application of the revisionist and with the permission of the trial court revisionist had deposited Rs.3,00,000/- towards rent up 31.08.2019 on 01.09.2019. Thereafter he has again deposited the rent of September and October, 2019 on 24.12.2019 with the permission of court. The rent deposited by the revisionist has been withdrawn by the opposite party. He has also filed an application for depositing the rent of November and December, 2019 on 03.01.2020 but the same has not been disposed of till date. Therefore, the revisionist could not deposit the same. He has further submitted the applications for depositing the rent. He is ready to deposit the entire dues up to date but the trial court has not permitted therefore it could not be deposited. But without considering it and the objection filed by the revisionist and also without considering that the 'first date of hearing' would be the date of framing issues, which have not been framed till date, the application under Order-15, Rule-5 has been allowed.

6. He further submitted that the application for condonation of delay in filing written statement has also been rejected without considering that the written statement was filed after getting a copy of plaint because after filing of tender on 04.09.2019 the date was fixed for 23.09.2019 but subsequently it was mentioned on the order sheet that copy received of plaint but without any signature or date of the revisionist or his counsel. The impugned order has been passed in an arbitrary and illegal manner, which is not sustainable in the eyes of law and is liable to be set-aside. Learned counsel for the revisionist relied on **M/S Mangat Singh Trilochan Singh through Mangat Singh (Dead) by L.Rs. and Others Vs. Satpal; AIR 2003 (SC) 4300, Bimal Chand Jain Vs. Gopal Agarwal; AIR 1981 SC 1657 and Anil Kumar Mayor Vs. IIIrd Additional District Judge, Saharanpur and Others; 2008 (3) ARC 580.**

7. Per contra, learned counsel for the opposite party had submitted that as per tenancy agreement the rent of the shop in question was Rs.50000/- per month. But the same was not being paid regularly and the period of agreement had also expired therefore after issuing notice in accordance with law, which was avoided by the revisionist, the suit for arrears of rent and ejectment was filed. He further submitted that the copy of the plaint was served on the revisionist alongwith the notice and a copy of the same was also filed alongwith supplementary counter affidavit in the civil suit filed by the revisionist in the month of July, 2019 and again on 04.09.2019 before the trial court as the receipt of the plaint was denied. But the written statement was not filed within a period of 90 days and the written statement was filed with delay on 04.01.2020 alongwith an application for condonation of delay without any explanation for delay in filing the written statement. Therefore the application has

rightly been rejected in accordance with law.

8. He further submitted that in the suit for arrears of rent and ejectment, the issues are not required to be framed and for the said purpose no date is fixed therefore the first date of appearance which was also for disposal is the first date of hearing by which date compliance of the Order-15, Rule-5 of C.P.C. should have been made, but it was not done because the interest was not deposited. Thereafter the due rent is required to be deposited regularly each and every month within the period provided but the same has been deposited with delay. Therefore the opposite party had filed the aforesaid applications which have been considered after inviting objections and the applications have been allowed in accordance with law after considering all facts and circumstances of the case. Hence there is no illegality or error in the impugned order. The revision has been filed on misconceived and baseless grounds which are not tenable in the eyes of law. Hence the revision is liable to be dismissed with cost. Learned counsel for the respondent has relied on **Mrs. S. Abel Vs. The District Judge and Others; AIR 1980 Allahabad 300, Meena (Smt.) and Another Vs. Smt. Pramodani Awasthi; 2016 (2) ARC 379 and Om Prakash Gupta Vs. District Judge and Another; 2019 (1) ARC 826.**

9. I have considered the submissions of learned counsel for the parties and perused the impugned order and the records.

10. The revisionist and the opposite party had entered into an agreement for tenancy on 01.04.2018, which was for a period w.e.f. 01.04.2018 to 28.02.2019. The opposite party, on completion of the period of agreement, after giving a notice to the revisionist, filed a SCC Suit for arrears of rent and ejectment. The opposite party had filed two applications; one under Order-8, Rule-10 C.P.C. and another under Order-15, Rule-5 C.P.C for striking off defence of the revisionist. Both the applications alongwith an application for condonation of delay in filing the written statement by the revisionist have been considered together and the applications filed by the opposite party have been allowed and the application filed by the revisionist has been rejected by means of the impugned order. Hence, the present revision has been filed.

11. The learned trial court has rejected the application for condonation of delay in filing written statement on the ground that the written statement has been filed with a delay of about one month but no explanation for delay has been filed and the application of the opposite party under Order-8, Rule-10 C.P.C has been allowed.

12. Order-8, Rule-1 of C.P.C. provides that the defendant shall, within 30 days from the date of service of summons on him, present a written-statement of defence. The said period may be extended up to 90 days for reasons to be recorded in writing. After service of summons the revisionist had appeared on 08.08.2019. It appears that the copy of the suit was not served and the same was served on 04.09.2019, however it has also been disputed. Therefore after receipt of the copy of the plaint by the revisionist on 04.09.2019, the written statement should have been filed within thirty days. But it was not filed and it was filed on 04.01.2020 which is also beyond ninety days, the maximum period provided for filing written-statement. Copy of the order sheet

filed alongwith revision indicates that on 04.09.2019, the copy of the plaint was received by the revisionist and subsequently the dates were fixed for written statement and lastly 02.01.2019 was fixed for written statement but the written statement was filed on 04.01.2019 alongwith an application for condonation of delay.

13. The Hon'ble Apex Court, in the case of **Salem Advocate Bar Association Vs. Union of India; (2005) 6 SCC 344,** has held that the rules of procedure are made to advance the cause of justice and not to defeat it. After considering Order-8, Rule-1 and Order-8, Rule-10 of C.P.C it has been held that the provision of upper limit of 90 days for filling written statement is directory. However, the time can be extended only in exceptional cases.

14. The Hon'ble Apex Court, in the case of **Kailash Vs. Nanhku and Others; (2005) 4 SCC 480,** considered the provisions of Order-8, Rule-1 of C.P. C. and held that the provisions are directory in nature and the time may be extended in case sufficient reason is shown. The extension of time sought by the defendant should not be granted in routine manner and it should be by way of an exception and for the reasons assigned by the defendant and also recorded in writing by the Court with its satisfaction. However, no straitjacket formula can be laid down for it. The relevant paragraphs 42 to 45 are reproduced below:-

"42. Ordinarily, the time schedule prescribed by Order VIII, Rule 1 has to be honoured. The defendant should be vigilant. No sooner the writ of summons is served on him he should take steps for drafting his defence and filing the written statement on the appointed date of hearing without waiting for the arrival of the date appointed in the summons for his appearance in the Court. The extension of time sought for by the defendant from the court whether within 30 days or 90 days, as the case may be, should not be granted just as a matter of routine and merely for asking more so, when the period of 90 days has expired. The extension can be only by way of an exception and for reasons assigned by the defendant and also recorded in writing by the Court to its satisfaction. It must be spelled out that a departure from the time schedule prescribed by Order VIII, Rule 1 of the Code was being allowed to be made because the circumstances were exceptional, occasioned by reasons beyond the control of the defendant and such extension was required in the interest of justice, and grave injustice would be occasioned if the time was not extended.

43. A prayer seeking time beyond 90 days for filing the written statement ought to be made in writing. In its judicial discretion exercised on well-settled parameters, the Court may indeed put the defendants on terms including imposition of compensatory costs and may also insist on an affidavit, medical certificate or other documentary evidence (depending on the facts and circumstances of a given case) being annexed with the application seeking extension of time so as to convince the Court that the prayer was founded on grounds which do exist.

44. The extension of time shall be only by way of exception and for reasons to be recorded in writing, howsoever brief they may be, by the court. In no case, the defendant shall be permitted to seek extension of time when the court is satisfied that it is a case of laxity or gross negligence on the part of the defendant or his counsel. The court may impose costs for

dual purpose: (i) to deter the defendant from seeking any extension of time just for asking and (ii) to compensate the plaintiff for the delay and inconvenience caused to him.

45. However, no straitjacket formula can be laid down except that the observance of time schedule contemplated by Order VIII Rule 1 shall be the rule and departure therefrom an exception, made for satisfactory reasons only. We hold that Order VIII Rule 1, though couched in mandatory form, is directory being a provision in the domain of processual law."

15. In view of above, the provisions made in Order-8, Rule-1 of C.P.C. are directory in nature and the period may be extended by the Court in case sufficient cause / reason is shown in writing and on consideration the Court finds the same sufficient and if time is not extended grave injustice may be done.

16. Perusal of the application for condonation of delay alongwith written statement placed on record reveals that the condonation of delay has been sought in the application on the basis of averments made in the written statement but in the written statement no reason or explanation for delay has been given. Consequently, the application for condonation of delay in filing written statement has been rejected. However the copy of the order sheet dated 04.09.2019 indicates that 'copy received of plaint' is mentioned on margin but there is no signature or date. So far the plea of respondent that the plaint was served with the supplementary counter affidavit filed in R.S. No.2001 of 2018 is concerned, perusal of which annexed as Annexure no.C.A.2 to the counter affidavit indicates that there is no mention of SCC Suit No.42 of 2019 in it and only two annexures have been shown although copy of plaint has been annexed as SCA-3. Therefore it is required to be considered.

17. The application filed under Order-15, Rule-5 of C.P.C. has been rejected on the ground that the revisionist has not deposited the interest of 9% in accordance with Order-15, Rule-5 while depositing the rent w.e.f. 01.03.2019 to 31.08.2019 and the revisionist has not disclosed any reason for delay in depositing the monthly rent of September and October, 2019 and the representation as provided under rule has not been made. However the revisionist had preferred an application on 03.01.2020 to deposit the rent for two months up to December, 2019. Therefore the revisionist has deposited the rent up to October, 2019 and he had further given the applications for depositing the rent although the interest was not deposited and there is some delay in depositing the monthly rent. Therefore it can not be said that there was complete non compliance of provision made in Order-15, Rule-5 of C.P.C. Therefore, the question arises as to whether the defence could have been struck off in the facts and circumstances of the case and because the revisionist has not preferred any representation as provided under Rule-2 of Order-15 of C.P.C. However the revisionist has submitted further application for depositing the rent and is ready to deposit the entire dues. The revisionist has also pleaded in his objection against the application under Order-15, Rule-5 that security deposit of Rs.1,80,000/- is still in deposit with the opposite party and he is ready to deposit the remaining rent till date etc.

18. In order to appreciate the rival contentions, the provisions contained in Order 15 Rule 5 of C.P.C. may be referred to, which is extracted below:-

"5. Striking off defence for failure to deposit admitted rent, etc.-

(1) In any suit by a lessor for the eviction of a lessee after the determination of his lease and for the recovery from him of rent or compensation for use and occupation, the defendant shall, at or before the first hearing of the suit, deposit the entire amount admitted by him to be due together with interest thereon at the rate of nine per cent, per annum and whether or not he admits any amount to be due, he shall throughout the continuation of the suit regularly deposit the monthly amount due within a week from the date of its accrual, and in the event of any default in making the deposit of the entire amount admitted by him to be due or the monthly amount due as aforesaid, the Court may, subject to the provisions of sub-rule (2), strike off his defence.

Explanation 1.-The expression "first hearing" means the date for filing written statement for hearing mentioned in the summons or where more than one of such dates are mentioned, the last of the dates mentioned.

Explanation 2.-The expression "entire amount admitted by him to be due" means the entire gross amount, whether as rent or compensation for use and occupation, calculated at the admitted rate of rent for the admitted period of arrears after making no other deduction except the taxes, if any, paid to a local authority in respect of the building on lessor's account and the amount, if any, paid to the lessor acknowledged by the lessor in writing signed by him and the amount, if any, deposited in any Court under section 30 of the U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972.

Explanation 3.-(1) The expression "monthly amount due" means the amount due every month, whether as rent or compensation for use and occupation at the admitted rate of rent, after making no other deduction except the taxes, if any, paid to a local authority, in respect of the building on lessor's account.

(2)Before making an order for striking off defence, the Court may consider any representation made by the defendant in that behalf provided such representation is made within 10 days of the first hearing or, of the expiry of the week referred to in sub-section (1), as the case may be.

(3) The amount deposited under this rule may at any time be withdrawn by the plaintiff.

Provided that such withdrawal shall not have the effect of prejudicing any claim by the plaintiff disputing the correctness of the amount deposited:

Provided further that if the amount deposited includes any sums claimed by the depositor to be deductible on any account, the Court may require the plaintiff to furnish the security for such sum before he is allowed to withdraw the same."

19. Sub-rule (1) of Order-15, Rule-5 provides that in the event of any default in making, the deposit of the entire amount admitted by him to be due or the monthly amount as aforesaid, the court may, subject to the provisions of such-rule (2), strike off his defence. Sub-rule (2) provides that before making an order for striking off defence, the court may consider any representation made by the defendant in that behalf provided such representation is made within 10 days, of the first hearing or,

of the expiry of the week referred to in sub-sectio (1) as the case may. In both sub-rule (1) and (2) the word "may" has been used. Therefore the court may consider the representation, if made within the period provided in such-rule (2). But it does not mean that if the representation is not made then the court has to strike off defence in every case of default. Therefore in case the representation is made within the time provided under sub-rule (2) then the court may consider the same before taking any decision. However even in absence of representation it is for the court to decide as to whether on the basis material available on record and in the facts and circumstances of the case, the defence should or should not be struck off.

20. The Hon'ble Apex Court, in the case of **Bimal Chand Jain Vs. Gopal Agarwal (Supra),** considered the provisions of Order-15, Rule-5 of C.P.C and held that delay always be a matter for the judgment of the court to decide whether on the material before it, notwithstanding the absence of a representation under sub-rule (2), the defence should or should not be struck off. The word "may" in sub-rule (1) merely vests power in the court to strike off the defence but it does not oblige it to do so in every case of default. The relevant paragraph no.6 is extracted below:-

" 6. It seems to us on a comprehensive understanding of Rule 5 of Order XV that the true construction of the Rule should be thus. Sub-rule (1) obliges the defendant to deposit, at or before the first hearing of the suit, the entire amount admitted by him to be due together with interest thereon at the rate of nine per cent per annum and further, whether or not he admits any amount to be due, to deposit regularly throughout the continuation of the suit the monthly amount due within a week from the date of its accrual. In the event of any default in making any deposit, "the court may subject to the provisions of sub-rule (2) strike off his defence". We shall presently come to what this means. Sub-rule (2) obliges the court, before making an order for striking off the defence to consider any representation made by the defendant in that behalf. In other words,the defendant has been vested with a statutory right to make a representation to the court against his defence being struck off. If a representation is made the court must consider it on its merits, and then decide whether the defence should or should not be struck off. This is a right expressly vested in the defendant and enables him to show by bringing material on the record that he has not been guilty of the default alleged or if the default has occurred, there is good reason for it. Now, it is not impossible that the record may contain such material already. In that event, can it be said that sub-rule (1) obliges the court to strike off the defence? We must remember that an order under sub-rule (1) striking off the defence is in the nature of a penalty. A serious responsibility rests on the court in the matter and the power is not to be exercised mechanically. There is a reserve of discretion vested in the court entitling it not to strike off the defence if on the facts and circumstances already existing on the record it finds good reason for not doing so. It will always be a matter for the judgment of the court to decide whether on the material before it, notwithstanding the absence of a representation under sub- rule (2), the defence should or should not be struck off. The word "may" in sub-rule (1) merely vests power in the court to strike off the defence. It does not oblige it to do so in every case of default. To that extent, we are

unable to agree with the view taken by the High Court in Puran Chand (supra). We are of opinion that the High Court has placed an unduly narrow construction on the provisions of clause (1) of Rule 5 of Order XV."

21. A coordinate bench of this Court, in the case of **Mrs. S. Abel Vs. the District Judge and Other (Supra)** relied by the respondent, has held that word 'may' provided in Order-15, Rule-5 confers the power on the court to condone subject to representation made within ten days. However as discussed above and in view of judgment of Hon'ble Supreme Court in the case of **Bimal Chandra Jain Vs. Gopal Agrawal (Supra)** it is to be decided by the court as to whether in absence of representation the defence should be struck off or not. The other judgments relied by the learned counsel for respondent are not applicable in facts and circumstance of this case and the discussion made above.

22. In view of above, the concerned court has to take a decision under Order-15, Rule-5, looking to the facts and circumstances of the case, in which the revisionist has made the compliance of Order-15, Rule-5 with some shortcoming and delay and he is ready to comply it up to date, as to whether the defence should be struck off or not on the basis of material on record in absence of representation.

23. One of the arguments of the learned counsel for the revisionist was that the first date of framing issues would be the first date of hearing, which have not been framed till date, therefore also the defence could not have been struck off because the revisionist was ready to deposit the remaining dues. It has been disputed by the learned counsel for the opposite party on the ground that issues are not framed in SCC Suit and the first date was for written-statement and hearing. According to the law of "Lexican" "the trial of a suit is called a "hearing" and technically considered, this includes not only the introduction of the 'evidence and arguments of the counsels, but the pronouncing of the decree by the presiding officer'. Therefore the "hearing" would be when the court applies its mind to the facts of the case and the first date of hearing, the first date on which the court applies its mind to the facts of the case.

24. The Hon'ble Apex Court, in the case of **Kanwar Singh Saini Vs. High Court of Delhi; (2012) 4 SCC 307,** has held that "first hearing of a suit "under C.P.C. is ordinarily understood to be the date on which the court proposes to apply its mind to the contentions raised by the parties and it can never be earlier than the date fixed for the preliminary examination of the parties and the settlement of issues. It has further been held that on the date of appearance of the defendant, the court does not take up the case for hearing or apply its mind to the facts of the case, and it is only after filing of the written statement and framing of issues, the hearing of case commences. The relevant paragraphs 12 and 13 are extracted below:-

"12. The suit was filed on 26.4.2003 and notice was issued returnable just after three days, i.e. 29.4.2003 and on that date the written statement was filed and the appellant appeared in person and his statement was recorded. Order X Rule 1 CPC provides for recording the statement of the parties to the suit at the "first hearing of the suit" which comes after the framing of the issues and then the suit is posted for trial, i.e. for production of evidence. Such an interpretation emerges

from the conjoint reading of the provisions of Order X Rule 1; Order XIV Rule 1(5); and Order XV Rule 1, CPC. The cumulative effect of the above referred provisions of CPC comes to that the "first hearing of the suit" can never be earlier than the date fixed for the preliminary examination of the parties and the settlement of issues. On the date of appearance of the defendant, the court does not take up the case for hearing or apply its mind to the facts of the case, and it is only after filing of the written statement and framing of issues, the hearing of the case commences. The hearing presupposes the existence of an occasion which enables the parties to be heard by the Court in respect of the cause. Hearing, therefore, should be first in point of time after the issues have been framed.

13. The date of "first hearing of a suit" under CPC is ordinarily understood to be the date on which the Court proposes to apply its mind to the contentions raised by the parties in their respective pleadings and also to the documents filed by them for the purpose of framing the issues which are to be decided in the suit. Thus, the question of having the "first hearing of the suit" prior to determining the points in controversy between the parties i.e. framing of issues does not arise. The words the "first day of hearing" does not mean the day for the return of the summons or the returnable date, but the day on which the court applies its mind to the case which ordinarily would be at the time when either the issues are determined or evidence is taken. (Vide: Ved Prakash Wadhwa v. Vishwa Mohan, AIR 1982 SC 816; Sham Lal (dead) by Lrs. v. Atma Nand Jain Sabha (Regd.) Dal Bazar, AIR 1987 SC 197;Siraj Ahmad Siddiqui v. Shri Prem Nath Kapoor, AIR 1993 SC 2525; and M/s Mangat Singh Trilochan Singh thr. Mangat Singh (dead) by Lrs. & Ors. v. Satpal, AIR 2003 SC 4300).

25. In view of above "first hearing of a suit" would be the day on which court applies its mind to the case which ordinarily would be at the time when either the issues are determined or evidence taken. The Hon'ble Apex Court in the case of **Sham Lal (Dead) By Lrs Vs. Atme Nand Jain Sabha (Regd.); (1987) 1 SCC 222**, held that the words the 'first day of hearing' as meaning not the day for the return of the summons or the returnable day, but the day on which the Court applies its mind to the case which ordinarily would be at the time when either the issues are determined or evidence taken. The relevant paragraph-11 is extracted below:-

"11. It appears that there is consensus in regard to the interpretation of the expression 'first day' in the context of the rent legislations of several other states, for instance, the Gujarat High Court in Shah Ambalal Chhotalal. v. Shah Babaldas Dayabhai, dealing with the identical question as to the meaning of the words "the first day of the hearing of the suit" as provided in sub-Seciion 3(b) of Section 12 of Bombay Rents, Hotel and Lodging House Rates (Control) Act, 1947 has observed after considering several decisions that "the words 'the first day of hearing' as meaning not the day for the return of the summons or the returnable day, but the day on which the Court applies its mind to the case which ordinarily would be at the time when either the issues are determined or evidence taken."

26. In view of above and considering the overall facts and circumstances of the case and the interest of justice this court is of the view that the impugned order is liable to be set aside with an opportunity to the revisionist to submit explanation for delay in support of application for

condonation of delay within a period of two weeks from the date of this order before the trial court and partly allow the revision with a cost to be paid by the appellant and direction to the trial court to decide the applications afresh in accordance with law.

27. With the aforesaid the impugned order dated 07.01.2020 is hereby set-aside and the revision is **partly allowed** with a cost of Rs.20,000/- to be deposited by the revisionist before the trial court within two weeks of this order. The trial court is directed to reconsider the applications afresh in accordance with law and the observations made here-in-above in this order. The cost deposited by the revisionist shall be released in favour of the opposite party and paid to the account in the name of opposite party.

(2021)02ILR A141
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.02.2021

BEFORE

THE HON'BLE SURYA PRAKASH KESARWANI, J.
THE HON'BLE DR. YOGENDRA KUMAR SRIVASTAVA, J.

Writ Tax No. 655 of 2018
with other cases

M/S Torque Pharmaceuticals Pvt. Ltd.
...Petitioner
Versus
U.O.I. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Nishant Mishra, Sri Rahul Agarwal, Sri Vipin Kumar Kushwaha

Counsel for the Respondents:
A.S.G.I., Sri Akhilesh Kumar Mishra, C.S.C., Sri Krishna Ji Shukla, Sri Om Prakash Srivastava, Sri Ramesh Chandra Shukla.

Tax Law-This batch of Writ are appealable before the Appellate Tribunal u/s 112 of the CGST ACT/U.P. GST Act-but Tribunal u/s 109 CGST Act not constituted-challenge to impugned orders relates to question of fact and Appellate Authority is last fact finding authority-mandamus issued to specify by notification the State bench at Prayagraj and-four area benches at Ghaziabad, Lucknow, Varanasi and Agra -as Appellate Tribunal of the Goods and Services Tax Appellate Tribunal-made functional from 01.04.2021.

W.P disposed(E-7)

List of Cases cited:-

1.PIL Civil No.6800 of 2019 (Oudh Bar Association through Secretary, & anr. Vs U.O.I. through Secretary, Ministry of Finance & ors.)

2. Special Appeal No.1481 of 2007 (M/S Universal Insulator and Cereamics Ltd. Vs Official Liquidator High Court Allahabad)

3. Vijendra Pal SC Singh Vs Senior Regional Manager, Food Corporation of India, Lucknow & anr., AIR 2002 (All) 206

4. Ashok Pandey Vs Allahabad High Court, (2014) 3 All.LJ 507

5. U.P. Junior Doctors' Association Committee Vs B. Sheetal Nandwani, (1990) 4 SCC 633

6. L.P. Misra Vs St. of U.P., (1998) 7 SCC 379

(Delivered by Hon'ble Surya Prakash Kesarwani, J.
&
Hon'ble Dr. Yogendra Kumar Srivastava, J.)

1. Heard Sri Navin Sinha, learned Senior Advocate assisted by Ms. Kalpana Sinha, Sri Nishant Misra, Sri Vishwjit, Sri Harish Chandra Dubey, Sri Suyash Agarwal, Sri Atul Gupta, learned counsel and other learned counsel for the petitioners, Sri Shashi Prakash, learned Additional Solicitor General of India

assisted by Sri Krishna Agarwal, Sri K.J. Shukla, Sri R.C. Tiwari, Sri Anant Kumar Tiwari, learned counsel and other learned counsel for the Indirect Taxes/Central Government and Sri Manish Goel, learned Additional Advocate General assisted by Sri C.B. Tripathi, learned Special Counsel appearing for the State-respondents.

2. With the consent of learned counsels for the parties, **Writ Tax No.655 of 2018 has been treated as the leading writ petition and only the relief relating to the constitution of the Goods and Services Tax Appellate Tribunal (hereinafter referred to as ''the Tribunal') under the Central Goods and Services Tax Act, 2017** (hereinafter referred to as "the CGST Act')/ U.P. Goods and Services Tax Act, 2017 (hereinafter referred to as "the U.P. GST Act'), **is being decided and all other questions are left open.**

3. **Reliefs sought in Writ Tax No.655 of 2018,** are reproduced below:

*"A- Issue a writ, order or direction in the nature of mandamus commanding respondents No. 1 & 2 to constitute 'Regional Bench' and 'State Bench' for the State of U.P, at the seat of jurisdictional High Court and also such number of ''**Area Benches**' in the State of U.P, as may be recommended by Respondent No. 6;*

*B- **Issue** a Writ, order or direction in the nature of certiorari quashing the impugned order dated 2.4.2018 & 7.2.2018 **(Annexure-1 & 2)** passed by Respondents No. 4 & 5 respectively;*

*C- **Issue** a writ, order or direction quashing the Circular dated 6.2.2017 issued by Respondent No. 2, to the extent it directs that Rule 138 of UPGST Rules under which Notification No.1014 dated 21.7.2017 was issued prescribing e-way bill 01, gets automatically revived on rescinding of Notification No.138 dated 30.1.2018;*

In the Alternative

***Issue** a writ, order or directing declaring that Notification No. 1014 dated 21.7.2017, as amended, is directory and not mandatory, in so far it requires carrying e-way bill 01 for inter-State transaction covered by IGST Act, 2017;*

*D- **Issue** any other writ, order or direction, which this Hon'ble Court may deem fit in the facts and circumstances of the case;*

*DI. Issue a writ, order or direction the nature of certiorari calling for and examining DO No. 20/GST dated 29th May 2020 dated 29.5.2020 submitted by Respondent No. 2 before Respondent No. 6 and also the approval of Respondent No. 6 in its 40th meeting held on 12th June, 2020, in so far it relates to creation of State Bench of Goods and Services Tax Appellate Tribunal at Lucknow and **quashing the said DO No. 20/GST dated 29th May 2020 dated 29.5.2020 and approval of Respondent No. 6l, as without authority of law and contrary to Section 109 (6) of the Central Goods &Services Tax Act, 2017;***

***E- Award** costs of the petition to the Petitioner.*

*E1. Issue a writ, order or direction in the nature of **mandamus directing Respondent No.6 to restore the decision taken in its 39th meeting held on 14th March' 2020 in respect of creation of State Bench of Goods and Services Tax Appellate Tribunal at Allahabad and 4 Area Benches at Ghaziabad, Lucknow, Varanasi and Agra AND** further issue a writ, order or direction in the nature of mandamus commanding Respondent No.1*

to forthwith issue necessary notification for the same."

4. Briefly stated facts of the present case are that the impugned orders passed in this batch of writ petitions are appealable before the Appellate Tribunal under Section 112 of the CGST Act/ U.P. GST Act but the petitioners have filed these writ petitions for reason that the Tribunal under Section 109 of the CGST Act has not been constituted so far by the Government, i.e. the Central Government, under Section 109 of the CGST Act. Since the challenge to the impugned orders relates to questions of fact and the Appellate Tribunal is the last fact finding authority, therefore, we leave it open for all the petitioners to challenge the impugned orders before the Appellate Tribunal under Section 112 of the CGST Act/ U.P. GST Act as and when the State Bench and Area Benches of the Appellate Tribunal are constituted in the State of Uttar Pradesh.

Relief being considered in this bunch of writ petitions:-

5. Now we proceed to consider the **reliefs (A), (D1) and (E1)** which at the cost of repetition, are reproduced hereunder:

*"**A**- Issue a writ, order or direction in the nature of mandamus commanding respondents No. 1 & 2 to constitute 'Regional Bench' and 'State Bench' for the State of U.P, at the seat of jurisdictional High Court and also such number of "**Area Benches**' in the State of U.P, as may be recommended by Respondent No. 6;*

***DI.** Issue a writ, order or direction the nature of certiorari calling for and examining DO No. 20/GST dated 29th May 2020 dated 29.5.2020 submitted by Respondent No. 2 before Respondent No. 6 and also the approval of Respondent No. 6 in its 40th meeting held on 12th June, 2020, in so far it relates to creation of State Bench of Goods and Services Tax Appellate Tribunal at Lucknow and quashing the said DO No. 20/GST dated 29th May 2020 dated 29.5.2020 and approval of Respondent No. 6l, as without authority of law and contrary to Section 109 (6) of the Central Goods &Services Tax Act, 2017;*

***E1**. Issue a writ, order or direction in the nature of mandamus directing Respondent No.6 to restore the decision taken in its 39th meeting held on 14th March' 2020 in respect of creation of State Bench of Goods and Services Tax Appellate Tribunal at Allahabad and 4 Area Benches at Ghaziabad, Lucknow, Varanasi and Agra AND further issue a writ, order or direction in the nature of mandamus commanding Respondent No.1 to forthwith issue necessary notification for the same."*

6. We have heard learned counsels for the parties at length. Arguments were heard in the leading writ petition by this court on 17.04.2018, 13.02.2019, 28.02.2019, 03.07.2019, 19.07.2019, 18.01.2021, 20.01.2021 and 25.01.2021. High Court Bar Association, Allahabad was also heard on 03.07.2019 and 19.07.2019. **The order dated 19.07.2019** passed by this court, is reproduced below:

"Heard Shri Nishant Mishra, learned counsel for the petitioner, Shri Gyan Prakash, learned Assistant Solicitor General of India assisted by Shri K.J. Shukla and Shri R.C. Shukla learned counsel for the respondent nos.1 to 6, Shri Vikas Chandra Tripathi, learned Chief Standing Counsel assisted by Shri Nimai Dass, learned Additional Chief Standing

Counsel and Shri B.P. Singh Kachhawah, learned Standing Counsel, Shri C.B. Tripathi, learned Special Counsel for the State.

Shri Navin Sinha, learned Senior Advocate assisted by Shri Rahul Agrawal, Advocate and Sri Akhilesh Kumar Mishra, Senior Vice President, High Court, Bar Association Allahabad are also present to assist the Court.

The status report along with an affidavit has been filed by the State Government today, which is taken on record. The Counsel for the Central Government has also placed a letter, which is also taken on record.

Learned Counsel for the petitioner, Sri Nishant Mishra has drawn the attention of this Court to the provisions of Section 109 (6) of Central Goods & Services Tax Act, 2017 which reads as hereunder:-

"(6) The Government shall, by notification, specify for each State or Union territory except for the State of Jammu and Kashmir, a Bench of the Appellate Tribunal (hereafter in this Chapter, referred to as ?State Bench?) for exercising the powers of the Appellate Tribunal within the concerned State or Union territory:

Provided that for the State of Jammu and Kashmir, the State Bench of the Goods and Services Tax Appellate Tribunal constituted under this Act shall be the State Appellate Tribunal constituted under the Jammu and Kashmir Goods and Services Tax Act, 2017:

Provided further that the Government shall, on receipt of a request from any State Government, constitute such number of Area Benches in that State, as may be recommended by the Council:

Provided also that the Government may, on receipt of a request from any State, or on its own motion for a Union territory, notify the Appellate Tribunal in a State to act as the Appellate Tribunal for any other State or Union territory, as may be recommended by the Council, subject to such terms and conditions as may be prescribed."

From a bare reading of the provision of the Act itself ***it is clear that it is not in the domain of the State Government to make a recommendation for deciding the place of the State Bench of the Tribunal. The role of the State is confined to determine the place of area benches.***

Insofar as the determination of location of the State Bench is concerned, it remains in the domain of the Central Government for which the matter is under consideration before the Central Government.

Insofar as the judgement dated 31.05.2019 of the Lucknow Bench in PIL (Civil) No.6800 of 2019 (Oudh Bar Asso. High Court, Lko. Thru General Secretary & Anr. vs. U.O.I. Thru Secy. Ministry of Finance & Ors.) is concerned, it appears that the aforesaid provisions have not been considered at all, hence, prima facie the judgement appears to be bereft with non-consideration of the above facts. ***The Central Government shall proceed in accordance with Section 109 (6) of C.G.S.T. Act, 2017.***

List this matter on 19.08.2019.

A proposal has been made by the High Court Bar Association, Allahabad that as the principal seat is at Allahabad having larger territorial jurisdiction and there is a sufficient space available in the premises of Board of Revenue/Police Headquarter, Allahabad, which has been currently vacated, the State Bench may be housed in the said premises. The location of the premises is practically in the institutional area, centrally located having

ample parking space and near Allahabad High Court. Their suggestion is welcomed by the members of the Bar.

Sri Gyan Prakash Srivastava, learned Assistant Solicitor General of India is granted three week's time to file status report regarding decision taken by the Central Government."

Relevant Provisions:

7. For the purposes of the present controversy, the relevant provisions are Article 279A of the Constitution of India, Section 109 of the CGST Act and Section 109 of the U.P. GST Act, which are reproduced below:

"Article 279A of the Constitution of India:-

*''''**279A.Goods and Services Tax Council** (1) The President shall, within sixty days from the date of commencement of the Constitution (One Hundred and First Amendment) Act, 2016, by order, constitute a Council to be called the Goods and Services Tax Council.*

(2) The Goods and Services Tax Council shall consist of the following members, namely:--

(a) the Union Finance Minister..... Chairperson;

(b) the Union Minister of State in charge of Revenue or Finance..... Member;

(c) the Minister in charge of Finance or Taxation or any other Minister nominated by each State Government.....Members.

(3) The Members of the Goods and Services Tax Council referred to in sub-clause (c) of clause (2) shall, as soon as may be, choose one amongst themselves to be the Vice-Chairperson of the Council for such period as they may decide.

(4) The Goods and Services Tax Council shall make recommendations to the Union and the States on--

(a) the taxes, cesses and surcharges levied by the Union, the States and the local bodies which may be subsumed in the goods and services tax;

(b) the goods and services that may be subjected to, or exempted from the goods and services tax;

(c) model Goods and Services Tax Laws, principles of levy, apportionment of Goods and Services Tax levied on supplies in the course of inter-State trade or commerce under article 269-A and the principles that govern the place of supply;

(d) the threshold limit of turnover below which goods and services may be exempted from goods and services tax;

(e) the rates including floor rates with bands of goods and services tax;

(f) any special rate or rates for a specified period, to raise additional resources during any natural calamity or disaster;

(g) special provision with respect to the States of Arunachal Pradesh, Assam, Jammu and Kashmir, Manipur, Meghalaya, Mizoram, Nagaland, Sikkim, Tripura, Himachal Pradesh and Uttarakhand; and

(h) any other matter relating to the goods and services tax, as the Council may decide.

(5) The Goods and Services Tax Council shall recommend the date on which the goods and services tax be levied on petroleum crude, high speed diesel, motor spirit (commonly known as petrol), natural gas and aviation turbine fuel.

(6) While discharging the functions conferred by this article, the Goods and Services Tax Council shall be guided by the need for a harmonised structure of goods and services tax and for

the development of a harmonised national market for goods and services.

(7) One half of the total number of Members of the Goods and Services Tax Council shall constitute the quorum at its meetings.

(8) The Goods and Services Tax Council shall determine the procedure in the performance of its functions.

(9) Every decision of the Goods and Services Tax Council shall be taken at a meeting, by a majority of not less than three-fourths of the weighted votes of the members present and voting, in accordance with the following principles, *namely:--*

(a) the vote of the Central Government shall have a weightage of one third of the total votes cast, and

(b) the votes of all the State Governments taken together shall have a weightage of two-thirds of the total votes cast, in that meeting.

(10) No act or proceedings of the Goods and Services Tax Council shall be invalid merely by reason of--

(a) any vacancy in, or any defect in, the constitution of the Council; or

(b) any defect in the appointment of a person as a member of the Council; or

(c) any procedural irregularity of the Council not affecting the merits of the case.

(11) The Goods and Services Tax Council shall establish a mechanism to adjudicate any dispute-

(a) between the Government of India and one or more States; or

(b) between the Government of India and any State or States on one side and one or more other States on the other side; or

(c) between two or more States,

arising out of the recommendations of the Council or implementation thereof."

Section 109 of the CGST Act:-

109.Constitution of Appellate Tribunal and Benches thereof.- (1) The Government shall, on the recommendations of the Council, by notification, constitute with effect from such date as may be specified therein, an Appellate Tribunal known as the Goods and Services Tax Appellate Tribunal for hearing appeals against the orders passed by the Appellate Authority or the Revisional Authority.

(2) The powers of the Appellate Tribunal shall be exercisable by the National Bench and Benches thereof (hereinafter in this Chapter referred to as "Regional Benches"), State Bench and Benches thereof (hereafter in this Chapter referred to as "Area Benches").

(3) The National Bench of the Appellate Tribunal shall be situated at New Delhi which shall be presided over by the President and shall consist of one Technical Member (Centre) and one Technical Member (State).

(4) The Government shall, on the recommendations of the Council, by notification, constitute such number of Regional Benches as may be required and such Regional Benches shall consist of a Judicial Member, one Technical Member (Centre) and one Technical Member (State).

(5) The National Bench or Regional Benches of the Appellate Tribunal shall have jurisdiction to hear appeals against the orders passed by the Appellate Authority or the Revisional Authority in the cases where one of the issues involved relates to the place of supply.

(6) The Government shall, by notification, specify for each State or Union territory, *except for the State of Jammu and Kashmir,* ***a Bench of the***

Appellate Tribunal (hereafter in this Chapter, referred to as "State Bench") *for exercising the powers of the Appellate Tribunal within the concerned State or Union territory:*

Provided that for the State of Jammu and Kashmir, the State Bench of the Goods and Services Tax Appellate Tribunal constituted under this Act shall be the State Appellate Tribunal constituted under the Jammu and Kashmir Goods and Services Tax Act, 2017:

Provided further that the Government shall, on receipt of a request from any State Government, constitute such number of Area Benches in that State, as may be recommended by the Council:

Provided also that the Government may, on receipt of a request from any State, or on its own motion for a Union territory, notify the Appellate Tribunal in a State to act as the Appellate Tribunal for any other State or Union territory, as may be recommended by the Council, subject to such terms and conditions as may be prescribed.

(7) The State Bench or Area Benches shall have jurisdiction to hear appeals against the orders passed by the Appellate Authority or the Revisional Authority in the cases involving matters other than those referred to in sub-section (5).

(8) The President and the State President shall, by general or special order, distribute the business or transfer cases among Regional Benches or, as the case may be, Area Benches in a State.

(9) Each State Bench and Area Benches of the Appellate Tribunal shall consist of a Judicial Member, one Technical Member (Centre) and one Technical Member (State) and the State Government may designate the senior most Judicial Member in a State as the State President.

(10) In the absence of a Member in any Bench due to vacancy or otherwise, any appeal may, with the approval of the President or, as the case may be, the State President, be heard by a Bench of two Members:

Provided that any appeal where the tax or input tax credit involved or the difference in tax or input tax credit involved or the amount of fine, fee or penalty determined in any order appealed against, does not exceed five lakh rupees and which does not involve any question of law may, with the approval of the President and subject to such conditions as may be prescribed on the recommendations of the Council, be heard by a bench consisting of a single member.

(11) If the Members of the National Bench, Regional Benches, State Bench or Area Benches differ in opinion on any point or points, it shall be decided according to the opinion of the majority, if there is a majority, but if the Members are equally divided, they shall state the point or points on which they differ, and the case shall be referred by the President or as the case may be, State President for hearing on such point or points to one or more of the other Members of the National Bench, Regional Benches, State Bench or Area Benches and such point or points shall be decided according to the opinion of the majority of Members who have heard the case, including those who first heard it.

(12) The Government, in consultation with the President may, for the administrative convenience, transfer--

(a) any Judicial Member or a Member Technical (State) from one Bench to another Bench, whether National or Regional; or

(b) any Member Technical (Centre) from one Bench to another Bench, whether National, Regional, State or Area.

(13) The State Government, in consultation with the State President may, for the administrative convenience, transfer a Judicial Member or a Member Technical (State) from one Bench to another Bench within the State.

(14) No act or proceedings of the Appellate Tribunal shall be questioned or shall be invalid merely on the ground of the existence of any vacancy or defect in the constitution of the Appellate Tribunal.

Section 109 of the U.P. GST Act:-

109. Appellate Tribunal and Benches thereof- (1) Subject to the provisions of this Chapter, the Goods and Services Tax Tribunal constituted under the Central Goods and Services Tax Act, 2017 (12 of 2017) shall be the Appellate Tribunal for hearing appeals against the orders passed by the Appellate Authority or the Revisional Authority under this Act.

(2) The constitution and jurisdiction of the State Bench and the Area Benches located in the State shall be in accordance with the provisions of section 109 of the Central Goods and Services Tax Act, 2017 (12 of 2017) or the rules made thereunder."

Discussion and Findings:

8. Since the **submission** of learned counsels for the parties in the present batch of writ petitions is **mainly confined to the interpretation of Section 109(6)** of the CGST Act/ U.P. GST Act and facts of the case, **therefore, we now proceed to decide the controversy.**

9. Section 109(6) of the CGST Act mandates that the Central Government shall, by notification, specify for each State or Union Territory except for the State of Jammu and Kashmir, **a State Bench** of the Appellate Tribunal for exercising the powers of the Appellate Tribunal within the concerned State or Union Territory. Under the second provision to sub-Section (6) of Section 109 of the CGST Act, **area benches in that State** shall be constituted by the Central Government in such number as **may be recommended by the council on receipt of a request from the concerned State Government.** The third proviso to sub-Section (6) of Section 109 of the CGST Act provides that the Government may on receipt of a request from any State, or on its own motion for a Union Territory **notify the Appellate Tribunal in a State to act as the Appellate Tribunal for any other State or Union Territory,** as may be recommended by the council, subject to such terms and conditions as may be prescribed. Section 109(2) of the U.P. GST Act provides that the constitution and jurisdiction of State Bench and the Area Benches located in the State shall be in accordance with the provisions of Section 109 of the CGST Act or the Rules made thereunder. Thus, **sub-section (6) of Section 109 of the CGST Act clearly mandates that "State Bench of the Goods and Services Tax Appellate Tribunal" shall be constituted and notified by the Central Government** but the **Area Benches** in such number as may be requested by the concerned State Government, may be constituted by the Central Government on the recommendation of the Council.

10. **Vide DO Letter** No.386/11-2-19-9(24)/19 - Institutional Finance, Tax and Registration Anubhag - 2 **dated 05.03.2019,** the State Government

requested/ proposed to the Secretary of the GST Council New Delhi for **creation of State Bench at Allahabad and 19 Area Benches at different places** in the State of Uttar Pradesh. By this letter, the State Government has revised its earlier proposal dated 21.02.2019. **The letter/ proposal of the State Government dated 05.03.2019** filed as annexure-2 to the affidavit dated 15.10.2019 of respondent No.1 (Union of India), **is reproduced below:**

"आलोक सिन्हा,
अर्द्धशा0प0सं0–386/11–2–19–9(24)/19
अपर मुख्य सचिव।
संस्थागत वित्त, कर एवं निबंधन अनुभाग–2
उ0प्र0 शासन।
लखनऊः दिनांक
05 मार्च, 2019
प्रिय महोदय,

उत्तर प्रदेश राज्य में जी0एस0टी0 अधिनियम के अंतर्गत प्राविधानित अपीलीय ट्रिब्यूनल के स्टेट बेंच एवं उनकी एरिया बेंन्चेज के गठन से संबंधित प्रेषित प्रस्ताव विषयक कृपया अधोहस्ताक्षरी के **अर्द्धशासकीय पत्र संख्या–334/11–2–19–9(24)/19, दिनांक 21.02.2019 का संदर्भ ग्रहण करने का कष्ट करें।**

उल्लेखनीय है कि मा0 उच्च न्यायालय, इलाहाबाद द्वारा सर्वश्री टॉर्क फार्मास्यूटिकल प्रा0लि0 बनाम यूनियन ऑफ इण्डिया एवं अन्य, रिट याचिका संख्या–655/2018 के बाद में निर्णय दिनांक 28.02.2019 में यह अभिमत व्यक्त किया गया है कि सर्वश्री मद्रास बार एसोसियेशन बनाम यूनियन आफ इण्डिया एवं अन्य (2014) 10ब्ब पेज नं0–1, के सर्वोच्च न्यायालय के निर्णय के अनुसार ट्रिब्यूनल का गठन वहीं होना चाहिए, जहॉ हाईकोर्ट की प्रिन्सिपल बेंच कार्यरत है। राज्य द्वारा जी0एस0टी0 काउंसिल को प्रेषित प्रस्ताव में ट्रिब्यूनल का गठन लखनऊ में करते हुये 20 एरिया बेंचेज की संस्तुति की गई है, जिसे मा0 न्यायालय द्वारा उचित नहीं माना गया है। (न्यायालय के निर्णय की प्रति संलग्न)

मा0 न्यायालय द्वारा दिये गये निर्णय के दृष्टिगत स्टेट ट्रिब्यूनल के गठन हेतु **पूर्व में प्रेषित प्रस्ताव को संशोधित करते हुये स्टेट ट्रिब्यूनल का गठन मुख्यालय, इलाहाबाद निर्धारित किये जाने तथा इलाहाबाद के अतिरिक्त शेष 19 एरिया बेंचेज का गठन निम्नवत् किया जाना प्रस्तावित है:–**

क0 सं0	जोन का नाम	स्थान
1.	नोएडा	नोएडा
2.	गजियाबाद प्रथम	गाजियाबाद
3.	गाजियाबाद द्वितीय	गाजियाबाद
4.	सहारनपुर	सहारनपुर
5.	मेरठ	मेरठ
6.	मुरादाबाद	मुरादाबाद
7.	बरेली	बरेली
8.	लखनऊ प्रथम	लखनऊ
9.	लखनऊ द्वितीय	लखनऊ
10.	कानपुर प्रथम	कानपुर
11.	कानपुर द्वितीय	कानपुर
12.	वाराणसी प्रथम	वाराणसी
13.	वाराणसी द्वितीय	वाराणसी
14.	अलीगढ़	अलीगढ़
15.	आगरा	आगरा
16.	इटावा	इटावा
17.	फैजाबाद	फैजाबाद
18.	गोरखपुर	गोरखपुर
19.	झॉसी	झॉसी

कृपया उपरोक्तानुसार उत्तर प्रदेश राज्य में जी0एस0टी0 अधिनियम के अन्तर्गत प्राविधानित अपीलीय ट्रिब्यूनल के स्टेट बेन्च एवं उनकी एरिया बेन्चेज के गठन के संबंध में आवश्यक कार्यवाही कराने की की कृपा करें।

सादर।

भवदीय

ह0अप0

(आलोक सिन्हा)

श्री अजय भूषण पाण्डेय,
वित्त सचिव एवं
सचिव जी0एस0टी0 काउंसिल,
भारत सरकार, नई दिल्ली।"

11. The aforequoted proposal dated 05.03.2019 was discussed by the State Government with the GST Council and, therefore, the State Government decided to propose only 4 Area Benches instead of 19 Area Benches. Consequently, proposal for 4 area benches, reiterating the State Bench at Prayagraj, was sent by the State Government to the GST Council vide DO Letter No.478/11-2-19-9-(24)/19 Institutional Finance, Tax and Registration Anubhag-2, Government of U.P. dated 15.03.2019, which is reproduced below:

"आलोक सिन्हा,
अर्द्धशा0प0सं0–478/11–2–19–9(24)/19
अपर मुख्य सचिव।
संस्थागत वित्त, कर एवं निबंधन अनुभाग–2
उ0प्र0 शासन।
लखनऊः दिनांक 15 मार्च, 2019

प्रिय महोदय,

उत्तर प्रदेश राज्य में जी0एस0टी0 अधिनियम के अंतर्गत प्राविधानित अपीलीय ट्रिब्यूनल के स्टेट बेंच एवं उनकी एरिया बेंन्चेज के गठन से संबंधित प्रेषित प्रस्ताव विषयक कृपया अधोहस्ताक्षरी के अर्द्धशासकीय पत्र संख्या–476/11–2–19–9(24)/19, दिनांक 15.03.2019 का संदर्भ ग्रहण करने का कष्ट करें।

2– उल्लेखनीय है कि मा0 उच्च न्यायालय, इलाहाबाद द्वारा सर्वश्री टॉर्क फार्मास्यूटिकल प्रा0लि0 बनाम यूनियन ऑफ इण्डिया एवं अन्य, रिट याचिका संख्या–655/2018 के बाद में मा0 उच्च न्यायालय, इलाहाबाद द्वारा पारित निर्णय दिनांक 28.02.2019 अर्द्धशासकीय पत्र संख्या–386/11–2–19–9(24)/19, दिनांक 05.03.2019 से सचिव, जी0एस0टी0 काउंसिल को उत्तर प्रदेश राज्य में स्टेट ट्रिब्यूनल एवं एरिया बेंचेज के गठन के संबंध में प्रेषित संशोधित प्रस्ताव का संज्ञान लेते हुये जी0एस0टी0 काउंसिल सचिवालय द्वारा जी0एस0टी0 अपीलेट ट्रिब्यूनल ;ळैज।ज्द्ध के गठन के प्रस्ताव जी0एस0टी0 काउंसिल की आगामी बैठकें के एजेण्डा में शामिल करते हुये ई–मेल के माध्यम से इस विषय पर प्रस्तावित एजेण्डा बिन्दु राज्यों के कन्फर्मेशन हेतु ई–मेल के माध्यम से सर्कुलेट किया गया है।

3– **तत्क्रम में जी0एस0टी0 काउंसिल सचिवालय से दूरभाष पर हुई वार्ता में जी0एस0टी0 काउंसिल सचिवालय द्वारा अवगत कराया गया है कि उत्तर प्रदेश राज्य द्वारा 19 एरिया बेन्चेज सहित कुल 20 बेन्चेज के गठन का प्रस्ताव प्रेषित किया गया है** जबकि महाराष्ट्र एवं पश्चिम बंगाल द्वारा एरिया बेन्चेज सहित कुल तीन बेन्चेज तथा शेष अन्य राज्यों द्वारा केवल एक बेन्च के गठन का प्रस्ताव प्रेषित किया गया है। **अन्य राज्यों द्वारा प्रेषित प्रस्ताव के दृष्टिगत उत्तर प्रदेश राज्य द्वारा प्रस्तावित बेन्चेज की संख्या (कुल 20) बहुत अधिक है। जी0एस0टी काउंसिल सचिवालय द्वारा उत्तर प्रदेश में प्रस्तावित बेन्चेज की संख्या कम करते हुये अन्य राज्यों के समरूप संशोधित प्रस्ताव प्रेषित करने की अपेक्षा की गई है।**

4– यह भी उल्लेखनीय है कि स्टेट ट्रिब्यूनल एवं एरिया बेन्चेज का गठन सी0जी0एस0टी0 **अधिनियम की धारा–109 के तहत प्रदत्त शक्तियों का प्रयोग करते हुये जी0एस0टी0 काउंसिल की संस्तुति पर केन्द्र सरकार द्वारा किया जाना है।** उत्तर प्रदेश एस0जी0एस0टी0 अधिनियम की धारा 109 के तहत सी0जी0एस0टी0 अधिनियम की धारा–109 के तहत केन्द्र सरकार द्वारा सी0जी0एस0टी0 अधिनियम के अंतर्गत गठित ट्रिब्यूनल को अंगीकार किया गया है। इस प्रकार स्टेट ट्रिब्यूनल एवं एरिया बेन्चेज के गठन का दायित्व केन्द्र सरकार का है।

5– उक्त समग्र तथ्यों के दृष्टिगत उत्तर प्रदेश राज्य की ओर से जी0एस0टी0 अपीलेट ट्रिब्यूनल की **स्टेट बेन्च एवं एरिया बेन्चेज के गठन का संशोधित प्रस्ताव प्रथम प्रस्तर में संदर्भित अर्द्धशासकीय पत्र दिनांक 15.03.2019 द्वारा प्रेषित किया जा चुका है। तत्क्रम में ट्रिब्यूनल की स्टेट बेन्च एवं एरिया बेन्चेज के अधिक्षेत्र** में आने वाले उत्तर प्रदेश वाणिज्य कर के समस्त जोन का विवरण एवं गठन का प्रस्ताव निम्नवत् हैः–

क्र0सं0	स्टेट बेन्च/एरिया बेन्च के अधिक्षेत्र में समाहित वाणिज्य कर जोन के नाम	स्टेट बेन्च/एरिया बेन्च हेतु प्रस्तावित स्थान
1	2	3
1	वाणिज्य कर जोन प्रयागराज एवं फैजाबाद	प्रयागराज (स्टेट बेन्च)
2	वाणिज्य कर जोन	

	गाजियाबाद प्रथम, गाजियाबाद–द्वितीय, नोएडा, मेरठ, सराहनपुर एवं मुरादाबाद गाजियाबाद (एरिया बेन्च)	
3	वाणिज्य कर जोन लखनऊ–प्रथम, लखनऊ द्वितीय तथा बरेली एवं वाणिज्य कर जोन कानपुर –प्रथम, कानपुर द्वितीय	लखनऊ (एरिया बेन्च)
4	वाणिज्य कर जोन आगरा, अलीगढ़, इटावा एवं झाँसी	आगरा (एरिया बेन्च)
5	वाणिज्य कर जोन वाराणसी–द्वितीय तथा गोरखपुर	वाराणसी (एरिया बेन्च)

यदि भविष्य में राज्य में और एरिया बेंचेज की आवश्यकता होगी तो तत्समय प्रस्ताव प्रेषित किया जायेगा। कृपया उपरोक्तानुसार उत्तर प्रदेश राज्य में जी0एस0टी0 अधिनियम के अन्तर्गत प्राविधानित अपीलीय ट्रिब्यूनल के स्टेट बेन्च एवं उनकी एरिया बेन्चेज के गठन के संबंध में आवश्यक कार्यवाही कराने की कृपा करें।

सादर।
भवदीय
ह0अप0
(आलोक सिन्हा)
श्री अजय भूषण पाण्डेय,
वित्त सचिव एवं
सचिव जी0एस0टी0 काउंसिल,
भारत सरकार, नई दिल्ली।"

12. Thus, initially, the State Government vide letter dated 21.02.2019 addressed to the Secretary, GST Council, New Delhi, proposed for creation of State Bench at Lucknow and 20 Area Benches in different districts of the State of Uttar Pradesh. In supersession of the aforesaid proposal, the State Government had sent a fresh proposal dated 05.03.2019 for constitution of the "State Bench" at Allahabad and "Nineteen Area Benches" in different cities. **Since GST Council Secretariat apprised the U.P. State Government that request for creation** of 19 Area Benches is excessive, therefore, the State Government, vide letter dated 15.03.2019, revised its earlier request dated 05.03.2019 of Nineteen Area Benches and requested only for Four Area Benches in districts namely Ghaziabad, Lucknow, Agra and Varanasi and reiterated the proposal for the State Bench at Allahabad.

13. The aforestated letter-proposal dated 15.03.2019 was challenged in **PIL Civil No.6800 of 2019 (Oudh Bar Association through Secretary, and another vs. Union of India through Secretary, Ministry of Finance and others)**, the same was decided by the Lucknow Bench of this Court vide judgment and order dated 31.05.2019. Taking note of the provisions of Section 109 of the CGST Act, the Hon'ble Bench opined that the seat where the Tribunal is to be established, is an issue which is within the domain of the executive in terms of Section 109 of the CGST Act and is not justiciable. The Bench observed that it was not concerned with the issue on merits as to where the Benches should be established but only with the issue whether the earlier proposal could have been reviewed and thereafter proceeded to quash the amended proposal dated 15.03.2019 observing, as under:

"44. Thus there are two Seats of the High Court of Judicature at Allahabad, one at Lucknow and the other at Allahabad, none of which is permanent.

49. Now the seat where the Tribunal is to be established is an issue which is within the domain of the Executive in terms of Section 109 of CGST Act ordinarily and is not justiciable in view of the decision of the Supreme Court in the case of Lalit Kumar (supra), wherein it was held that "that the issue with regard to setting up of permanent Bench and Circuit Benches of the Tribunal is not to be the subject matter of consideration by the judicial forum unless facts of the case are so appalling that judicial interference would be called for." There were no exceptional circumstances existing in the case, so far as the proposal dated 21.02.2019 was concerned, which was not even under challenge, therefore the same did not fall for adjudication in Writ Petition No. 655 (TAX) of 2018, on merits. As far we are concerned, ***we are not concerned with the issue on merits as to where the Benches should be established but we are only concerned with the issue whether the earlier proposal could have been reviewed on account of certain observations made in an interim order and*** *whether on which count the revised proposal is sustainable as a valid exercise of power. .....*

50. In the present case, the legislation, namely, GST Act, 2017 has been enacted and has come into force with effect from 01.07.2017. Under the said enactment, various authorities have to be set up, namely, GST Council, and ***the GST Council was authorised to make recommendations to the Government for constitution of the regional Benches and State Benches.***

51. ***In view of the above discussion, the amended proposal dated 15.03.2019 sent by the Commissioner, Commercial Tax is quashed. Consequently the earlier proposal dated 21.02.2019, which was a reasoned and considered one, shall be acted upon and GST Benches shall be constituted accordingly, expeditiously, say within three months'."***

14. **Thereafter,** in its **35th meeting held on 21.06.2019,** vide Agenda Item No.8, the GST Council has noted in para-35.3 that *"Sri Alok Sinha, ACS Uttar Pradesh stated that although* ***the State Government had proposed for setting up of a State Bench in Allahabad*** *and 4 Area Benches in Ghaziabad, Lucknow, Varanasi and Agra, the same had been challenged before the Hon'ble High Court Lucknow Bench, the Hon'ble High Court* ***has quashed the instant proposal and ordered for considering the earlier proposal of the State Government recommending constitution of one State Bench with 20 Area Benches. He informed that the State Government was contemplating filing an appeal in the Supreme Court and requested that Government of India may also file an appeal against the High Court's order, as it was respondent No.1."*** Therefore, the matter of constitution of State Bench and Area Benches was deferred. Consequently, in 35th meeting, no decision was taken by the Council regarding constitution of State Bench and Area Benches in the State of Uttar Pradesh. However, in 25 States and 5 Union Territories, State Benches of the Appellate Tribunal were constituted and notified by Notification No.2744 dated 21.08.2019 and published in the Gazette of India.

15. **Thereafter**, in its **37th meeting held on 20.09.2019**, the GST Council vide Agenda Item No.18 observed that for the State of Uttar Pradesh, Department of Revenue would consider the records/ court orders issued by the Hon'ble High Court Benches of Allahabad and Lucknow taking

a final view for the location of a State Bench of the Tribunal in view of the request made by the State of Uttar Pradesh.

16. Thus, even on quashing of the afore-quoted proposal of the State Government dated 15.03.2019 in PIL Civil No.6800 of 2019, the proposal of the State Government dated 05.03.2019, remained with the Council for establishing State Bench at Allahabad, which was neither under challenge in the PIL Civil No.6800 of 2019 nor it was withdrawn by the State Government.

17. **Thereafter**, the GST Council in **39th Meeting held on 14.03.2020,** considered the issue of creation of State Bench and Area Benches in State of Uttar Pradesh vide Agenda Item No.6 and approved the proposal for creating State Bench of the Tribunal at Allahabad and Four Area Benches at Ghazibad, Lucknow, Varanasi and Agra, as under:

"Agenda Item 6: Creation of the State and Area Benches of the Goods and Services Tax Appellate Tribunal (GSTAT) for the State of Uttar Pradesh

15. The Secretary introduced the agenda and stated that in terms of Section 109 of the CGST Act, 2017: Goods and Services Tax Appellate Tribunal (GSTAT) were being constituted by the Government on the recommendation of the GST Council. The Appellate Tribunal having National/Regional Benches at National level and the State / Area Benches at State level, to hear appeals against orders passed by the Appellate Authority or by the Revisional Authority (Enclosed in Agenda circulated for reference).

15.1. While the proposal of states and UTs for creation of State and Area Benches of Goods and Services Tax Appellate Tribunal was considered in the 35th and 37th meeting of the GST Council, the proposal for the State of Uttar Pradesh could not be considered as the Hon'ble High Court of Allahabad, Lucknow Bench had quashed the proposal of State Government for setting up of State Bench in Allahabad and 4 Area Benches in Ghaziabad, Lucknow, Varanasi and Agra. The Department of Revenue had proposed to file SLP against the said judgment of the Allahabad high Court, Lucknow Bench.

15.2. Hon'ble High Court of Allahabad vide its judgement dated 16.01.2020 in Writ Tax NO. 942 of 2018 had inter-alia directed that the issue of creation of GSTAT Benches for the state of Uttar Pradesh be taken up by the Central Government as well as the GST Council, as expeditiously as possible.

15.3. Accordingly, proposal for creating State Bench of Good and Services Tax Appellate Tribunal for the State of Uttar Pradesh in Allahabad and 4 Area Benches in Ghaziabad, Lucknow, Varanasi and Agra was placed before GST Council for consideration.

16. For Agenda item 6, the Council approved the proposal for creating State Bench of Goods and Services Tax Appellate Tribunal for the State of Uttar Pradesh at Allahabad and 4 Area Benches at Ghaziabad, Lucknow, Varanasi and Agra."

18. It appears that in the meantime, the **Commissioner of Commercial Tax Uttar Pradesh Lucknow** wrote a DO Letter No.20/GST dated 29.05.2020 to the Joint Secretary of the GST Council, which is extracted below:

"Amrita Soni
I.A.S.
44/Dt.01-06-2020

(Do. No.20/GST

Commissioner Commercial Tax Uttar Pradesh
Lucknow.

29th May 2020

SUBJECT- Agenda Item 6: Creation of the State and Area Benches of the Goods and Services Tax Appellate Tribunal (GSTAT) for the State of Uttar Pradesh of the 39th GST Council meeting.

Respected Sir,

This is in reference to the Agenda item 6: Creation of the State and Area Benches of the Goods and Services Tax Appellate Tribunal (GSTAT) for the State of Uttar Pradesh of the 39th GST Council meeting, held on 14 march 2020 at Vigyan Bhawan, New Delhi.

In this regard, I would like to communicate you that ***Government of Uttar Pradesh has decided to create total 04 benches of GSTAT including State Bench in the state i.e. State Bench in Lucknow and 03 Area benches in Varanasi, Ghaziabad, and Agra*** *respectively, instead of 05 benches of GSTAT proposed by the state earlier,*

Kindly acknowledge the decision as above from Government of Uttar Pradesh.

The above decision is being communicated with the due approval from the Government of Uttar Pradesh.

(AMRITA SONI)
To,
Shri S.K. Rahman,
Joint Secretary,
GST Council
Phone: (Off.) - 0522-2721147 / 2721149, Fax: 0522-2721167
E-mail : ctcomhqlu-up@nic.in, cctup2013@gmail.com"

19. Thereafter in its **40th meeting held on 12.06.2020,** the GST Council vide Agenda Item No.7 recommended/ approved, as under:

"Agenda Item7: Creation of the State and Area Benches of the Goods and Services Tax Appellate Tribunal (GSTAT) for the State of Uttar Pradesh:

16. The Secretary introduced the agenda and stated that the Chapter XVIII of the CGST Act 2017 provides for the Appeal and Review Mechanism for dispute resolution under the GST regime. The proposal of States and UTs for creation of State and Area Benches of Goods and Services Tax Appellate Tribunal was considered in the 35th, 37th, 38th and 39th meeting of the GST Council.

16.1. ***He further stated that in the 39th GST Council meeting the Council approved the proposal for creating State Bench of Goods and Services Tax Appellate Tribunal for the State of Uttar Pradesh at Allahabad*** *and 4 Area Benches at Ghaziabad, Lucknow, Varanasi and Agra. He then asked JS, DoR, GoI to apprise the Council of the latest update.*

16.2 JS, DoR, GoI stated that ***a fresh proposal was received from the State of Uttar Pradesh vide DO. No 20/GST dated 29th May, 2020*** *regarding creation of the State and Area Benches of the Goods and Services Tax Appellate Tribunal (GSTAT) for the State of Uttar Pradesh. As per this letter,* ***the State Government of Uttar Pradesh has decided to create total 04 benches of GSTAT including State Bench in the State i.e. State Bench in Lucknow and 03 Area Benches in Varanasi, Ghaziabad and Agra respectively,*** *instead of 05 benches of GSTAT proposed by the State earlier.*

16.3. ***Hon'ble Minister for Finance from Uttar Pradesh intervened*** *and further proposed to consider creation of another Area Bench at Prayagraj apart from Varanasi, Ghaziabad, and Agra with State Bench at Lucknow.*

16.4. Accordingly, the proposal for creating the State and Area Benches of the Goods and Services Tax Appellate Tribunal (GSTAT) for the State of Uttar Pradesh i.e State Bench at Lucknow and 04 Area Benches at Varanasi, Ghaziabad, Agra and Prayagraj was considered and approved by the Council.

7. ***For Agenda No. 7*** *the Council approved the creation of* ***State Bench at Lucknow and 4 Area benches at Varanasi, Ghaziabad, Agra and Prayagraj*** *for the State of Uttar Pradesh."*

20. The relief in the nature of certiorari to quash the aforesaid recommendation DO Letter No.20/GST dated 29.05.2020 issued by the respondent No.3 (Commissioner, Commercial Tax, U.P. Lucknow) and approval by the respondent No.6 (GST Council) in its 40th meeting held on 12.06.2020 for recommending to create State Bench at Lucknow and 4 Area Benches at Varanasi, Ghaziabad, Agra and Prayagraj, has been sought by relief No.(D1). By Relief No.(E1) and Relief No.(A), a direction has been sought to the respondent No.6 to restore its decision of the 39th Meeting held on 14.03.2020 and a direction to the respondent No.1 to forthwith issue necessary notification by creation of State Bench at Prayagraj and Area Benches at Ghaziabad, Lucknow, Varanasi and Agra.

Stand taken by the respondent Nos.1 and 6 (Union of India and GST Council) in their affidavits:-

21. The stand taken by the respondent Nos.1 and 6 in their counter affidavits/ affidavits is, as under:

(a) In **paragraph 12 of the counter affidavit dated 27.07.2018 and paragraph-3(H) and para-13 of the counter affidavit dated 16.08.2018,** it has been stated that under Section 109 of the CGST Act, the Central Government on the recommendation of the Council, has power to constitute "Appellate Tribunal".

(b) In the **affidavit dated 15.10.2019 of Sri S. Bhowmik, Under Secretary,** Department of Ministry of Finance, North Block, New Delhi, **filed on behalf of respondent No.1** (Union of India), it has been stated in paragraphs 3, 4, 7 and 8, as under:

"3.That in terms of section 109 of the CGST Act, 2017, the UP Government vide letter dated 21.02.2019 initially requested the GST Council to consider a proposal for constitution of State Bench of GST Appellate Tribunal at Lucknow and 20 Area Benches at l6 different locations. A copy of the proposal dated 21.02.2019 is enclosed herewith and marked as ***Annexure No. I.***

4. It is submitted that the Hon'ble Court of Allahabad, Allahabad Bench vide its order dated 28.02.2019 in W.P. No. 655/2018 held that the Appellate Tribunal should be set up in Allahabad following the decision of Apex Court in the matter of Madras Bar Association which provides the Tribunal should be set up at the place where the Principal Bench of the High Court is situated. Accordingly, UP State vide their letter dated 05.03.2019 revised their proposal dated 21.02.2019 to the extent that the State Bench of the Appellate Tribunal should be constituted at Allahabad along with 19 Area Benches. On 15.03.2019, they again revised their

proposal for constitution of 5 Benches of Appellate Tribunal i.e. one State Bench at Prayagraj and four area benches at Ghaziabad, Lucknow, Agra and Varanasi. A copy of the proposal dated 05.03.2019 and proposal dated 15.03.2019 is placed at Annexure No. II and Annexure No. III respectively.

7. It is humbly submitted that the matter regarding deciding the location and number of Benches of the GSTAT is an executive prerogative. The GST Council is a constitutional Body under Article 279A of the Constitution of India, which alone can make recommendation to the Union and State Governments and it is the appropriate authority for recommending the location and number of benches of GSTAT.

8. It is submitted that in view of the above submissions, the Department is pursuing to file an SLP in the Hon'ble Supreme Court of India against the Hon'ble Allahabad High Court, Lucknow Bench judgement dated 31.05.2019 in PIL Civil No. 6800 of 2019 before the Hon'ble Supreme Court of India."

(c) In **paragraph-8 of the affidavit dated 16.01.2020** filed on behalf of respondent No.1 (Union of India), it has been stated as under:

"8. It is humbly submitted that the matter regarding deciding the location and number of Benches of the GSTAT is an executive prerogative. The GST Council is a constitutional Body under Article 279A of the Constitution of India, which alone can make recommendation to the Union and State Governments and it is the appropriate authority for recommending the location and number of benches of GSTAT."

Stand taken by the State-Respondents in their counter affidavits/ affidavits

22. The stand taken by the State-respondents in their counter affidavits/ affidavits is, as under:

(a) In paragraphs-3, 6 and 7 of **the supplementary counter affidavit dated 27.02.2019** filed on behalf of respondent No.2 (State of U.P.), it has been stated as under:

"3.That under Section 109 of GST Act, 2017 ***the Central Government has to specify for each State*** *and union territory,* ***a Bench of Appellate Tribunal*** *(hereinafter referred to as '****State Bench'****) and on receipt of request from the State Government constitute such number of Area Benches in the State as may be recommended by the Council.*

6. That thereafter the Addl. Chief Secretary sent a recommendation to the Secretary GST Council Government of India vide letter dated 21 February, 2019 for constitution of 20 Area Benches of the Tribunal in 16 Districts including one State Bench at Lucknow. Copy of the recommendation dated 21 February, 2019 is being annexed herewith and marked as ***Annexure- S.C.A.-3*** *to this affidavit.*

7. That the ultimate decision in this regard is to be taken by the Central Government as provided under Section 109 of the ACT."

(b) In paragraphs-5 and 6 of the better **supplementary counter affidavit dated 13.03.2019** filed on behalf of the respondent Nos.2 and 3 (State of U.P. and Commissioner), it has been stated as under:

"5. That, thereafter Additional Chief Secretary, Government of U.P. sent a ***revised proposal*** *dated 05.03.2019 to the Finance Secretary and Secretary, G.S.T. Council for constitution of State Bench of the Tribunal at Allahabad and 19 Area Benches in different districts. A copy of revised proposal sent by the Additional*

Chief Secretary, Government of U.P. ***dated 05.03.2019*** *is being filed herewith and marked as* ***Annexure No. S.C.A.-2*** *to this affidavit.*

6. That, under Section 109 of the Goods and Services Tax Act, 2017, it is the ***Central Government which has to specify for each State*** *and Indian Territory a bench of Appellate Tribunal* ***as State Bench*** *and on receipt of the request of the State Government, the Central Government has* ***to constitute such number of benches in the State as may be recommended by the Council.*** *Therefore the function of the State Government is only to recommend for the constitution of the benches."*

(c) **In status report affidavit dated 18.07.2019** filed on behalf of State-respondents, it has been stated in paragraphs 10 and 11, as under:

"9. That, in the mean time the matter of constitution of Tribunal in the States was considered by G.S.T. Council. In this regard Joint Secretary, G.S.T. Council wrote a letter on 11.07.2019 to the Joint Secretary, Revenue with endorsement to answering respondent. A copy of letter dated 11.07.2019 as well as copy of minutes of Agenda-8 are being filed herewith and marked as ***Annexure No.-6*** *collectively to this affidavit.*

10. That, ***the State Government is also considering further action for filing S.L.P. against the judgment and order dated 31.05.2019,*** *passed by Hon'ble High Court at Lucknow.*

11. That, under Section 109 of the Goods and Service Tax Act, 2017, ***it is the Central Government which has to specify for each State*** *and Indian Territory a bench of Appellate Tribunal "****State Bench*** *and on receipt on the request of the State Government, the Central Government has to constitute such number of Area Benches in the State as may be recommended by the Council."*

23. **Learned Additional Solicitor General of India** appearing along with other learned counsel for Indirect Taxes - Central Government has referred to the stand taken in the aforementioned affidavits to contend that the matter regarding the decision for location and the number of Benches of the GSTAT, is an executive prerogative and the GST Council being a constitutional body under Article 279A of the Constitution of India, alone can make a recommendation to the Union in respect of the location and number of benches of GSTAT.

24. **Learned Additional Advocate General** appearing along with Sri C.B. Tripathi, learned special counsel for the State-respondents, has taken aid of the stand taken in the counter affidavits of the State- respondents to submit that under Section 109 of the CGST Act, the Central Government has to specify for each State and Union Territory, a Bench of Appellate Tribunal (i.e. "State Bench') and on receipt of request on the State Government to constitute such number of Area Benches in the State as may be recommended by the Council.

25. **From the pleadings as briefly noted above and also the submissions made by the learned counsels for the parties,** it is evident that the petitioners as well as respondents are in agreement on the following points:

(a) The Central Government shall, by notification, specify a State Bench of the Appellate Tribunal in view of Section 109(6) of the CGST Act and Section 109(2) of the U.P. GST Act.

(b) The State Government has a role only in creation of Area Benches to the extent that it can request for such number of Area Benches it desires. The Central Government, on receipt of a request of any State Government, shall constitute such number of Area Benches in that State as may be recommended by the Council. Thus, the recommendation of the Council for creation of Area Benches on request of the State Government is required to enable the Central Government to constitute Area Benches.

(c) The creation of State Bench of Appellate Tribunal at Prayagraj (Allahabad) and Area Benches at Lucknow, Ghazibad, Varanasi and Agra was approved in the 39th meeting of the GST Council. After approval/ recommendation of the GST Council in its 39th meeting dated 14.03.2020, the matter fell within the powers of the Central Government alone to issue notification in exercise of powers under Section 109(6) of the CGST Act.

(d) The State Government has no power under Section 109(6) of the CGST Act or Section 109 of the U.P. GST Act to specify for State Bench of Appellate Tribunal. It is solely within the domain of the Central Government.

26. In the case of **Oudh Bar Association High Court, Lucknow (supra),** vide order dated 31.05.2019, Luckow Bench of this Court **held vide para-44 that out of two seats of High Court of Judicature at Allahabad,** one at Lucknow and other at Allahabad, **none of which is permanent.** The provisions of Section 109 of the CGST Act/ U.P. GST Act, were not under consideration in the aforesaid case except that in concluding portion of the order, a reference to Section 109 has been made holding that the seat where the Tribunal is to be established is an issue which is in the domain of executive in terms of Section 109. The aforesaid case was filed by an Advocates Association. The present writ petitions have been filed by the dealers of different districts, namely Banda, Kanpur Nagar, Kanpur, Mathura, Lalitpur, Meerut, Aligarh, NOIDA/G.B. Nagar, Bijnor, Agra, Ghaziabad, Bulandshahar, Jhansi and Moradabad, against the order passed by authorities under CGST Act/ U.P. GST Act and their main argument is of interpretation of Section 109 of the CGST Act/ U.P. GST Act and the relief has been sought for establishing the State Bench and Area Benches. The reliefs so sought have already been quoted above.

27. It shall not be out of place to mention that in **Special Appeal No.1481 of 2007 (M/S Universal Insulator And Cereamics Ltd. vs. Official Liquidator High Court Allahabad),** decided on 17.10.2019, a Division of this Court considered the following question:

"(I) Whether "Permanent Seat" and "Principal Seat" is one and the same thing and can it be said that there is no "Permanent Seat" as well as "Principal Seat" of this High Court at Allahabad and Lucknow?"

28. In the aforesaid case of **Universal Insulator and Ceramics Ltd. (supra),** the Division Bench exhaustively considered the history of High Court of Judicature at Allahabad and Chief Court of Oudh, the entire legislative history and the relevant provisions, and answered the afore-quoted question, as under.

"117. The aforesaid historical backdrop, therefore, makes it clear that High Court at Allahabad was created by Royal Charter. Initially it was called as

'High Court of Judicature for North Western Provinces' which had the area of aforesaid Province but Oudh was a different Province, not governed by North Western Provinces. 'High Court of Judicature for North Western Provinces' subsequently became 'High Court of Judicature at Allahabad'. Judicial system at Province in Oudh area came to be governed by British system of justice after Oudh area was acceded to by Britishers (East India Company) in 1856. Judicial system for Oudh area was governed by Statute governing judicial system in Oudh, then changed by various statutes and commencing from Act No.XIV of 1865 abd followed by Act No.XXXII of 1871 i.e. 'Oudh Civil Courts Act' and subsequent Statutes enacted thereafter. In 1925 vide Oudh Courts Act, a Chief Court for Oudh was constituted consisting of one Chief Judge and four Puisne Judges. They continued till U. P. High Courts (Amalgamation) Order, 1948 was enacted amalgamating both Courts at Lucknow and Allahabad in one High Court called as 'High Court of Judicature at Allahabad'. Though Government of India Acts were enacted from time to time and first one, being Government of India Act, 1800, was enacted with further Regulations for establishing British domain in India and better administration of justice within the same, but Chartered High Courts established under the provisions of Indian High Courts Act, 1861 came to be governed together for the first time by Government of India Act, 1919 i.e. 1915-1919 and Section 101 thereof provided that High Courts referred to in the said Act are such which were established in British India by Letters Patent.

118. By Section 130 of G.I. Act, 1915-1919, Acts specified in Fourth Schedule were repealed and Indian High Courts Act, 1861 and Indian High Courts Act, 1865 in entirety were repealed. The G.I. Act, 1915-1919 obviously did not cover Judicial Commissioner's Court for Oudh Province.

119. However for the first time, G. I. Act, 1935 while declaring as to which Court shall be deemed to be High Courts for the purpose of G. I. Act, 1935, declared, besides others, existing High Courts, to include Chief Court of Oudh also. This status conferred upon Chief Court of Oudh as a 'High Court' came to be recognized vide U. P. High Courts (Amalgamation) Order, 1948 wherein Chief Court of Oudh at Lucknow and High Court of Judicature at Allahabad, both were termed as 'existing High Courts' and on amalgamation gave rise to a New High Court i.e. 'High Court of Judicature at Allahabad'. However, Chief Justice of Allahabad High Court became Chief Justice of New High Court and Chief Judge of Avadh/Oudh became one of the Judges though as per his priority, he was placed above other Puisne Judges of High Court of Judicature at Allahabad. Superintendence of New High Court by Chief Justice, who was sitting at Allahabad at that time, continued with him.

120. The entire discussions made above at the pain of repetition leads an undoubted inference that New High Court created by U. P. High Courts (Amalgamation) Order, 1948 did not declare any 'Permanent Seat' of New High Court, but considering the fact that Chief Justice of High Court of Judicature at Allahabad i.e. existing High Court became Chief Justice of New High Court also, we have no manner of doubt to observe that 'Principal Seat of Allahabad remained at Allahabad'. This is also evident from the fact that the number of Judges to sit at Lucknow would not be less than two but how much beyond that, has to be decided

by Chief Justice. All other judges would sit at Allahabad. Similarly, territorial jurisdiction of New High Court at Lucknow is subject to determination of Chief Justice, which power could have been exercised for once. In respect of remaining areas, jurisdiction remained with New High Court at Allahabad. Further in a pending case, Chief Justice may transfer the matter for hearing to Allahabad but not vice versa. This shows that High Court at Allahabad has residuary authority. It can hear matters within jurisdiction of Judges sitting at Lucknow but not vice versa. All this go to show that New High Court at Allahabad can be termed as "Principal Seat" of High Court.

*121. Question (1) therefore, is answered by holding that Allahabad or Lucknow cannot be said to be a "Permanent Seat" of High Court and no such permanence in respect of seat has been visualized or provided by U.P. High Courts (Amalgamation) Order, 1948 as held by Constitution Bench in Sri Nasiruddin (supra) but "**Principal Seat" of 'High Court of Judicature at Allahabad' is at 'Allahabad'.**"*

29. Thus, there is no conflict between the aforesaid two judgments, i.e. in the cases of **Oudh Bar Association (supra) and Universal Insulator and Ceramics Ltd. (supra).** Both the judgments hold that neither Allahabad nor Lucknow can be said to be permanent seat of High Court **but principal seat of the High Court of Judicature at Allahabad is at ''Allahabad'**. Principal seat of the High Court of Judiciature is at Allahabad, is also reflected from judgments of this court in **Vijendra Pal SC Singh vs. Senior Regional Manager, Food Corporation of India, Lucknow and another, AIR 2002 (All) 206, Ashok Pandey vs. Allahabad High Court, (2014) 3 All.LJ 507** and also from judgments of **Hon'ble Supreme Court in U.P. Junior Doctors' Association Committee vs. B. Sheetal Nandwani, (1990) 4 SCC 633 (Para-5) and L.P. Misra vs. State of U.P., (1998) 7 SCC 379 (Para-8).**

30. Coming back to the proceedings before the GST Council; perusal of Agenda Item No.7 of the 40th Meeting of the Council held on 12.06.2020 as reproduced in Para-19 above, goes to show that the recommendation has been made on the basis of DO Letter No.20/GST dated 29th May, 2020 for creation of State Bench and Area Benches of the Goods and Services Tax Appellate Tribunal, for the State of Uttar Pradesh. The D.O. Letter No.20/GST dated 29.05.020 as reproduced in Para-18 above would show that it is a letter written by the Commissioner Commercial Tax, who is an Officer under the U.P. GST Act and appointed by the State Government by notification, as evident from the definition of the word "Commissioner" under Section 2(24) read with Sections 3 and 4 of the U.P. GST Act, 2017. The earlier proposals dated 05.03.2019 and 15.03.2019 were of the State Government through its Additional Chief Secretary, who is the competent authority. **The proposal of the State Government for creation of State Bench at Allahabad dated 05.03.2019 has neither been quashed by any court nor has been withdrawn by the State Government.**

31. As regards the proposal dated 29.05.2020 sent by the Commissioner, Commercial Tax U.P. Lucknow, it may be noticed that the same is in contradiction to the proposals of the State Government dated 05.03.2019 and accordingly, the same cannot be sustained. Upon a specific

query made to the learned counsel appearing for the State-respondents as to whether the proposal sent by the Commissioner, Commercial Tax U.P. Lucknow could be said to be a proposal of the State Government as per the relevant "Rules of Business", the counsel appearing for the State-respondents have fairly submitted that the proposal of the Commissioner, Commercial Tax U.P. Lucknow cannot be said to be the proposal of the State Government. **In view of the aforesaid position, the proposal dated 29.05.2020 forwarded by Commissioner, Commercial Tax, U.P. Lucknow being in contradiction to the proposals duly sent by the State Government on 05.03.2019, the said proposal dated 29.05.2020 is unsustainable and is accordingly quashed.** Consequently, the Agenda Item No.7 of 40th Meeting of the Council, based on the aforesaid proposal of the Commissioner dated 29.05.2020, can also not be sustained and is hereby quashed. The GST Council has taken the decision in its 39th Meeting dated 14.03.2020 vide Agenda Item No.6 for creation of the State Bench at Allahabad (Prayagraj) and Four Area Benches in Ghaziabad, Lucknow, Varanasi and Agra. Once the Council has recommended, vide Agenda Item No.6 of the 39th Meeting held on 14.03.2020, the matter automatically fell within the jurisdiction of the Central Government to exercise its powers under Section 109(6) of the CGST Act. This position also stands affirmed by own stand taken by the State-respondents in their counter affidavits/ affidavits, the relevant portions of which have been quoted in foregoing paragraphs of this order/ judgment.

32. It is pertinent to mention that dealers in the State of Uttar Pradesh falling under the CGST Act/ U.P. GST Act and aggrieved with the orders of first appellate authority under Section 107, have been left remediless inasmuch as Appellate Tribunal under the Act is not available in the State of Uttar Pradesh for preferring appeals under Section 112 of the CGST Act/ U.P. GST Act. The Appellate Tribunal being the last fact finding authority and its not availability in the State of Uttar Pradesh, is causing serious prejudice to the rights of aggrieved persons for statutory appeal which is continuing since the enactment of the CGST Act/ U.P. GST Act. Therefore, in peculiar facts and circumstances of the case and in view of the legislative mandate of Section 109(6) of the CGST Act, we direct as under:

(i) The GST Council shall forward its recommendation of Agenda Item No.6 of the 39th Meeting held on 14.03.2020 to the Central Government/ respondent No.1 within two weeks from today.

(ii) Thereafter, the respondent No.1/ Central Government shall, within next four weeks, specify by notification in terms of sub-Section (6) of Section 109 of the CGST Act the "State Bench" at Prayagraj (Allahabad), of the Goods and Services Tax Appellate Tribunal and four Area Benches at Ghaziabad, Lucknow, Varanasi and Agra, in the State of Uttar Pradesh for exercising the powers of the Appellate Tribunal.

(iii) The respondent Nos.1, 2, 3 and 6 shall ensure that the State Bench and the Area Benches of the Appellate Tribunal (Goods and Service Tax Appellate Tribunal) in the State of Uttar Pradesh are made functional as far as possible from 01.04.2021.

(iv) Since the challenge to the impugned orders relates to questions of fact and the Appellate Tribunal is the last fact

finding authority, therefore, we leave it open for all the petitioners to challenge the impugned orders before the Appellate Tribunal under Section 112 of the CGST Act/ U.P. GST Act as and when the State Bench and Area Benches of the Appellate Tribunal are constituted in the State of Uttar Pradesh. However, till expiry of the period of limitation for filing appeals under Section 112 of the CGST Act after establishment of the State Bench and Area Benches or till appeals are filed, whichever is earlier, no coercive action shall be taken against the petitioners herein pursuant to the impugned orders passed by the first authority or the first appellate authority. Liberty is also granted to the petitioners to avail such remedy as available to them under law in respect of other reliefs which have not been considered and decided by this judgment.

33. For all the reasons stated above, **the writ petitions are disposed off** as indicated above. Accordingly, **the relief Nos.(A), (D-1) and (E-1), are granted**. There shall be no order as to costs.

34. We hope and trust that the respondent Nos.1, 2, 3 and 6 shall ensure compliance of this order within the stipulated time frame.

(2021)02ILR A162
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 02.02.2021

BEFORE

THE HON'BLE VIKAS KUNVAR SRIVASTAV, J.

U/S 482/378/407 No. 304 of 2021

Mohd. Saddam @ Mohd. Zeeshan & Ors.
...Applicants
Versus
State of U.P. ...Opposite Party

Counsel for the Applicants:
Mohsin Iqbal

Counsel for the Opposite Party:
G.A.

(A) Criminal Law - Code of Criminal Procedure, 1973 - Section 311 - Power to summon material witness, or examine person present - The applicant's unnecessary attempt and intent to get retrial is not justified.

Application of the accused applicants purported to be under Section 311 Cr.P.C. was rejected by trial court.

HELD:- The application under Section 311 Cr.P.C. seems flimsy and as such is having no force. Trial court in it's impugned order has elaborately discussed about the lack of justification of calling proposed evidence and witness in their application under Section 311 Cr.P.C. at the stage of final decision. Court does not find any reason to interfere at this stage in the impugned order rejecting the application under Section 311 Cr.P.C.(Para -14,18)

Application u/s 482 Cr.P.C. rejected. (E-6)

List of Cases cited:-

Manju Devi Vs St. of Raj. & anr. , 2019 (2) JIC 279 (SC)

(Delivered by Hon'ble Vikas Kunvar Srivastav, J.)

1. The case is called out.

2. Heard learned counsel for applicants, Sri Mohsin Iqbal, Advocate as well as learned Additional Government Advocate for State and perused the record.

3. The present application under Section 482 Cr.P.C. is directed against the order of the court below (learned Additional Sessions Judge, Court no.3,

Faizabad) passed in Sessions Trial No.84/2013 by which the application of the accused applicants purported to be under Section 311 Cr.P.C. was rejected. The prayer made in the present application runs as under:-

"Wherefore, it is most respectfully prayed that this Hon'ble Court may kindly be pleased to exercise the powers under Section 482 Cr.P.C. and to quash the order dated 06.01.2021 passed by the learned Additional District and Sessions Judge, Court no.3, Faizabad, S.T. No.84 of 2013 (arising out of Crime No.3895 of 2012) U/S- 147, 148, 149, 336, 504, 302, 307, 506 IPC, Police Station- Kotwali Nagar, District Faizabad State Vs. Mohd. Siddique and others which is contained as Annexure No.4 to the petition, allow the petition under Section 482 Cr.P.C. and direct the learned Trial Court to firstly summon the doctor as well as injury report, Bed Head Ticket etc. of injured Suleman-PW-2 from K.G.M.U., Lucknow and thereafter conclude the trial, in the interest of justice."

4. It would be pertinent to reproduce para-2 of this application which is as under:-

"That the petitioners are involved in case crime No.3895 of 2012, under Section 147, 148, 149, 302, 307, 336, 504, 506 IPC of P.S.-Kotwali Nagar, District-Faizabad, which was registered on 8.12.2012 at 4:00 p.m. relating to the incident dated 8.12.2012 at 2.15 p.m. on the information of Mohd. Usman."

5. The certified copy of the impugned order is made Annexure No.4 to the present application. From perusal of the order dated 06.1.2021, it is obvious that the applicants have moved an application bearing No.234(Kha) in Sessions Trial No. 84/2013 (State Vs. Mohd. Saddam and Ors.) pending before that Court, to the effect that since the injured of the occurrence involved in the aforesaid Sessions Trial namely Suleman (PW-2) stated in his examination before the court that he was admitted in District Hospital, Faizabad from where he was referred to Lucknow by doctor, therefore, the said doctor alongwith bed head ticket and reference letter be called in the court for examination alongwith doctors at Trauma Center, Lucknow who made medical examination and treatment of the said injured, exercising the power vested in the court under Section 311 Cr.P.C. The impugned order has also mention of the fact that the applicants have not made clear, whether the proposed witnesses and evidences sought to be summoned in the court would be prosecution witnesses or the witnesses of the defence.

6. Further, learned court below observed that the said applications are moved in the mid of arguments impressing on the fact that First Information Report is anti-timed with a view to improve their case, though they themselves have led the evidence of their four witnesses in defence also. Learned court below further observed that after the closure of the prosecution evidence, the accused-applicants were examined under Section 313 Cr.P.C., were afforded opportunity to lead evidence and they virtually availed the said opportunities in the trial, thereafter the evidence in defence was led by them sufficiently. Therefore, the date was fixed for final argument long back in the year 2016.

7. Learned court below further observed that the applicants have no explanation as to why the proposed

evidence and witnesses sought to be summoned could not be produced by them in the course when they were availing the opportunity to adduce evidence in defence before the Court. Further, learned trial court observed that though the application moved by the accused applicants under Section 311 Cr.P.C. have no justification and force to invoke the discretion of the Court, then also, this would be open for the court to call any such evidence or witness under Section 311 Cr.P.C. when it feels necessary in the interest of justice.

8. The fact as to the tactics to delay the decision in the trial, adopted by learned counsel for the defence is also taken note by the trial court itself. In its order, the court below mentions that despite the order of the High Court with regard to expeditious disposal, the trial was being posted from date to date since 26.05.2016 for final argument, whereas the earlier presiding officer had also heard the arguments and thereafter the present trial court also continuously hearing the arguments. It is now to sum up the hearing but any such need of evidence in the interest of justice has never been raised earlier at any stage of the arguments.

9. Learned court below further stated in the impugned order that within such a long span of time, no such application invoking the jurisdiction under Section 311 Cr.P.C. was moved by the learned counsel for the defence before 29.10.2020, is in itself suggestive of accused applicants' delaying tactics. Ultimately learned court below had dismissed the application, fixing 12.01.2021 for rest of the arguments.

10. Learned counsel for the accused applicants has also prayed for an interim order of staying the proceeding of aforesaid Sessions Trial No. 84/2013, he pressed today that the **judgment in the case is likely to be pronounced tomorrow i.e. 03.02.2021.**

11. Learned counsel summed up his arguments for invoking the discretion of this court under Section 482 Cr.P.C. with vehemence to stifle the proceeding of the court below at the stage of pronouncement of the judgment.

12. In support of his arguments, learned counsel for the applicant relied on the case law propounded by Hon'ble Supreme Court in the case of ***Manju Devi Vs. State of Rajasthan & Anr. reported in 2019 (2) JIC 279 (SC),*** wherein it is held that the trial court is not justified to reject the application under Section 311 Cr.P.C. merely on the reason that trial was pending for eight years.

13. Learned A.G.A. on his turn, submitted that no doubt the discretion of calling any witness not examined or recalling a witness has already been examined or if any evidence needed in the interest of justice is vested in the course before which trial is running but the exercise of the said discretion depends on the necessity to impart justice between the parties. The prosecution has examined all his witnesses including PW-2, 'Suleman' who was the injured witness in the incident along with the medical certificate, in corroboration of the statement therein. After closure of the evidence of prosecution, the applicant accused were called on in person by the court under Section 313 Cr.P.C. The questions were put before them on the basis of the prosecution evidence produced against them in the trial. When they were asked to produce any evidence or witness in their defence, they

availed the opportunity and produced four witness in defence. Thereafter since 2016, the case is being posted for final hearing. It was materially heard on merit from time to time. The accused applicants have no explanation or justification why and under what circumstances they have sought invocation of discretion of the court under Section 311 Cr.P.C. to call for the evidence and witness afresh.

14. It is observed by this Court also that the applicants have neither stated in their application under Section 311 Cr.P.C. before the trial Court nor in their present application under Section 482 Cr.P.C. that how the said evidence and witnesses are relevant to which of the issue involved in the trial, therefore, the application under Section 311 Cr.P.C. seems flimsy and as such is having no force. On the other hand learned trial court in it's impugned order has elaborately discussed about the lack of justification of calling proposed evidence and witness in their application under Section 311 Cr.P.C. at the stage of final decision.

15. Section 311 Cr.P.C. reads as under:-

"Power to summon material witness, or examine person present. Any Court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or. recall and re-examine any person already examined; and the Court shall summon and examine or recall and re- examine any such person if his evidence appears to it to be essential to the just decision of the case."

16. The Apex Court in case law Manju Devi ***(Supra)*** relied by the learned counsel for the applicants, discussed in its para-9.1 as under:-

9.1 It needs hardly any emphasis that the discretionary powers like those under Section 311 CrPC are essentially intended to ensure that every necessary and appropriate measure is taken by the Court to keep the record straight and to clear any ambiguity in so far as the evidence is concerned as also to ensure that no prejudice is caused to anyone. The principles underlying Section 311 CrPC and amplitude of the powers of the Court thereunder have been explained by this Court in several decisions 1. In Natasha Singh v. CBI (State) : (2013) 5 SCC 741, though the application for examination of witnesses was filed by the accused but, on the principles relating to the exercise of powers under Section 311, this Court observed, inter alia, as under:-

" 8. Section 311 CrPC empowers the court to summon a material witness, or to examine a person present at ?any stage? of ?any enquiry?, or ?trial?, or ?any other proceedings? under CrPC, or to summon any person as a witness, or to recall and re-examine any person who has already been examined if his evidence appears to it, to be essential to the arrival of a just decision of the case. Undoubtedly, the CrPC has conferred a very wide discretionary power upon the court in this respect, but such a discretion is to be exercised judiciously and not arbitrarily. The power of the court in this context is very wide, and in exercise of the same, it may summon any person as a witness at any stage of the trial, or other proceedings. The court is competent to exercise such power even suo motu if no such application has been filed by either of the parties. However, the court must satisfy itself, that it was in fact essential to examine such a witness, or to recall him for further examination in order to arrive at a just decision of the case.

15. The scope and object of the provision is to enable the court to determine the truth and to render a just decision after discovering all relevant facts and obtaining proper proof of such facts, to arrive at a just decision of the case. Power must be exercised judiciously and not capriciously or arbitrarily, as any improper or capricious exercise of such power may lead to undesirable results. An application under Section 311 CrPC must not be allowed only to fill up a lacuna in the case of the prosecution, or of the defence, or to the disadvantage of the accused, or to cause serious prejudice to the defence of the accused, or to give an unfair advantage to the opposite party. Further, the additional evidence must not be received as a disguise for retrial, or to change the nature of the case against either of the parties. Such a power must be exercised, provided that the evidence that is likely to be tendered by a witness, is germane to the issue involved. An opportunity of rebuttal however, must be given to the other party. The power conferred under Section 311 CrPC must therefore, be invoked by the court only in order to meet the ends of justice, for strong and valid reasons, and the same must be exercised with great caution and circumspection. The very use of words such as "any Court", "at any stage?, or "or any enquiry, trial or other proceedings", "any person" and "any such person" clearly spells out that the provisions of this section have been expressed in the widest possible terms, and do not limit the discretion of the Court in any way. There is thus no escape if the fresh evidence to be obtained is essential to the just decision of the case. The determinative factor should therefore be, whether the summoning/recalling of the said witness is in fact, essential to the just decision of the case."

17. This would be also relevant here to mention the copy of the order dated 05.07.2017 of Hon'ble Supreme Court in **Suleman Vs. State of Uttar Pradesh** submitted by learned A.G.A. which relates to present Sessions Trial No.84/2013, the said order reads as under:-

"Delay condoned.

The case of the petitioner is that the trial is already in progress in S.T. 84/2013 regarding the incident in question where version of the complainant in the present case No.1604/2015 before the Chief Judicial Magistrate, Faizabad, U.P. can also be gone into.

In that view of the matter, the proceedings in the present case No.1604/2015 before the Chief Judicial Magistrate, Faizabad, U.P. may be taken up only after conclusion of the first trial.

The special leave petition is disposed of in above terms.

Pending applications, if any, shall also stand disposed of."

18. The accused applicants have no denial in their applications under Section 482 Cr.P.C. that they had availed the opportunity to adduce evidence and examine witnesses in their defence, moreover, they have sufficiently examined the PW-2, injured witness, Suleman alongwith the documentary evidences produced to prove the injury. Presently, as learned counsel for the present accused applicants submitted that the argument have already been submitted by learned counsels for the respective parties before the trial court and the judgment is likely to be pronounced tomorrow i.e. 03.02.2021. Court does not find any reason to interfere at this stage in the impugned order dated 06.01.2021 rejecting the application under Section 311 Cr.P.C. The applicants may not

be permitted to stifle the proceeding without any reasonable cause. They may also not be permitted to fill up any lacuna in their defence particularly when the trial court in it's order impugned in the application has left open the room for exercise of it's discretion vested in it under Section 311 Cr.P.C. if it feels necessary, in the course of delivering it's judgment. The applicant's unnecessary attempt and intent to get retrial is not justified.

19. At this stage, when the present application under Section 482 Cr.P.C. is lacking any prominent issue which need be proved with the help of evidence and witnesses sought to be summoned as well as for lack of pleading as to reasonable apprehension, if their move under Section 311 Cr.P.C., not allowed what adverse effect would occasion, entailing gross injustice to them, this Court does not find any force in the application to interfere with the proceedings of court below.

20. On the basis of discussions made hereinabove, the applicants' application under Section 482 Cr.P.C. is **REJECTED.**

21. Deputy Registrar (Criminal) is directed to inform the result of the present application under Section 482 Cr.P.C. forthwith through e-mail or other ways to learned Additional District and Sessions Judge, Court No.3, Faizabad forthwith.

(2021)02ILR A167
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 18.02.2021

BEFORE

THE HON'BLE VIKAS KUNVAR SRIVASTAV, J.

U/S 482/378/407 No. 776 of 2021

Lalman & Anr. ...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Nijam Ahamad

Counsel for the Opposite Parties:
G.A.

(A) Criminal Law - Indian Penal Code, 1860 - Sections 420 - Cheating and dishonestly inducing delivery of cheating, Sections 467 - forgery for valuable security,will etc. , Sections 468 - forgery for purpose of cheating , Sections 471 - using as genuine a forged document or electronic record, Code of criminal procedure, 1973 - Section 239 - when accused shall be discharged .

(B) Criminal Law - Code of criminal procedure, 1973 - Sections 219 - Three offences of same kind within year may be charged together, Sections 220 - trial for more than one offence, Section 300 - Person once convicted or acquitted not to be tried for same offence - The two criminal cases against the same execution of same sale deed dated 3.11.2016 and charge sheet submitted in both the cases are not suffering from the vice of sameness. (Para -13)

Application for discharge under Section 239 Cr.P.C. placed before the Court of Magistrate on 7.1.2019 by the present accused applicants alongwith other co-accused - availed opportunity of hearing - they had not proposed any evidence in their favour - only ground set-forth for their discharge - one crime case in relation with the same sale deed has again been made subject matter of the present Case Crime lodged by the opposite party no.2 . (Para -13)

HELD:- No instance of abuse of power or error of law particularly as to the lack of allegations which constituted an offence committed by the applicants against the opposite party no.2, the complainant of the Case Crime No.30/2019, there is no reason to interfere in both the impugned order dated 21.1.2020 and 16.12.2020 passed by the court's below under

Section 239 of the Cr.P.C.. The applicants wants only to stifle the proceeding of the case genuinely filed and legally running, therefore, the extraordinary inherent power of the court under Section 482 Cr.P.C. cannot be exercised to fulfill his purpose. (Para -17,18)

Application u/s 482 Cr.P.C. rejected. (E-6)

List of Cases cited:-

1. Prabhunath Yadav Vs St.of U.P. , 2008 (60) ACC 59

2. Ramesh Singh Vs St.of Bihar , AIR 1977 (SC) 2018

3. Rajbeer Singh Vs St. of U.P. & anr. , 2006 (55) ACC 318 (SC)

4. Haresh & ors. Vs St. of Chattisgarh , 2009 Cr.L.J. 1383

5. St. of Raj.Vs Fateh Karan Mehdu , AIR 2017 SC 796

6. Surender Kaushik & ors. Vs St. of U.P. & ors. , (2013) 5 SCC 148

7. Inder Mohan Goswami & anr. Vs St.of Uttaranchal & ors. , (2007) 12 SCC 1

(Delivered by Hon'ble Vikas Kunvar Srivastav, J.)

1. The case is called out.

2. The present application under Section 482 Cr.P.C. pressed before the Court by learned counsel for the applicants, Sri Nijam Ahmad, on behalf of the applicants - Lalman and Durga Prasad. A copy of the application has already been served in the office of learned G.A., pursuant thereto learned A.G.A. appear to protest the same.

3. Heard learned counsel for the parties and perused the materials available on record, the prayer made in the application, invoking the inherent jurisdiction of the court under Section 482 Cr.P.C. is to the effect, to quash the order dated 16.12.2020 passed by learned Sessions Judge, Ambedkar Nagar in Criminal Revision No.30/2020 (Umesh Vishwakarma & Ors. Vs. State of U.P.) and order dated 21.1.2020 passed by learned Judicial Magistrate, Ambedkar Nagar in Criminal Case No.4265/2019 (State Vs. Sabha Narayan & Ors.) arising out of Case Crime No.30/2019 under Sections 420, 467, 468, 471 of I.P.C., registered at Police Station- Jalalpur, District- Ambedkar Nagar.

The Factual Matrix

4. The materials available on record reveals that the applicant nos.1 and 2 are amongst the accused involved in Case Crime No.30/2019 referred hereinabove, registered under Sections 420, 467, 468 and 471 I.P.C. The impugned order is passed by the learned Judicial Magistrate, Ambedkar Nagar on 21.1.2020 on an application of the present applicants along with the other co-accused Umesh Vishwakarma and Narendra Dev moved on 7.12.2019 under Section 239 Cr.P.C. for their **discharge**.

5. Learned counsel for the applicants submitted that, the said application for discharge was moved before the court, pursuant to the order of this Court passed over application under Section 482 Cr.P.C. seeking quashing of the impugned charge sheet dated 10.6.2019 filed in Case Crime No.30/2019 under Sections 420, 467, 468 and 471 I.P.C., the relevant portion of the said order is reproduced hereinunder:-

"After arguing the matter up to some length, learned counsel for the applicants submit that he does not want to press this application on merit and he confines his prayer only to the extent that applicants may be permitted to move discharge application through counsel and suitable directions may be issued for expeditious disposal of the same.

Learned A.G.A. has no objection in grant of aforesaid prayer.

In view of above, it is provided that applicants permitted to move their discharge application(s) through counsel within four weeks' from today and in case any such application(s) are being filed, same shall be heard and decided expeditiously after hearing the parties, in accordance with law, by means of a reasoned and speaking order.

Till the aforesaid period of four weeks' and during pendency of discharge application, no coercive steps shall be taken against the applicants in the aforesaid case."

Discharge application on the ground of sameness of matter in two FIRs.

6. Pursuant to the above order of this Court, discharge application dated 7.1.2019 under Section 239 Cr.P.C. (Annexure No.7), was moved before the Court of Magistrate, Ambedkar Nagar, where the case was pending. The applicants set forth, before the court, the grounds and reasons for their discharge that there is a crime case no.371/2016 registered under Section 420 and 465 I.P.C. already lodged in respect of the 'sale deed dated 3.11.2016' by one Gaurav Kumar on 26.12.2016 against the same accused (present accused-applicants) with the other co-accused persons in same Police Station- Jalalpur, District - Ambedkar Nagar. After due investigation, charge-sheet was filed therein under Section 420 and 465 I.P.C. which is pending in the Court of Civil Judge (Senior Division)/Fast Track/A.C.J.M., State Vs. Umesh Vishwakarma & Ors., bearing Criminal Case No.192/2018. The said criminal case is at the stage of evidence. In the said criminal case, the charge-sheet filed by the investigating officer contains the name of 'Meda Devi' in the column of witnesses, alongwith her statement recorded by the Investigating Officer under Section 161 Cr.P.C.

7. Despite the pendency of aforesaid criminal case, Meda Devi, the complainant of the present case, on 2.2.2019 has filed another criminal case in relation to the said sale deed in question dated 3.11.2016 against the applicants and other co-accused Sabha Narayan, Umesh Vishwakarma, Mahendra Yadav, Narendra Dev bearing Case Crime No.30/2019 under Section 420, 467, 468, 471 I.P.C. in Police Station- Jalalpur, District- Ambedkar Ngar. The investigating officer submitted charge-sheet dated 10.6.2019 in the court after investigation.

8. The present applicants took another ground in their application for discharge dated 7.1.2019 that Section 300 Cr.P.C. provisions, no one can be punished twice for the same offence and one cannot be tried twice for the same offence. Moreover, the Sections 219 and 220 Cr.P.C. provides that if an offence is committed in the same manner within one year, then for all such offences only one charge should be framed by the Court.

9. The said application for discharge under Section 239 Cr.P.C. moved by the present applicants through their counsel was entertained by the Court of Judicial

Magistrate, Ambedkar Nagar and disposed of vide a reasoned and elaborated order on 21.1.2020 (impugned in this application). Learned Judicial Magistrate has held that under Section 239 Cr.P.C. at the stage of framing the charge, the court is required to consider the plea of accused for discharge in the light of materials available on record. The court is required to hear prosecution as well as accused. If it finds the charges to be groundless against the accused, shall discharge him recording reasons for doing so. Learned Judicial Magistrate further held that when police files a final report under Section 173 Cr.P.C., it means that charge sheet contains essential allegations coupled with prima facie evidence which, if proved, will constitute a punishable offence. Learned Magistrate did not find the charge-sheet groundless. He has further held that at the stage of cognizance or framing of charge, the prosecution is not burdened to prove the evidences sufficient to convict the accused, and only this much is sufficient for the prosecution that there is prima facie evidence against the accused persons on record. Learned court of Magistrate further observed that in this case at the stage of cognizance, the court has already found prima facie evidences against the present accused-applicants for trial and thus have summoned them under Section 420, 467, 468 and 471 I.P.C.

10. The aforesaid order of the Judicial Magistrate, Ambedkar Nagar dated 21.1.2020, challenged in revision before the Court of Sessions Judge, Ambedkar Nagar who finally decided the same vide order dated 16.12.2020, (impugned in this application). The impugned order dated 16.12.2020 is a reasoned and speaking order on the issue of discharge of accused-applicants. Learned Sessions Judge in his order dated 16.12.2020 has elaborately discussed the scope and ambit of the Section 239 Cr.P.C. and the extent to which the Magistrate is required under the law in deciding the issue of discharge. He relied on the cases ***Prabhunath Yadav Vs. State of U.P. reported in 2008 (60) ACC 59, Ramesh Singh Vs. State of Bihar*** reported in ***AIR 1977 (SC) 2018, Rajbeer Singh Vs. State of U.P. & Anr.*** reported in ***2006 (55) ACC 318 (SC), Haresh & Ors. Vs State of Chattisgarh reported in 2009 Cr.L.J. 1383*** and ***State of Rajasthan Vs. Fateh Karan Mehdu*** reported in ***AIR 2017 SC 796*** and concluded that in a criminal case charge can be framed even on the basis of serious suspicion against the accused and while framing of charge, the Court is required to consider only the evidences collected by the prosecution, whether they are sufficient to raise suspicion against the accused that, the offence is committed by him. Learned Sessions Judge in para-9 of the impugned order has discussed the case of prosecution, in present Case Crime No.30/2019 lodged by Meda Devi, (the opposite party no.2). The said opposite party no.2, Meda Devi, who is the complainant of the case, has reported to the police that the land comprising Gata No.470 of area 0.003 hectare and Gata No.471 of area 0.003 hectare was purchased by her through sale deed, executed on 31.3.1980 by Sabha Narayan, the co-accused. On the said land, the opposite party no.2, is in possession and use by constructing her residential house and resides there with family. Since mutation proceeding was not concluded, the accused Sabha Narayan, Umesh Vishwakarma, Lalman, Durga Prasad, Mahendra Yadav and Narendra Dev in collusion with each other alienated the same land again through sale deed on 3.11.2016 deceitfully, and thus affected the right title and interest of the complaint. Learned Sessions Judge agreeing from the

findings of Judicial Magistrate, Ambedkar Nagar in his order dated 21.1.2020, observed that at this stage, atleast the statement of complainant of the case stands unrebutted as well as the two sale deeds of same property in question also stand unrebutted, therefore, the facts, materials and the circumstances of the present Criminal Case No.30-2019, prima facie stands triable against the revisionist accused separately than that of the criminal case lodged by Gaurav Kumar in Case Crime No.371/2016.

Whether the impugned orders of court below suffer from any vice.

11. On the above discussion, learned court of revision found that there are strong ground to frame charges against the accused persons. Both the impugned orders dated 21.1.2020 passed by learned court of Judicial Magistrate, Ambedkar Nagar and that passed in revision by the Court of Sessions Judge, Ambedkar Nagar on 16.12.2020 are well reasoned and speaking orders, in conformity with the requirement of law as provisioned under Section 239 Cr.P.C. Section 239 Cr.P.C. runs as under:-

"239. When accused shall be discharged. If, upon considering the police report and the documents sent with it under section 173 and making such examination, if any, of the accused as the Magistrate thinks necessary and after giving the prosecution and the accused an opportunity of being heard, the Magistrate considers the charge against the accused to be groundless, he shall discharge the accused, and record his reasons for so doing."

12. The present case instituted on the basis of police report, therefore, the trial is to run under the provision of Criminal Procedure Code, 1973 from Section 238 to 243 Cr.P.C. Section 239 of the Cr.P.C. provides that before framing of charges against the accused person, he can be discharged under Section 239 Cr.P.C. From its bare reading, the essential ingredients for discharge are obviously as follows:-

The court have to consider the charge sheet and documents appended thereto by the police under Section 173 Cr.P.C.

The Magistrate may if deems fit examine the accused, thereafter, the arguments of both the sides namely the prosecution and the accused should be heard. If the court finds the ground against the accused are baseless and there is no evidence available against the accused. In other words the court considers prima facie case against the accused then the accused.

13. In the present case, the application under Section 239 Cr.P.C. was placed before the Court of Magistrate on 7.1.2019, by the present accused applicants alongwith other co-accused, they availed opportunity of hearing, they had not proposed any evidence in their favour. However, the only ground set-forth for their discharge is that one crime case bearing no.371/2016 lodged by Gaurav Kumar in relation with the same sale deed dated 3.11.2016 has again been made subject matter of the present Case Crime No.30/2019 lodged by the opposite party no.2, Meda Devi. The application itself made it clear that by virtue of execution of sale deed dated 3.11.2016 which is forged and deceitful as alleged by Gaurav Kumar, because the boundary of land comprising his shops sold to him earlier in the year 1980, is also included in the subsequent sale deed dated 3.11.2016. Likewise, Meda Devi also is aggrieved independently, from the sale deed dated

3.11.2016 as the land, purchased by her from the accused, Sabha Narayan in the year 1980 through a duly registered sale deed, has again been included in the sale deed 3.11.2016. As such Gaurav Kumar and Meda Devi both are aggrieved from the deceitful execution of sale deed dated 3.11.2016 by the accused Sabha Narayan, independently and, they have their independent, separate and individual right to protect their property, vested in them, against the criminal act of execution of sale deed dated 3.11.2016 deceitfully by the accused-applicants. In the case of Gaurav Kumar, charge sheet has already been submitted, the accused have put their appearance in that case, which is being posted at the stage of evidence. The Case Crime No.30/2019 lodged by the opposite party no.2, Meda Devi is also an independent case, the charge sheet has been submitted after due investigation and the courts below have concurrently found sufficient ground for framing of charges, so as to commence the trial. They have committed no wrong, there is no illegality. The two criminal cases against the same execution of same sale deed dated 3.11.2016 and charge sheet submitted in both the cases are not **suffering from the vice of sameness.**

14. In a case having similar circumstance, ***'Surender Kaushik & Ors. Vs. State of U.P. & Ors.'*** reported in ***2013 (5) SCC 148,*** Hon'ble the Supreme Court in its para-25 observed as under:-

"25. In the case at hand, the appellants lodged the FIR No. 274 of 2012 against four accused persons alleging that they had prepared fake and fraudulent documents. The second FIR came to be registered on the basis of the direction issued by the learned Additional Chief Judicial Magistrate in exercise of power under Section 156(3) of the Code at the instance of another person alleging, inter alia, that he was neither present in the meetings nor had he signed any of the resolutions of the meetings and the accused persons, five in number, including the appellant No. 1 herein, had fabricated documents and filed the same before the competent authority. FIR No. 442 of 2012 (which gave rise to Crime No. 491 of 2012) was registered because of an order passed by the learned Magistrate. Be it noted, the complaint was filed by another member of the Governing Body of the Society and the allegation was that the accused persons, twelve in number, had entered into a conspiracy and prepared forged documents relating to the meetings held on different dates. There was allegation of fabrication of the signatures of the members and filing of forged documents before the Registrar of Societies with the common intention to grab the property/funds of the Society. If the involvement of the number of accused persons and the nature of the allegations are scrutinized, it becomes crystal clear that every FIR has a different spectrum. The allegations made are distinct and separate. It may be regarded as a counter complaint and cannot be stated that an effort has been made to improve the allegations that find place in the first FIR. It is well-nigh impossible to say that the principle of sameness gets attracted. We are inclined to think so, for if the said principle is made applicable to the case at hand and the investigation is scuttled by quashing the FIRs, the complainants in the other two FIRs would be deprived of justice. The appellants have lodged the FIR making the allegations against certain persons, but that does not debar the other aggrieved persons to move the court for direction of registration of an FIR as there

have been other accused persons including the complainant in the first FIR involved in the forgery and fabrication of documents and getting benefits from the statutory authority. In the ultimate eventuate, how the trial would commence and be concluded is up to the concerned court. The appellants or any of the other complainants or the accused persons may move the appropriate court for a trial in one court. That is another aspect altogether. But to say that it is a second FIR relating to the same cause of action and the same incident and there is sameness of occurrence and an attempt has been made to improvise the case is not correct. Hence, we conclude and hold that the submission that the FIR lodged by the fourth respondent is a second FIR and is, therefore, liable to be quashed, does not merit acceptance."

15. The learned counsel for the applicants could not succeed in bringing the impugned orders in the ambit of abuse of power or suffering from any legal bar so as to invoke the extraordinary inherent power of the High Court under Section 482 Cr.P.C.

16. The Hon'ble Apex Court in the case of ***Inder Mohan Goswami and Another Vs. State of Uttaranchal and Ors.*** reported in ***(2007) 12 SCC 1***, in paragraph nos.26 and 27 held as under:-

26. "In R.P. Kapur Vs. State of Punjab reported in AIR 1960 SC 866, this Court summarized some categories of cases where inherent power can and should be exercised to quash the proceedings:-

(i) where it manifestly appears that there is a legal bar against the institution or continuance of the proceedings;

(ii) where the allegations in the first information report or complaint taken at their fact value and accepted in their entirety do not constitute the offence alleged.

(iii) where the allegations constitute an offence, but there is no legal evidence adduced or the evidence adduced clearly or manifestly fails to prove the charge."

27. The powers possessed by the High Court under section 482 of the Code are very wide and the very plenitude of the power requires great caution in its exercise. The court must be careful to see that its decision in exercise of this power is based on sound principles. The inherent power should not be exercised to stifle a legitimate prosecution. The High Court should normally refrain from giving a prima facie decision in a case where all the facts are incomplete and hazy; more so, when the evidence has not been collected and produced before the court and the issues involved, whether factual or legal, are of such magnitude that they cannot be seen in their true perspective without sufficient material. Of course, no hard and fast rule can be laid down in regard to cases in which the High Court will exercise its extraordinary jurisdiction of quashing the proceedings at any stage."

17. On the discussions made hereinabove, when the learned counsel for the applicants has not shown the instance of abuse of power or error of law particularly as to the lack of allegations which constituted an offence committed by the applicants against the opposite party no.2, the complainant of the Case Crime No.30/2019, there is no reason to interfere in both the impugned order dated 21.1.2020 and 16.12.2020 passed by the court's below under Section 239 of the Cr.P.C.

18. The applicants wants only to stifle the proceeding of the case genuinely filed

and legally running, therefore, the extraordinary inherent power of the court under Section 482 Cr.P.C. cannot be exercised to fulfill his purpose, the application is therefore, **REJECTED** and disposed of finally.

19. The Deputy Registrar (Criminal) is directed to communicate the order of Court immediately through e-mail to the trial court through the District and Session Judge, Ambedkar Nagar in addition to ordinary course of communication forthwith.

(2021)02ILR A174
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 23.02.2021

BEFORE

THE HON'BLE MRS. SAROJ YADAV, J.

U/S 482/378/407 No. 3104 of 2019

Arun Kumar Gupta ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Amit Chaudhary, Sukumar Srivastava

Counsel for the Opposite Parties:
G.A., Arun Sinha, Siddhartha Sinha

(A) Criminal Law - Indian Penal Code, 1860 - Sections 465 - punishment for forgery , Sections 420 - Cheating and dishonestly inducing deliverey of property, Sections 468 - forgery for cheating, Sections 471 - using as genuine a forged document or electronic record , Sections 504 - intentional insult with intent to provoke breach of the peace , Sections 506 - punishment for criminal intimidation, Sections 406 - punishment for criminal breach of trust - Criminal Court after passing the judgment or final order disposing the case can not alter or review the same except to correct the clerical or arithmetical error . (Para - 8)

Petitioner (complainant) lodged an F.I.R. against the (opposite party no. 2) & two other persons - for not giving possession of flat purchased from opposite no. 2 - investigation - charge sheet submitted - cognizance taken - opposite party no. 2 filed a petition under Section 482 Cr.P.C. against that order - Court stayed the coercive measures against the accused-applicant - direction to pass the order afresh - passed a fresh order taking cognizance - summoned the accused-applicant to face trial - fixed date for appearance of the accused - accused did not appear on the said date - on the next date moved an application for recall of the order - Learned C.J.M. on the application so moved passed an order dated 17.10.2018 staying the order dated 14.08.2018 passed by him.(Para -2)

HELD:- By the impugned order, learned Chief Judicial Magistrate has stayed the order of taking cognizance passed by him on 14.08.2018, which is not permissible under the provisions of Code of Criminal Procedure, hence the impugned order deserves to be quashed. (Para - 8)

Application u/s 482 Cr.P.C. allowed. (E-6)

List of Cases cited:-

Sanjeev Kapoor Vs Chandana Kapoor & ors., Criminal Appeal No. 286 of 2020 (Arising out of SLP (CRL) No. 1041 of 2020)

(Delivered by Hon'ble Mrs. Saroj Yadav, J.)

1. This petition under Section 482 of the Code of Criminal Procedure, 1973 (hereinafter referred as Cr.P.C.) has been filed by the petitioner Arun Kumar Gupta (complainant) for quashing the order dated 17.10.2018 passed in Criminal Case No. 0101210/2014, arising out of Case Crime No. 515/2014, (State of UP Versus Alok Kumar Gupta), under Sections 465, 420,

468, 471, 504, 506, 406 of the Indian Penal Code, 1860 (hereinafter referred as I.P.C.), Police Station Hazratganj, District Lucknow and seeking a direction for early disposal of the matter pending before the Chief Judicial Magistrate, Lucknow.

2. In short, the facts necessary for disposal of this petition are as follows:

The petitioner purchased a Flat i.e. Flat No. 405 in the Lotus Petals Apartments, 6/1-B Mall Avenue, Lucknow from the opposite party no. 2 (Alok Kumar Gupta) in the year 2011 and the same has been registered in the name of the petitioner (complainant). The petitioner, however, did not take possession of the said Flat after execution of the sale deed as some finishing work was still left to be done. That as per the assurance of opposite party no. 2-Alok Kumar Gupta, was to be completed by him in a short span of time. In the month of August, 2014, the petitioner/ (complainant) found that the said Flat was in illegal possession of two persons namely Sri Achal Mehrotra and Sri Rajiv Bajpai. The petitioner approached the opposite party no. 2 (Alok Kumar Gupta) and requested him to hand over the possession of the aforesaid Flat but he refused to do so. On further inquiry, the petitioner came to know that Alok Kumar Gupta (opposite party no. 2), Sri Achal Mehrotra and Sri Rajiv Bajpai have connived to defraud the petitioner (complainant). In such circumstances, the petitioner (complainant) lodged an F.I.R. against the above mentioned persons, registered as Case Crime No. 515/2014, under Sections 465, 420, 468, 471, 504, 506, 406 IPC, Police Station Hazratganj, District Lucknow. After investigation, charge sheet was submitted by the Investigating Officer and learned Chief Judicial Magistrate, Lucknow took cognizance vide order dated 01.12.2014. Against that order, the opposite party no. 2-Alok Kumar Gupta filed a petition under Section 482 Cr.P.C. bearing Criminal Misc. Case No. 2066 of 2015 (Alok Gupta Vs. State of U.P and others) before this Court and this Court vide order dated 23.07.2018 was pleased to stay the coercive measures against the accused-applicant and quash the order dated 01.12.2014 passed by the learned Chief Judicial Magistrate and directed the learned Chief Judicial Magistrate, Lucknow to pass the order afresh. In compliance of the order of the High Court dated 23.07.2018, learned Chief Judicial Magistrate, Lucknow passed a fresh order dated 14.08.2018 taking cognizance and summoned the accused-applicant to face trial for the offence under Sections 465, 420, 468, 471, 504, 506, 406 IPC and fixed the date 10th September, 2018 for appearance of the accused. The accused did not appear on the said date but on the next date fixed i.e. 15.10.2018, he moved an application for recall of the order dated 14.08.2018 of taking cognizance. Learned C.J.M. Lucknow on the application so moved passed an order dated 17.10.2018 staying the order dated 14.08.2018 passed by him. Learned Chief Judicial Magistrate, Lucknow also ordered for recalling of the process issued against the accused till further orders. Being aggrieved with the said order, the present petition has been filed by the petitioner (complainant). In this petition, an inteirm order was passed by the coordinate bench of this Court vide order dated 25.04.2019 staying the operation and implementation of order dated 17.10.2018 and proceedings in Criminal Case No. 0101210/2014, arising out of Case Crime No. 515/2014, under Sections 465, 420, 468, 471, 504, 506, 406 IPC, Police Station Hazratganj,

Lucknow. Again, the order so passed was modified by this Court on 30.05.2019 to the following effect:

"Till the next date of listing, the operation and implementation of order dated 17.10.2018 shall remain stayed."

3. Heard the counsel for both the sides.

4. Learned counsel appearing on behalf of the petitioner (complainant) argued that the impugned order dated 17.10.2018 passed by the learned Chief Judicial Magistrate, Lucknow is illegal, arbitrary and without jurisdiction because in the Cr.P.C., there is no provision enabling the Magistrate to stay its own final order. Section 362 Cr.P.C. prohibits that no Court shall alter or review any judgment or final order disposing a case after signing the same except to correct a clerical or arithmetical error, hence, the impugned order should be quashed.

5. On the other hand, Shri Siddhartha Sinha, learned counsel appearing on behalf of the opposite party no. 2 argued that in the order of taking cognizance dated 14.08.2018, wrong fact was mentioned that the accused applicant moved an application and he was heard, so the opposite party no. 2 moved an application for recall of order and learned Magistrate stayed the execution of the order because the order was illegal, hence this petition should be dismissed.

6. Considered the submission of both the sides and perused the record. As far as the alteration or review of the order disposing the case or judgment is concerned, Section 362 Cr.P.C. provides as under:

"362. Court not to alter judgment.-- Save as otherwise provided by this Code or by any other law for the time being in force, no Court, when it has signed its judgment or final order disposing of a case, shall alter or review the same except to correct a clerical or arithmetical error."

7. In the case of ***Sanjeev Kapoor Versus Chandana Kapoor & Others, Criminal Appeal No. 286 of 2020 (Arising out of SLP (CRL) No. 1041 of 2020)***, Hon'ble Apex Court has held as follows:

"The judgments of this Court as noted above, summarised the law to the effect that criminal justice delivery system does not cloth criminal court with power to alter or review the judgment or final order disposing the case except to correct the clerical or arithmetical error. After the judgment delivered by a criminal Court or passing final order disposing the case the Court becomes functus officio and any mistake or glaring omission is left to be corrected only by appropriate forum in accordance with law. "

8. It is settled legal position that Criminal Court after passing the judgment or final order disposing the case can not alter or review the same except to correct the clerical or arithmetical error. By the impugned order, learned Chief Judicial Magistrate has stayed the order of taking cognizance passed by him on 14.08.2018, which is not permissible under the provisions of Code of Criminal Procedure, hence the impugned order deserves to be quashed. The order dated 17.10.2018 passed by the learned Chief Judicial Magistrate, Lucknow is hereby quashed and this petition under Section 482 Cr.P.C. is, accordingly, ***allowed.***

9. As in the present matter F.I.R. lodged and charge-sheet was filed in the year 2014 and the case is still at initial stage, after a lapse of about six years, the

concerned Court below is directed to expedite the proceedings of the case pending before it in accordance with law.

(2021)02ILR A177
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 23.02.2021

BEFORE

THE HON'BLE MRS. SAROJ YADAV, J.

U/S 482/378/407 No. 4500 of 2019

Alok Gupta ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Siddhartha Sinha

Counsel for the Opposite Parties:
G.A.

(A) Criminal Law - Indian Penal Code, 1860 - Sections 406 - Punishment for criminal breach of trust, Sections 420 - cheating and dishonestly inducing delivery of property, Sections 465 - punishment for forgery, Sections 468 - forgery for purpose of cheating, Sections 471 - using as genuine a forged document or eloectronic record, Sections 504 - intentional insult with intent to provoke breach of the peace, Sections 506 - punishment for criminal intimidation.

(B) Criminal law - Code of criminal procedure, 1973 - Section 190 - Cognizance of offences by Magistrates - at the time of taking cognizance there is no requirement of providing opportunity of hearing to either party - Only satisfaction of the concerned Magistrate is required after application of legal mind. (Para -10)

Petition has been filed for quashing of the order dated 14.08.2018 - summoning the accused-applicant to face the trial - pending in the Court of Chief Judicial Magistrate - ground - Chief Judicial Magistrate has not applied its mind and also violated the principle of natural justice.

HELD:- Accused-applicant has no right to be heard at the time of taking cognizance, so no prejudice has been caused to the petitioner/accused. There is no justification to interfere under Section 482 Cr.P.C. and to quash the impugned order dated 14.08.2018 passed Chief Judicial Magistrate. (Para - 11,14)

Application u/s 482 Cr.P.C. dismissed. (E-6)

List of Cases cited:-

1. Mahesh Chand & etc Vs St. of Raj. & etc, , AIR 1986 Raj. 58

2. Bhushan Kumar & anr. Vs State (NCT of Delhi) & anr. , AIR (SC) 1747 (2012)

(Delivered by Hon'ble Mrs. Saroj Yadav, J.)

1. This petition under Section 482 of the Code of Criminal Procedure, 1973 (hereinafter referred as Cr.P.C.) has been filed for quashing of the order dated 14.08.2018 summoning the accused-applicant to face the trial, passed in Case Crime No. 515/2014, under Sections 406/420/465/468/471/504/506 of the Indian Penal Code, 1860 (hereinafter referred as I.P.C.), Police Station Hazratganj, District Lucknow pending in the Court of learned Chief Judicial Magistrate, Lucknow.

2. Heard Shri Siddhartha Sinha, learned counsel for the petitioner/accused, Shri Amit Chaudhary, learned counsel appearing on behalf of the opposite party no. 2 and learned A.G.A. for the State.

3. In short, the facts necessary for disposal of this petition are as follows:-

The opposite party no. 2 -Arun Kumar Gupta lodged a first information report bearing Case Crime No. 515/2014, under Sections 406 /420 /465 /468 /471 /504 /506 IPC, Police Station Hazratganj, District Lucknow against the petitioner/accused Alok Gupta. After investigation, the Investigating Officer submitted charge-sheet against the petitioner/accused in the Court. Learned Chief Judicial Magistrate, Lucknow took cognizance vide order dated 01.12.2014 and summoned the petitioner Alok Gupta to face trial in the above mentioned crime. Being aggrieved by the order of cognizance, the petitioner preferred a petition under Section 482 Cr.P.C. i.e. Criminal Misc. Case No. 2066 of 2015 (Alok Gupta Versus State of U.P and Others) for quashing the order of taking cognizance dated 01.12.2014. This Court quashed the order dated 01.12.2014 vide order dated 23.07.2018 and directed the Chief Judicial Magistrate, Lucknow to pass the order afresh. The relevant part of the order of this Court is quoted below:-

"Under such circumstance, I find that the impugned order suffers from non-application of mind, therefore, the same cannot be sustained. Accordingly, I quash the said order and remit the case to the file of Chief Judicial Magistrate, Lucknow with a direction to re-apprise first information report, charge-sheet and case diary along with all the papers attached with the case diary and then record his satisfaction as to how the offences mentioned in the charge-sheet are prima facie made out against the petitioner then pass the order either accepting or rejecting the charge-sheet. The said order must be passed within one month from the date of production/receipt of certified copy of this order by either of the parties. "

4. In compliance of the above order of this Court, learned Chief Judicial Magistrate, Lucknow passed the impugned order dated 14.08.2018 and summoned the petitioner.

5. This order has been assailed by the petitioner mainly on the ground that learned Chief Judicial Magistrate, Lucknow has not applied its mind and also violated the principle of natural justice. It has been argued by the learned counsel for the petitioner that in the impugned order learned Chief Judicial Magistrate, Lucknow has mentioned that the counsel for the petitioner (accused) was given an opportunity of being heard, however, the fact so mentioned is incorrect and false as petitioner neither moved application nor counsel of the petitioner/accused was heard before passing the impugned order. This is in gross violation of principle of natural justice as the petitioner/accused was not heard and the order was passed mentioning that petitioner/accused-applicant was heard. The petitioner/accused was not heard despite of this Court's order dated 23.07.2018, hence the order dated 14.08.2018 should be quashed.

6. Contrary to it, learned counsel for the opposite party no. 2 (complainant) and learned A.G.A. appearing on behalf of the State submitted that the impugned order is perfectly legal order as far as it relates to taking cognizance. The concerned Magistrate has mentioned in the order about all the relevant documents on the basis of which he has taken cognizance of the case. The mention of the name of the petitioner/accused and the fact of hearing him, written in the order may be wrong due to typographical mistake or otherwise as there is similarity in the names and parentage of parties but that did not cause

any prejudice to the petitioner as he had no right to be heard at that stage, i.e. the stage of taking cognizance. The petitioner has adopted all delaying tactics and he has not come with clean hands before this Court. Hence, this petition should be rejected.

7. Considered the submissions of both the sides and perused the material available on record. As far as taking of cognizance is concerned, Section 190 of the Code of Criminal Procedure provides as under:-

"190. Cognizance of offences by Magistrates.

(1) Subject to the provisions of this Chapter, any Magistrate of the first class, and any Magistrate of the second class specially empowered in this behalf under sub- section (2), may take cognizance of any offence-

(a) upon receiving a complaint of facts which constitute such offence;

(b) upon a police report of such facts;

(c) upon information received from any person other than a police officer, or upon his own knowledge, that such offence has been committed.

(2) The Chief Judicial Magistrate may empower any Magistrate of the second class to take cognizance under sub- section (1) of such offences as are within his competence to inquire into or try."

This section does not provide to give any opportunity of hearing either to accused or to informant at the time of taking cognizance. It is only satisfaction of the concerned Magistrate, after application of legal mind on the basis of the material placed before him is required for the purpose.

8. In ***Mahesh Chand And etc Versus State of Rajasthan and etc, AIR 1986 Raj. 58,*** the Full Bench of Rajasthan High Court in this regard answering the question, "Whether cognizance of offence can be taken in the absence of the accused?" has observed as under:-

"We would first take up the questions which, in our opinion, admit of simple and straight answers. Let us take up question 4 which is : Whether cognizance of an offence can be taken in the absence of the accused? This question must straightway be answered in the affirmative, and we answer it accordingly. A plain reading of Section 190, Cr. P.C. will provide reasons for this opinion. Section 190 deals with cognizance of offences by Magistrates. It lays down that any Magistrate of the first class may take cognizance of any offence (a) upon receiving a complaint of facts which constitute such offence; (b) upon a police report of such facts and (c) upon information received from any person other than a police officer, or upon his own knowledge that such an offence has been committed. It will be seen that the accused is nowhere in the picture in the context of taking cognizance of an offence under Section 190, Cr. P.C. The Magistrate takes cognizance of an offence and not against any particular accused. It may happen, and indeed does happen quite frequently that, when a Magistrate takes cognizance of an offence upon receiving a complaint of facts which constitute such offence, he may not even be knowing as to who is the accused who allegedly committed such offence.

It is only after taking cognizance of the offence under Section 190(1)(a) Cr. P.C. that the Magistrate embarks upon the enquiry under Sections 200 and 202, Cr. P.C.; and he may as a result thereof discover as to who is the accused. If he is able to make such discovery, which in the

language of the Code means if he is of opinion that, "there is sufficient ground for proceeding", it is only then that he is required under Section 204, to issue process for the attendance of the accused in his Court. If the Magistrate is of opinion that there is no sufficient ground for proceeding, he has no option but to dismiss the complaint upon which he had taken cognizance of the offence before embarking on such enquiry. Thus, Section 190(1)(a), read with Sections 200, 202, 203 and 204, Cr. P.C., leaves no manner of doubt that cognizance of an offence is taken at a stage when the accused is nowhere in the picture before the Magistrate and that therefore there is no question of taking cognizance of the offence in the presence of the accused. In other words, cognizance of an offence is not just a question of "can be", but it "has to be" taken in the absence of the accused.

12. Similarly, if the Magistrate takes cognizance of an offence under Section 190(1)(a), Cr. P.C., he would quite often be doing so obviously in the absence of the accused. We can think of only exceptional cases where it may be possible for the Magistrate to take cognizance of the offence in the presence of the accused. For example, if the accused commits the offence in the presence of the Magistrate and the latter takes cognizance of the offence under Section 190(1)(c) before the accused leaves the scene of the crime it may be said that the Magistrate has taken cognizance of the offence in the presence of the accused. Even the presence of the accused in such a situation would demonstrably show that such presence is happen-chance and not the requirement of law.

13. Even in the case of a Magistrate taking cognizance of the offence upon a police report under Section 190(1)(b), Cr. P.C., such cognizance has quite often to be taken in the absence of the accused if he is not forwarded in custody at the time of presenting the police report. The Magistrate would thus first take cognizance of the offence upon the police report and thereafter issue process for the attendance of the accused. "

9. In ***Bhushan Kumar and Another Versus State (NCT of Delhi) and Another, AIR (SC) 1747 (2012)***, the Hon'ble Apex Court in this regard has observed as under:

"In S.K. Sinha, Chief Enforcement Officer vs. Videocon International Ltd. & Ors., (2008) 2 SCC 492, the expression "cognizance" was explained by this Court as it merely means "become aware of" and when used with reference to a court or a Judge, it connotes "to take notice of judicially". It indicates the point when a court or a Magistrate takes judicial notice of an offence with a view to initiating proceedings in respect of such offence said to have been committed by someone. It is entirely a different thing from initiation of proceedings; rather it is the condition precedent to the initiation of proceedings by the Magistrate or the Judge. Cognizance is taken of cases and not of persons.

8) Under Section 190 of the Code, it is the application of judicial mind to the averments in the complaint that constitutes cognizance. At this stage, the Magistrate has to be satisfied whether there is sufficient ground for proceeding and not whether there is sufficient ground for conviction. Whether the evidence is adequate for supporting the conviction can be determined only at the trial and not at the stage of enquiry. If there is sufficient ground for proceeding then the Magistrate is empowered for issuance of process under Section 204 of the Code. "

10. Thus, it is settled legal position that at the time of taking cognizance there is no requirement of providing opportunity of hearing to either party. Only satisfaction of the concerned Magistrate is required after application of legal mind.

11. Perusal of the impugned order dated 14.08.2018 denotes that the Magistrate while passing the order of cognizance has mentioned that he has perused the case diary and the statements of the witnesses recorded as well as the documents put forward before him. It clearly reveals that the Magistrate while passing the order of taking cognizance has applied its legal mind. No doubt in the order, it has been mentioned that accused-applicant Alok Kumar Gupta was heard in compliance of the order passed by this Court but in the order of the High Court, there was no direction that the accused-applicant should be given an opportunity of hearing before taking the cognizance as has been argued by the learned counsel for the petitioner/accused. As mentioned above that accused-applicant has no right to be heard at the time of taking cognizance, so no prejudice has been caused to the petitioner/accused.

12. It is to be taken note that in this matter, the first information report was lodged in the year 2014, thereafter Investigating Officer submitted charge-sheet initially on 01.12.2014 cognizance was taken and the accused was summoned to face trial but accused-applicant came to this Court for quashing the order of taking cognizance on the ground of non application of mind and that order was set aside and a fresh order was passed by the Magistrate, which is impugned order and that was again challenged mainly for the reason that name of the petitioner/accused has been mentioned in the cognizance order disclosing that he has been heard while in-fact he was not heard but the rest of the summoning order discloses that learned Chief Judicial Magistrate has perused the material placed before him along with the charge-sheet. A long period has passed after lodging the F.I.R. but the matter is still pending at the initial stage in the Trial Court and petitioner/accused has not surrendered before the Court.

13. During argument it has been disclosed by the learned counsel for the informant/opposite party no. 2 that the petitioner/accused has moved an application before the trial court for discharge and this fact has been admitted by the counsel for the petitioner/accused. There remains the opportunity for the petitioner/accused to argue or make a submission that there is no prima facie material to constitute the offences alleged against the accused.

14. In the light of the aforesaid discussions, there is no justification to interfere under Section 482 Cr.P.C. and to quash the impugned order dated 14.08.2018 passed by the learned Chief Judicial Magistrate, Lucknow.

15. This petition under Section 482 Cr.P.C. is, accordingly, dismissed.

(2021)02ILR A181
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 07.01.2021

BEFORE

THE HON'BLE YASHWANT VARMA, J.

Writ A No. 11237 of 2020

Vatsala Jaiswal & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Seemant Singh, Sri Ashok Khare

Counsel for the Respondents:
C.S.C., Sri Avneesh Tripathi, Sri M.N. Singh

A. Service Law – Appointment of Trained Graduate Teacher in English – Selection – Essential Qualification – Advertisement require Graduate degree in English Literature – Candidates possess Master degree in English Literature – Recognition – No executive decision holding a Graduate degree in English Language and Literature to be equivalent – Effect – 'Same line of progression' – Held, Master's degree in English Literature has not been established as having been obtained in the 'same line of progression' – Court even otherwise and upon applying the test of reasonable prudence fails to discern any manifest or patent fallacy if it be asserted, as it has by theSt., that the study of English Language and Literature is the pursuit of two separate or distinct subjects so as to hold in favour of the petitioner. (Para 15, 19 and 24)

B. Service Law – Selection – Essential Qualification – Evaluation of the equivalence of degrees and qualifications – Juicial Review – Scope – Held, such evaluation is a function which must necessarily be left to experts in the field – Court in proceeding to do so would not only be transgressing the inherent limitations on the power of judicial review but also venturing into a field where it may be viewed as lacking the requisite expertise required to deal with such questions. (Para 23)

Writ Petition dismissed. (E-1)

Cases relied on :-

1. Parvaiz Ahmad Parry Vs St. of J. & K. & ors., 2016 (1) ESC 54 (SC)

2. Jyoti K.K. & ors. Vs Kerala Public Service Commission & ors., (2010) 15 SCC 596

3. St. of Uttar. & ors. Vs Deep Chandra Tewari & anr., (2013) 15 SCC 557

4. Writ A No. 24273 of 2018, Deepak Singh & 9 ors. Vs St. of U.P. & 8 ors. decided on 23 July 2019

5. Writ A No. 6083 of 2020, Asheesh Kumar & 6 ors. Vs St. of U.P. & 2 ors. decided on 11 November 2020

6. Civil Misc. Writ Petition No. 27782 of 2009, Km. Deoki Verma Vs St. of U.P. & ors. decided on 14 May 2010

7. Civil Misc. Writ Petition No. 8013 of 2011, Dr. Upendra Kumar Kanaujia Vs Chancellor/HisExcellency Governor of Uttar Pradesh, Lucknow & Others decided on 11 February 2011

8. Order passed in Review Application No. 183215 of 2016 in Writ A No. 63424 of 2015, Professor Madan Mohan Rajput Vs St. of U.P. & 5ors. decided on 27 October 2016

9. Zahoor Ahmad Rather Vs Imtiyaz Ahmad, (2019) 2 SCC 404

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

1. The Court has heard Sri Ashok Khare, learned Senior Counsel assisted by Sri Seemant Singh for the petitioners, Sri Avneesh Tripathi who has addressed submissions on behalf of the Commission and Sri Piyush Shukla, the learned Additional Chief Standing Counsel for the State-respondents.

2. All the petitioners had participated in a selection process initiated by the respondents for appointment of Trained Graduate Teachers in English. It is their case that they were initially permitted by the respondents to participate in the recruitment exercise. According to the petitioners, at the stage of document verification the testimonials submitted by them online were not accepted by the respondents and they all received error

messages of either having entered an invalid roll number or password. Upon enquiries being made they were apprised that all of them were found to be ineligible since they did not possess the essential qualification as stipulated in the advertisement. The advertisement required all applicants applying for appointment as Trained Graduate Teachers in English to hold a Graduate degree in *"English Literature"* conferred by a University duly established by law or such other degree which may have been recognized by the State as being equivalent thereto. It is the conceded position that none of the petitioners hold a Graduate degree in English Literature nor did they pursue a course of study in that subject at the graduation stage. Their challenge to the exclusion of their candidature rests on the Master's degree conferred on them at which stage they did have English Literature as the primary subject. It is in the aforesaid backdrop that it is contended that the petitioners who hold a superior or advanced degree in the subject of English Literature have been wrongly denied the right to seek appointment as Trained Graduate Teachers in English.

3. Assailing the decision of the respondents Sri Khare, learned Senior Counsel, has contended that since all of the petitioners have obtained their Master's degree in English Literature, a degree which is liable to be recognized as superior or at least a qualification higher to that of a Bachelor's degree in the same subject, they must be recognized as fulfilling the essential requirement as placed in the advertisement. Sri Khare has placed reliance on the decisions of the Supreme Court rendered in **Parvaiz Ahmad Parry Vs. State of Jammu & Kashmir And Others1, Jyoti K.K. And Others Vs. Kerala Public Service Commission and Others2** as also its decision in **State of Uttarakhand And Others Vs. Deep Chandra Tewari and Another3** in support of his submission that a higher qualification necessarily presupposes the candidate fulfilling the requirement of possessing a lower qualification and in any case evidences the candidates' eligibility for appointment. Sri Khare submits that a higher qualification can never be viewed as a disqualification for appointment especially in a case where such higher qualification has not been specifically excluded.

4. It becomes pertinent to note that two major hurdles stood in the way of acceptance of the aforesaid submissions. The attention of the learned Senior Counsel was invited to the judgment rendered by the Full Bench of the Court in **Deepak Singh and 9 Others Vs. State of U.P. and 8 Others4** as well as the judgment rendered by this Court in **Asheesh Kumar and 6 Others Vs. State of U.P. and 2 Others5**. Both in **Deepak Singh** and **Asheesh Kumar**, the Court was called upon to deal with an identical submission of a higher qualification being viewed as sufficient evidence of eligibility of candidates. Sri Khare sought to distinguish the judgment of the Full Bench in **Deepak Singh** by contending that the principal issue which fell for consideration of the Full Bench was the claim of eligibility as raised by candidates holding a degree in Engineering whereas the requirement in the advertisement was of a Diploma in that field. According to Sri Khare the judgment of the Full Bench in **Deepak Singh** merely holds that there was no equivalency between a Degree and Diploma in Engineering and it was in that backdrop that the Full Bench held that the degree

holders were ineligible to participate in the selection process and had been rightly excluded from the zone of consideration. Dealing with the decision rendered by this Court in **Asheesh Kumar**, Sri Khare submitted that the said decision was rendered in the backdrop of the absence of a stipulation in the advertisement in terms of which a degree equivalent to that prescribed may have been taken into consideration. Sri Khare submits that to the contrary, the pre-requisite as prescribed in the advertisement which forms subject matter of the present petition clearly brings within its scope degrees which may have been recognized as equivalent to that of a Bachelor's degree in English Literature and viewed in that light the decision in **Asheesh Kumar** is clearly distinguishable.

5. Sri Khare additionally relied upon the certifications issued by certain Universities from which the petitioners have obtained their Graduation degrees which according to him clearly establish and settle any doubt with regard to equivalency between a course of study in English Language and Literature. He submits that in view of these certifications and in the absence of any contrary decision taken by the respondents the petitioners have been wrongfully excluded. Sri Khare lastly assails the action of the respondents in having failed to address the issue of equivalency prior to the commencement of the selection process and submitted that the respondents were obliged to rule on that issue before holding the petitioners' ineligible to seek appointment as Trained Graduate Teachers in English.

6. Sri Avneesh Tripathi, learned counsel representing the Commission submitted that the decisions in **Deepak Singh** and **Asheesh Kumar** had in unambiguous terms negatived identical contentions and were therefore authoritative pronouncements sufficient to negate the submissions advanced on behalf of the petitioners and noted above. Additionally, Sri Tripathi has placed reliance upon the following three decisions: **(A) Km. Deoki Verma Vs. State of U.P. and Others6, (B) Dr. Upendra Kumar Kanaujia Vs. Chancellor/His Excellency Governor of Uttar Pradesh, Lucknow & Others7** and (C) an order passed on a Review Application8 moved in **Professor Madan Mohan Rajput Vs. State of U.P. And 5 Others9.**

7. At the outset and before proceeding to deal with the rival submissions, it becomes pertinent to note that the decisions cited by Sri Tripathi do not appear to bear any relevance to the questions which arise. **Km. Deoki Verma** was dealing with the issue of whether a person claiming promotion to the post of Assistant Teacher in the L.T. Grade must possess the requisite qualification in the subject concerned. Answering that question, the Division Bench held that it was incumbent upon the person seeking promotion to possess the requisite educational qualification as prescribed for the Assistant Teacher whose vacancy was sought to be filled. In **Dr. Upendra Kumar Kanaujia** the Division Bench found that the petitioner there did not possess the essential qualification of having a Master's degree in Ancient History. Similarly, the order of the Division Bench on the Review Application moved in Professor Madan Mohan Rajput essentially deals with the scope of the review power conferred on courts. This Court fails to find any observation or recital in those decisions which may be viewed as having relevance to or bearing upon the questions which arise here.

8. At the outset the Court proposes to deal with the submission of Sri Khare of it being incumbent upon the respondents to have decided the issue of equivalence before commencement of the recruitment process. The Court notes that the advertisement in unambiguous terms stipulated that all candidates must possess a Graduation degree in English Literature or hold a degree recognized by the State as equivalent thereto. The petitioners have not relied upon any decision of the State which may have recognized a Graduation degree in English Language or Literature to be equivalent.

9. The petitioners fundamentally place reliance upon certain certificates issued by the Universities from which they obtained their Bachelor's degree in support of their stand that the said degree in English Language did clothe them with the requisite eligibility to be considered for selection and appointment. It becomes pertinent to observe that it is not very clear from the record whether these certificates were ever placed before the respondents for their consideration prior to the filing of the present writ petition. However, it is amply clear that at the time when the petitioners took part in the selection process, they were fully aware of the fact that the advertisement in unambiguous terms placed a requirement of a candidate possessing a Bachelor's degree in *"English Literature"* as distinct from *"English Language"*. They also did not rest their candidature on any preexisting decision of the State Government holding a Bachelor's degree in English Language and Literature to be equivalent. In the considered view of this Court, in light of the aforesaid factual position which obtained at the commencement of the recruitment process, it was incumbent upon the petitioners to have obtained a clarification in this respect before proceeding further and participating in the selection process. The mere fact that the petitioners were permitted by the respondents to participate in the selection process initially cannot be countenanced as a factor which created any vested rights in their favour or one which may be recognized as creating an estoppel against the respondents.

10. Alternatively, it was also open to the petitioners to have either obtained a requisite judicial declaration with regard to their eligibility or a mandate commanding the respondents to take a decision on equivalence before proceeding with the recruitment exercise. The petitioners chose not to adopt either of the measures noted above and took a chance by participating in the selection process. Having failed to do so, the Court finds no merit in the challenge raised on this score by the petitioners especially at this stage and upon the culmination of the entire selection process. The Court also bears in mind the reliefs as framed in the petition which establishes that the writ petitioners do not assail the entire selection process on this score. The only relief claimed is for the inclusion of the petitioners in the process of selection and for the evaluation of their candidature on merits.

11. In any case a failure on the part of the State to have ruled on the issue of equivalence cannot possibly lead this Court to conclude that the petitioners were otherwise eligible nor does it detract from the factual position which is otherwise shown to exist and prevail. The contention addressed in this regard in any case begs the more fundamental question of whether the petitioners were in fact eligible to be considered for selection and appointment as

Trained Graduate Teachers in English notwithstanding they not possessing a Graduate degree in English Literature. That is an issue which the Court now proceeds to consider and rule upon.

12. Coming to the primary issue of whether the petitioners were entitled to be recognized as eligible for appointment on the strength of their Master's degree in English Literature the Court notes that the decisions of the Supreme Court in **Jyoti KK, Parvaiz Ahmad Parry and Deep Chandra Tewari** were duly noticed and explained by the Full Bench of the Court in **Deepak Singh**.

13. Evaluating the correctness of the submission addressed on the strength of the decision in **Jyoti K.K.**, the Full Bench observed thus:

"The Court also noted that there was no exclusion to candidates to possess a higher qualification. The above referred decision in **Jyoti K.K. (supra)** turned on the provisions of Rule 10 (a)(ii). In the present case, there is no equivalent Rule akin to Rule 10(a)(ii). A perusal of the said Rule 10(a)(ii) clearly presupposes and provides that the acquisition of a higher qualification would presuppose the acquisition of the lower qualifications prescribed for the post. In the present case, there being no such Rule, we are afraid that the presumption is not available to the petitioners."

14. The Full Bench as well as the subsequent decision of the Supreme Court in **Zahoor Ahmad Rather Vs. Imtiyaz Ahmad10** noticed the decisive and distinctive feature in the backdrop of which certain observations came to be entered in that decision. **Jyoti K.K.** essentially rested upon the language of Rule 10(a)(ii) of the Kerala State and Subordinate Service Rules 1958 which employed the words "..... *qualifications recognized by executive orders or standing orders of government as equivalent to a qualification specified for a post in the special rules and such of those higher qualifications which presuppose the acquisition of the lower qualification prescribed for the post shall also be sufficient for the post."*

15. In the present case there is admittedly no executive decision holding a Graduate degree in English Language and Literature to be equivalent. More fundamentally, the petitioners have also failed to establish that holding a Master's degree in English Literature would compel one to conclude that possessing that qualification must necessarily lead to a presupposition that he had acquired the lower qualification.

16. Explaining the decision in **Parvaiz Ahmad Parry**, the Full Bench held:

"The next case relied upon by Sri Ashok Khare in **Parvaiz Ahmad Parry vs. State of Jammu & Kashmir and others, [2016 (1) ESC 54 (SC)].** In the said case, the matter related to appointment to the post of J & K Forest Service Range Officers, Grade-I, wherein the prescribed qualification was B.Sc. (Forestry) or its equivalent from any University recognised by the Indian Council of Agricultural Research (hereinafter referred to as the 'ICAR'). The appellants, in the said case, had a qualification of B.Sc. with Forestry as one of the major subjects and Master in Forestry i.e. M.Sc. (Forestry) on the date when he applied for the post in question,

the Apex Court allowed the appeal holding as under:

"In our considered view, firstly, if there was any ambiguity or vagueness noticed in prescribing the qualification in the advertisement, then it should have been clarified by the authority concerned in the advertisement itself. Secondly, if it was not clarified, then benefit should have been given to the candidate rather than to the respondents. Thirdly, even assuming that there was no ambiguity or/and any vagueness yet we find that the appellant was admittedly having B.Sc. degree with Forestry as one of the major subjects in his graduation and further he was also having Masters degree in Forestry, i.e., M.Sc. (Forestry). In the light of these facts, we are of the view that the appellant was possessed of the prescribed qualification to apply for the post in question and his application could not have been rejected treating him to be an ineligible candidate for not possessing prescribed qualification.

In our view, if a candidate has done B.Sc. in Forestry as one of the major subjects and has also done Masters in the Forestry, i.e., M.Sc.(Forestry) then in the absence of any clarification on such issue, the candidate possessing such higher qualification has to be held to possess the required qualification to apply for the post. In fact, acquiring higher qualification in the prescribed subject i.e. Forestry was sufficient to hold that the appellant had possessed the prescribed qualification. It was coupled with the fact that Forestry was one of the appellant's major subjects in graduation, due to which he was able to do his Masters in Forestry."

The said case has no applicability to the facts of the present case inasmuch as Diploma in Engineering and B.Tech in Engineering are two different courses and thus the ratio of the judgement in the case of **Parvaiz Ahmad Parry** vs. State of Jammu & Kashmir and others has no applicability to the facts of the present case."

17. Apart from what was observed by the Full Bench and extracted above, as the facts of that decision would reveal, the Supreme Court held in favour of the candidates before it principally since they had Forestry as a subject both at the Graduate and Master's level.

18. Noticing the submissions addressed in the backdrop of **Deep Chandra Tewari**, the Full Bench observed:

"Although a question raised before the Hon'ble Supreme Court was with regard to the difference in between B.Ed. with specialisation in vocational course and B.Ed. in specified subjects, the Supreme Court recorded the general principle as under:

"We are conscious of the principle that when particular qualifications are prescribed for a post, the candidature of a candidate possessing higher qualification cannot be rejected on that basis. No doubt, normal rule would be that candidate with higher qualification is deemed to fulfil the lower qualification prescribed for a post. But that higher qualification has to be in the same channel. Further, this rule will be subject to an exception. Where the prescription of a particular qualification is found to be relevant for discharging the functions of that post and at the same time, the Government is able to demonstrate that for want of the said qualification a candidate may not be suitable for the post, even if he possesses a "better" qualification but that "better" qualification has no relevance with the function attached with the post."

The Apex Court, further, while allowing the appeal, held as under:

"In the present case, we find the situation falling in this excepted category. As pointed out above, the Assistant Teacher is meant to impart education to students at primary level. For teaching primary students, subjects studied while doing basic BEd degree would be relevant and appropriate. For teaching such students, BEd with specialisation in vocational education would be of no use as those students are not imparted vocational education, which is the thrust in the degree obtained by the respondents herein. In the instant case, proficiency in the basic subjects taught at primary level is required and thus vocational training would not serve any purpose. Thus, when we find that in the instant case, essential education qualification is BEd degree which is prescribed in the relevant rules, having statutory flavour, the action of the Government cannot be faulted with, in rejecting the candidature of the respondents because of the reason that they do not have the qualification, as mentioned in the advertisement viz. BEd degree simpliciter."

The above referred case relied upon by Sri Ashok Khare, in fact, strengthens the proposition that where the qualification is specified, there should be no deviation from the said specified requirement."

19. As noted by the Full Bench, **Deep Chandra Tewari** dealt with the issue of the higher qualification having been obtained *"in the same channel"* and what may be described as the *"same line of progression"*. However as noted hereinbefore, none of the petitioners were shown to have taken English Literature as a subject at the Graduate stage. Consequently the Master's degree in English Literature cannot possibly be viewed as having been obtained in the same channel or line of progression.

20. Pausing here the Court also finds itself unable to accept the submission of Sri Khare that the decision in **Deepak Singh** is distinguishable and liable to be viewed as one dealing solely with the issue of equivalence between a Diploma and Degree in Engineering. While dealing with Question "C" and the question of equivalence of degrees and the scope of judicial review in such matters the Full Bench pertinently observed: -

"In view of the above referred judgements, we have no hesitation in holding that the State, as an employer, is well equipped to decide the desirable qualification or may prescribe additional qualification including any grant of preference. The Court cannot lay down the conditions of eligibility much less, it can go into the question of desirable qualification being at par with the essential qualification."

.....

"Testing the said arguments as raised by Sri Khare although on record no Rules have been placed, however, in view of the finding recorded by us that Diploma in Engineering is not the same as Bachelor in Engineering and also the finding recorded by us that the State is well equipped to prescribe the requisite required qualification keeping in view the requirement of posts for which the advertisements are issued, we hold that whether Diploma in Engineering is specified as a minimum qualification or a required qualification, Graduates in Engineering would not be entitled to be considered and will be out of zone of consideration unless a candidate possess both the qualifications to explain it further

suppose a candidate after acquiring Diploma in Engineering also passes Graduation in Engineering he would be eligible, in view of the fact that he has Diploma in Engineering which is the required qualification for applying to the post and cannot be denied to participate only because he has any qualification additional to the prescribed qualification. However, the State Government is free to provide for equivalence as was done by the Kerala State while incorporating Rule 10(a)(ii). Since there is nothing on record in the present case to show that there was any Rule or Directive of the State Government to provide equivalence, it is only logical to conclude that degree holders are ineligible to participate in the selection process for Junior Engineer in the light of the specific provisions incorporated under the advertisement in question."

.....

"Coupled with the said fact, we have already held that it is the State Government which has the powers to prescribe the requisite qualification required for the efficient discharge of duties for the post for which the advertisement is issued and that being outside domain of judicial review as held by the Hon'ble Supreme Court in the case of Zahoor Ahmad (supra) and Maharashtra Public Service Commission vs. Sandeep Shriram Warade and others (supra). We hold that the persons having PGDCA cannot be presumed to be having the qualification of 'O' level Diploma in Computer Application."

21. Dealing with identical submissions addressed in **Asheesh Singh** and after noticing the decisions rendered on the question of equivalence and suitability of qualifications prescribed, this Court observed thus:-

"That leaves the Court to consider the submission of it embarking upon an exercise to declare a degree in General English to be equivalent to the essential qualifications enumerated in the advertisement. The submission which is commended for acceptance would clearly amount to undertaking an exercise which would be legally impermissible and transgress the inherent limitations recognized by Courts while exercising their powers of judicial review as explained hereinafter.

The correctness of the submission advanced would essentially have to be tested bearing in mind the following cardinal principles. The prescription of a qualification is essentially and primarily a role reserved for the employer. It is not for this Court while exercising its jurisdiction under Article 226 of the Constitution to arrogate to itself that function. Similarly, it is neither the function nor the role of the Court to adjudge or assess the suitability or desirability of a particular qualification that may be stipulated. Lastly, it is not for Courts to assume upon themselves the authority to delve into questions of equivalence of degrees and educational qualifications. That function must necessarily stand reserved for the experts in the field namely the academicians.

The Supreme Court in **Zahoor Ahmad Rather Vs. Imtiyaz Ahmad [(2019) 2 SCC 404]** reiterated these settled principles holding: -

"26. ..... The prescription of qualifications for a post is a matter of recruitment policy. The State as the employer is entitled to prescribe the qualifications as a condition of eligibility. It is no part of the role or function of judicial review to expand upon the ambit of the prescribed qualifications. Similarly, equivalence of a qualification is not a

matter which can be determined in exercise of the power of judicial review. Whether a particular qualification should or should not be regarded as equivalent is a matter for the State, as the recruiting authority, to determine. The decision in ***Jyoti K.K.*** *[**Jyoti K.K.** v. Kerala Public Service Commission, (2010) 15 SCC 596* : (2013) 3 SCC (L&S) 664] turned on a specific statutory rule under which the holding of a higher qualification could presuppose the acquisition of a lower qualification. The absence of such a rule in the present case makes a crucial difference to the ultimate outcome. In this view of the matter, the Division Bench *[Imtiyaz Ahmad v. Zahoor Ahmad Rather, LPA (SW)* No. 135 of 2017, decided on 12-10-2017 (J&K)] of the High Court was justified in reversing the judgment *[Zahoor Ahmad Rather v. State of J&K, 2017 SCC OnLine J&K* 936] of the learned Single Judge and in coming to the conclusion that the appellants did not meet the prescribed qualifications. We find no error in the decision *[Imtiyaz Ahmad v. Zahoor Ahmad Rather,* LPA (SW) No. 135 of 2017, decided on 12-10-2017 (J&K)] of the Division Bench."

A similar note of restraint was entered in **Maharashtra Public Service Commission Vs. Sandeep Shriram Warade [(2019) 6 SCC 362**

9. The essential qualifications for appointment to a post are for the employer to decide. The employer may prescribe additional or desirable qualifications, including any grant of preference. It is the employer who is best suited to decide the requirements a candidate must possess according to the needs of the employer and the nature of work. The court cannot lay down the conditions of eligibility, much less can it delve into the issue with regard to desirable qualifications being on a par with the essential eligibility by an interpretive re-writing of the advertisement. Questions of equivalence will also fall outside the domain of judicial review. If the language of the advertisement and the rules are clear, the court cannot sit in judgment over the same. If there is an ambiguity in the advertisement or it is contrary to any rules or law the matter has to go back to the appointing authority after appropriate orders, to proceed in accordance with law. In no case can the court, in the garb of judicial review, sit in the chair of the appointing authority to decide what is best for the employer and interpret the conditions of the advertisement contrary to the plain language of the same."

More recently three learned Judges of the Supreme Court in **Punjab National Bank Vs. Anit Kumar Das [2020 SCC Online SC 897]** observed:-

"21. Thus, as held by this Court in the aforesaid decisions, it is for the employer to determine and decide the relevancy and suitability of the qualifications for any post and it is not for the Courts to consider and assess. A greater latitude is permitted by the Courts for the employer to prescribe qualifications for any post. There is a rationale behind it. Qualifications are prescribed keeping in view the need and interest of an Institution or an Industry or an establishment as the case may be. The Courts are not fit instruments to assess expediency or advisability or utility of such prescription of qualifications....."

The principles enunciated in Zahoor Ahmad and Maharashtra Public Service Commission were reiterated by a Full Bench of the Court in **Deepak Singh Vs. State of U.P. [2019 SCC Online ALL 4471 (FB)** where it observed:-

"52. Now we proceed to deal with the reference in the case of *Himani Singh v. State of U.P.,* the advertisement in question

prescribed the qualification of Graduate in Commerce "O' level Diploma issued by any Government Recognised Institution. The petitioners were non-suited as they hold a Post-Graduate Diploma in Computer Application. Thus, the claim of the petitioners, before the learned Single Judge, was that their qualifications are superior to the prescribed qualification i.e. "O' level Diploma in Computer Application. In the said case, the Uttar Pradesh Subordinate Services Selection Commission, Lucknow had issued a Notification on 27.8.2018 notifying that the "O' level Diploma in Computer Application had been specified as essential eligibility qualification and it further provided that there does not exist any Government Order specifying the equivalent of qualification with "O' level Diploma in Computer Operation and that National Institute of Electronics and Information Technology (hereinafter referred to "NIELIT'), earlier DOEAC Society had informed that apart from NIELIT no other institution was authorized to grant "O' level Certificate in Computer Operation. The learned Single Judge, in his judgement dated 04.12.2018, rejected the contention of the petitioners therein relying upon the earlier decision of the learned Single Judge in Civil Misc. Writ Petition No. 19687 of 2018 *(Yogendra Singh Rana v. State of U.P.)*. While dismissing the said writ petition, learned Single Judge held that the assessment with regard to the suitability of the higher qualification with a higher proficiency in the field of Computer Operation is in the field of policy and would not justify interference by the Writ Court. Before the Special Appeal Court, the petitioners had argued that the judgement of the *Yogendra Rana (supra)* is subject matter of pending appeal in which interim order has also been passed. It was thus argued before the Special Appeal Court that in view of decision in the case of ***Jyoti K.K.*** *(supra)* and *Parvez Ahmad Parry (supra)*, the matter requires to be considered by the larger Bench that is how the matter was referred vide order dated 15.2.2019.

22. As is evident from the extracted parts of the decision in **Asheesh Singh**, the Court did not hold against the petitioners there merely on account of the absence of a stipulation in the advertisement providing for equivalent degrees being also considered for the purposes of adjudging the eligibility of a candidate. It also dealt with the more fundamental issues of the scope of judicial review in such matters and to what extent it could consider and evaluate submissions with respect to equivalency of degrees and qualifications.

23. As noted by this Court in **Asheesh Singh**, Courts must desist from embarking upon an exercise of evaluating the equivalence of degrees and qualifications. That is a function which must necessarily be left to experts in the field. The Court in proceeding to do so would not only be transgressing the inherent limitations on the power of judicial review but also venturing into a field where it may be viewed as lacking the requisite expertise required to deal with such questions. Courts, by virtue of the well-recognized limitations on the power of judicial review, would be wary and hesitant in proceeding to determine equivalence of courses based upon its own assessment of the content or curriculum of two different courses or to enter a judicial declaration resting upon its own evaluation of an asserted comparability or similarity in the knowledge that one may gain while pursuing two different courses of study. It is in view of the aforesaid that it has often been said that the issue of equivalence of qualifications and degrees must essentially and consequently be left for determination by academicians.

24. In the present case the respondents are not shown to have taken any decision holding a Graduate degree in English Language and Literature as being equivalent or equipping a holder of either of those qualifications with an identical knowledge set. The Master's degree in English Literature has also not been established as having been obtained in the *"same line of progression"*. The Court even otherwise and upon applying the test of reasonable prudence fails to discern any manifest or patent fallacy if it be asserted, as it has by the State, that the study of English Language and Literature is the pursuit of two separate or distinct subjects so as to hold in favour of the petitioner even in the absence of a definitive decision taken by the respondents in that respect.

25. The Court also fails to find any justification to interfere with the selection process bearing in mind firstly the nature of reliefs that are claimed and secondly since the petitioners failed to initiate any proceedings requiring a decision to be taken by the respondents on the question of eligibility prior to commencement of the recruitment process. In any case, the petitioners did not rest their candidature on any preexisting executive decision holding a Bachelors degree in English Language to be equivalent to that of English Literature. The asserted eligibility of the petitioners in light of they having pursued a course of English Literature at the Master's level stands settled in light of the authoritative pronouncement of the Full Bench in **Deepak Singh** as well as of this Court in **Asheesh Singh**.

26. The reasons assigned in those decisions conclusively answer the submissions advanced on this issue against the petitioners.

27. In view of the aforesaid the writ petition fails and shall stand **dismissed.**

(2021)02ILR A192
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.01.2021

BEFORE

THE HON'BLE YASHWANT VARMA, J.

Writ A No. 14444 of 2020

Diwakar Paswan ...Petitioner
Versus
The State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Devesh Mishra, Sri Atipriya Gautam, Sri Vijay Gautam (Senior Adv.)

Counsel for the Respondents:
C.S.C.

A. Service Law – Recruitment for Constable – Medical fitness – Opinion of Medical Board and Review Medical Board – Interference – Contrary opinion of Doctor – Judicial Review – Scope – Held, permitting a reopening of a medical examination conducted by the respondents solely on that basis would set a dangerous precedent especially when the Court by virtue of its inherent limitations would be wholly unequipped to undertake a comparative analysis or evaluation of competing medical opinions – Rules do not envisage or contemplate a challenge to those reports based upon reports and opinions privately obtained by candidates – Medical fitness is a subject best left for determination by experts and should not be lightly interfered with unless it be shown to be contrary to the standards prescribed or otherwise be liable to be assailed on other judicially manageable parameters. (Para 10 and 11)

B. Service Law – Recruitment for Constable – Medical fitness – Opinion of

Medical Board and Review Medical Board – When is liable to be assailed and interfered with – High Court indicated three exceptions when opinion of Medical Board can be challenged and interfered with – These exceptions are : 1. Mala fide, 2. Contrary to the standard prescribed, and 3. Other judicially manageable parameters. (Para 10)

Writ Petition dismissed. (E-1)

Cases relied on :-

1. St. of U.P. Vs Rahul, 2016 (3) ADJ 327

2. Manish Kumar Vs St. of U.P., 2020 SCC OnLine ALL 923

3. Prakash Singh Vs St. of U.P., 2018 SCC OnLine ALL 5517

4. Writ Petition (C) 10783/2020, Km Priyanka Vs U.O.I., decided by Delhi High Court on 21 December 2020

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

1. Heard learned counsel for the petitioner and Sri Piyush Shukla, learned Additional Chief Standing Counsel who appears for the State respondents.

2. This petition has been preferred seeking the following reliefs:-

*"(i) Issue a writ, order or direction, in the nature of **certiorari**, calling the record of the case and quashing the medical examination result of the petitioner, dated 07/09/2020 & 09/09/2020 (which has not been served upon the petitioner and it was orally informed that the petitioner is medically unfit having "Hydrocele Testicle") declared by the Medical Board, for the post of **Constable Civil Police and Constable PAC, Direct Recruitment - 2018-II,** pursuant to the Advertisement dated 16/11/2018 and in pursuance of the select list issued vide Notification dated 02/03/2020.*

*(ii) Issue a writ, order or direction, in the nature of **mandamus,** commanding the Respondent Authorities, treating the petitioner as medically fit in the medically examination for the post of **Constable Civil Police and Constable PAC, Direct Recruitment - 2018-II,** pursuant to the Advertisement dated 16/11/2018 and select & appoint him finally for the said post, in pursuance of the select list, issued vide Notification dated 02/03/2020.*

*(iii) Issue a writ, order or direction, in the nature of **mandamus,** directing the Respondent Authorities, to declare the petitioner as a selected candidate finally and appoint him on the post of Constable, and send him necessary training for the post of **Constable Civil Police and Constable PAC, Direct Recruitment - 2018-II,** pursuant to the Advertisement dated 16/11/2018 and in pursuance of the select List issued vide Notification dated 02/03/2020"*

3. The petitioner who had participated in a recruitment exercise initiated by the respondents for appointment on the post of Constable in the Civil Police and PAC has been declared medically unfit. That opinion which was formed initially by the Medical Board constituted by the respondents, was affirmed by the Review Medical Board. Upon the petitioner being declared medically unfit, his candidature was rejected by the respondents. The sole ground on which the aforesaid medical opinion is challenged is a certificate obtained by the petitioner from a Government Hospital on the basis of which it is contended that the decision of the respondents is liable to be interfered with and set aside.

4. The Court finds itself unable to countenance the submission for the following reasons.

5. The parameters of judicial review in respect of the opinion formed by a Medical Board was duly enunciated by the Court in **State of U.P. Vs. Rahul1.** In **Rahul**, the Division Bench observed thus:-

"This Court in previous decisions has emphasized the need to preserve the sanctity of the recruitment process and of the care and circumspection which has to be exercised before the findings of an expert medical Board constituted by the authorities are interfered with in writ proceedings. Undoubtedly, the powers of the Court under Article 226 of the Constitution are wide enough to issue such a direction in an appropriate case. However, such directions cannot be issued merely on the basis of a request made in that behalf before the Court.

In a recent judgment of this Court in Union of India through Ministry of Railways vs. Parul Punia2, this Court has emphasized the need for caution when candidates seek to question the correctness of the findings of a medical Board constituted under the recruitment process adopted by the authorities of the State, on the basis of a report obtained by the candidates. The Division Bench observed as follows:

"...In a number of such cases, candidates who have been invalidated on medical grounds produce expert opinions of their own to cast doubt on the credibility of the official medical report constituted by the recruiting body. In such cases, the Court may not have any means of verifying the actual identity of the person who was examined in the course of the medical examination by the Doctor whose report is relied upon by the candidate. Hence, even though the authority whose medical report was produced by the candidate may be an expert, the basic issue as to whether the identity of the candidate who was examined, matches the identity of the person who has applied for the post is a serious issue which cannot be ignored..."

Dealing with the parameters of the writ jurisdiction in such cases, the Division Bench observed thus:

"...Undoubtedly, in a suitable case, the powers of the Court under Article 226 are wide enough to comprehend the issuance of appropriate directions, but such powers have to be wielded with caution and circumspection. Matters relating to the medical evaluation of candidates in the recruitment process involve expert determination. The Court should be cautious in supplanting the process adopted by the recruiting agency and substituting it by a Court mandated medical evaluation. In the present case the proper course would have been to permit an evaluation of the medical fitness of the respondent by a review medical board provided by the appellants. Otherwise, the recruitment process can be derailed if such requests of candidates who are not found to be medically fit for reassessment on the basis of procedures other than those which are envisaged by the recruiting authority are allowed. This would ordinarily be impermissible."

6. More recently reiterating the principles enunciated in **Rahul**, another Division Bench of the Court in **Manish Kumar Vs State of U.P.2** observed:

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 v. State of U.P.1 and Md. Arshad Khan v. State of U.P.2* 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.

7. Dealing with an identical challenge this Court in **Prakash Singh Vs. State of U.P.3** held:

"The petitioner essentially calls upon the Court to rule on and evaluate the correctness of the reports submitted by experts in their fields. These submissions and reliefs have evidently been sought and addressed without bearing in mind the contours of the writ jurisdiction. The opinion of a Medical Board is the outcome of an evaluation by experts in the subject. Except in exceptional situations such as where a finding of unfitness is returned in violation or disregard of the standards prescribed or on grounds which may call upon this Court to consider the correctness of the opinion on a legal plain, it would be wholly inappropriate for this Court to either interfere with the same or substitute its own opinion with respect to the medical fitness of a particular candidate. Treading this path

may also cause serious prejudice and jeopardise the recruitment process itself. The Court is constrained to enter this note of caution conscious of its own limitations with respect to adjudging the medical fitness or otherwise of a particular candidate. In the ultimate analysis, it would be pertinent to emphasise that such requests must be entertained with due care and circumspection."

8. The Delhi High Court in a recent decision handed down in the matter of **Km Priyanka Vs. Union of India4** cautioned against interfering with the opinion formed by medical boards constituted for selection of members of the armed forces on the strength of certificates issued by private or civilian doctors in the following terms: -

"8. We have on several occasions observed that the standard of physical fitness for the Armed Forces and the Police Forces is more stringent than for civilian employment. We have in *Priti Yadav Vs. Union of India 2020 SCC Online Del 951;Jonu Tiwari VS. Union of India 2020 SCC Online Del 855; Nishant Kumar Vs. Union of India SCC Online Del 808; and Shravan Kumar Rai Vs. Union of India 2020 SCC Online Del 924* held that once no mala fides are attributed and the doctors of the Forces who are well aware of the demands of duties of the Forces in the terrain in which the recruited personnel are required to work, have formed an opinion that the candidate is not medically fit for recruitment, opinion of private or other government doctors to the contrary cannot be accepted inasmuch as the recruited personnel are required to work for the Forces and not for the private doctors or the government hospitals and which medical professionals are unaware of the demands of the duties of the Forces."

9. Although learned counsel for the petitioner has placed reliance upon certain interim orders passed by learned Judges of the Court and which stand appended as Annexure 7 to the writ petition, the Court notes that none of those interim orders notice or deal with the principles as elucidated by the Division Bench in **Rahul** or the decisions in **Manish Kumar** and **Prakash Singh** noticed above.

10. It becomes pertinent to note that the opinions formed by the Medical and Review Boards have not been assailed by the petitioner on the ground of mala fides. A review of those decisions is sought solely on the basis of a contrary opinion rendered by a doctor of a government hospital. Permitting a reopening of a medical examination conducted by the respondents solely on that basis would set a dangerous precedent especially when the Court by virtue of its inherent limitations would be wholly unequipped to undertake a comparative analysis or evaluation of competing medical opinions. Medical fitness is a subject best left for determination by experts and should not be lightly interfered with unless it be shown to be contrary to the standards prescribed or otherwise be liable to be assailed on other judicially manageable parameters.

11. Quite apart from the consistent view taken by Courts on this question regard must also be had to the fact that the medical examination in the present case was undertaken in accordance with the provisions made in the statutory rules. Those Rules confer finality upon the opinions formed by the Medical Boards subject to an appeal against the same before a Review Medical Board. Those Rules do not envisage or contemplate a challenge to those reports based upon reports and

opinions privately obtained by candidates. Permitting such a course of action would not only be contrary to the Rules which apply and bind the candidate but also result in derailing the recruitment process itself.

12. For all the aforesaid reasons, the Court finds no ground to issue the writs as prayed for.

13. The writ petition is **dismissed.**

(2021)02ILR A197
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 20.01.2021

BEFORE

THE HON'BLE YASHWANT VERMA, J.

Writ A No. 15217 of 2020

Narendra Kumar Tripathi ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Krishna Datt Tiwari

Counsel for the Respondents:
C.S.C., Sri Arun Kumar

A. Service Law – Appointment – Obtained by using the forged marksheet – Recovery of Emoluments – Validity – Obtaining the employment under theSt. by practicing fraud is undisputed – Appointment found nullity from its very inception – Effect – Held, Petitioner has not only sullied a recruitment process initiated for the purposes of offering positions in public service, denied a rightful claim of another to secure employment under theSt., but also illegally drawn, used and retained moneys from public funds – Order for recovery of all emoluments merit no interference. (Para 9, 10 and 19)

B. Service Law – Appointment void ab initio – Practice of fraud and fabrication – No disciplinary enquiry – non-compliance of Principle of Natural Justice – Effect – Held, where the appointment is alleged to have been secured by fraud or misrepresentation, the normal rules governing the conduct of disciplinary proceedings were not liable to be followed – Since the termination is not on account of a misconduct committed during the course of employment. All that is required in such a situation is to place the employee on notice and comply with the fundamental principles of natural justice. (Para 16)

Writ Petition dismissed. (E-1)

Cases relied on:-

1. Writ - A No.8657 of 2020, Abhiram Vs St. of U.P. & 3 ors. decided on 02.11.2020

2. Special Appeal Defective No.110 of 2014, Smt. Parmi Maurya Vs St. of U.P. & 2 ors. decided on 31.01.2014

3. Secretary, St. of Karn. & ors. Vs Uma Devi & ors., (2006) 4 SCC 1

4. Punjab Urban Planning & Development Authority Vs Karamjit Singh, (2019) 16 SCC 782

5.St. of Bihar Vs Kirti Narayan Prasad, (2019) 13 SCC 250

6. Raj Kumar Saxena Vs Basic Shiksha Parishad, 2019 SCC OnLine ALL 4256

7. Narendra Kumar Gond Vs St. of U.P., 2018 SCC OnLine ALL 5716

8 Vinay Kumar Singh v. St. of U.P., 2012 SCC OnLine All 4171

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

1. Heard learned counsel for the petitioner and Sri Arun Kumar, learned counsel who appears for the respondents.

2. The petitioner is aggrieved by the orders of 3 July 2020 and 7 October 2020

passed by the respondents. In terms of the first order, it has been found upon due verification that the B.A. marksheet on the basis of which the petitioner obtained employment was forged. Consequent to that order, the services of the petitioner has been brought to an end. By the second order the respondents have also passed directions for recovery of all emoluments which have been paid to the petitioner. It becomes pertinent to note that the finding of the respondents that the petitioner obtained employment on the basis of a forged mark sheet is neither disputed nor challenged by the petitioner before this Court with learned counsel for the petitioner candidly stating that the petitioner had no defense to proffer.

3. Learned counsel for the petitioner placing reliance on the decision rendered by a learned Judge in **Abhiram Vs. State of U.P. And 3 Others1** and the judgment of the Division Bench in **Smt. Parmi Maurya Vs. State of U.P. And 2 Ors2** contended that it was incumbent upon the respondents to have conducted a formal disciplinary enquiry before dismissing the petitioner from service and in having failed to do so, the impugned orders are liable to be set aside on that score alone. It was further submitted that the decision to recover all emoluments paid during the period while the petitioner was in service causes grave injustice and hardship.

4. Before proceeding to deal with the submissions addressed by learned counsel, it becomes pertinent to bear in mind that the petitioner does not dispute that the testimonial on the basis of which appointment was obtained is forged. This is, therefore, not a case where an irregularity was committed by the respondents while offering appointment to the petitioner. It is also not a case where the appointment suffers from what may be described as a procedural irregularity or where the appointment suffers from a flaw which is of a non-fundamental character. These have come to be described in legal parlance as *"irregular appointments"* in light of the declaration of the law on the subject by the Constitution Bench in Uma Devi [3]3. On the other hand, appointments, made in violation of a statutory rule or executive instruction or even where it is alleged to have been made in violation of a procedure mandated by law have consistently been held to be illegal and void ab initio. They thus fall in the class of *"illegal appointments"*. This Court is of the view that while appointments in public service obtained on the basis of fraud or fabrication of testimonials are also liable to be classified as falling within the genre of an "illegal appointment", for the purposes of the present it would be apposite to confine this decision to cases where the appointment is said to have been obtained on the basis of fraud and fabrication of records. The solitary question which thus merits consideration is whether a decision of the employer to recover salary and emoluments paid during the period when service was rendered by an employee is liable to be upheld in a case where the original appointment was obtained on the basis of fraud.

5. At the outset it becomes pertinent to highlight that an appointment tainted by fraud or fabrication is one which has been obtained by a positive act of misrepresentation, forgery or fabrication on the part of one who seeks or applies for appointment. What needs to be emphasised and borne in mind is where the entry into service is based upon the incumbent

knowingly and consciously practicing fraud, such instances would necessarily merit consideration on a distinct set of principles. Bearing in mind the aforesaid, the Court proceeds to delineate the salient principles which would apply in such a situation.

6. Firstly, the determination of service of a person who is found to have entered government service on the strength of forged certificates, marksheets or degrees is not an action resting on an act of *"misconduct"* committed in the course of employment. The cessation of service occurs solely upon it being discovered and found that the person had fraudulently obtained employment under the State. The very entry into service is thus rendered void and non-est. It leads to the irresistible conclusion that the employee was never entitled to be in service. If the aforesaid be duly established, then the length of service rendered or the many years spent on that post are factors which not only pale into insignificance but are rendered wholly irrelevant.

7. Secondly, it must necessarily be recognised that an allegation of fraud or fabrication of certificates and testimonials is a serious charge which must be lawfully established. Since any action taken on the back of such an allegation would necessarily visit the person with serious civil consequences, it must be preceded by an opportunity of hearing being afforded to the individual enabling him to establish that the allegation of fraud or fabrication is incorrect. The only clarification which needs to be entered is that since and as already held, the action is not based on an act of "misconduct", while the rules relating to disciplinary proceedings would not apply, the rudimentary principles of natural justice would have to be adhered to and followed.

8. Lastly it may be noted that a challenge to an order of recovery of salaries paid for services rendered in such cases is essentially an appeal for sympathetic consideration and a prayer for invocation of principles of equity. As was urged here, the challenge to the direction for recovery of salary was addressed on the basis of the petitioner having rendered service for many years and thus the impugned action liable to be struck down on equitable considerations. This Court having conferred thoughtful consideration on the submission addressed on this score, fails to find either merit in the submission or justification for upholding that plea for the following reasons.

9. Undisputedly the petitioner forged his testimonials in order to obtain employment under the State. That was a conscious and deliberate act on the part of the petitioner in order to illegally and undeservedly enter into government service. That employment was acquired by practicing fraud and the petitioner fabricating testimonials. Fraud, as has been often said, unravels the most solemn of acts. The appointment secured was non-est and void ab initio. In fact the factum of that appointment cannot ever be countenanced in law.

10. Bearing in mind the fact that the appointment was and is liable to be viewed as a nullity from its very inception, it would be wholly illegal to permit the petitioner to retain the benefits secured from such an appointment. The petitioner has not only sullied a recruitment process initiated for the purposes of offering positions in public service, denied a rightful claim of another

to secure employment under the State, but also illegally drawn, used and retained moneys from public funds. This Court fails to perceive any justification in either vindicating or absolving the petitioner of this act nor does it discern any factor which may persuade it to ratify the wrongdoing committed by the petitioner. In fact permitting the petitioner to retain the benefits illegally obtained would be wrong in law. In situations like the present, the Court cannot be distracted by compassion or sympathy lest it be misunderstood that such acts can be condoned. This since the action impugned here is also designed to serve as a powerful message to deter and dissuade those who may in the future be tempted to tread a similar course. Lastly it must be remembered that equity is also intended to foster honesty and fairness in action. Unconscionable conduct clearly disentitles and prohibits an individual from invoking equity.

11. Having enumerated the fundamental considerations which must be borne in mind in cases like the present, it would be pertinent to notice the legal position as explained both by this Court as well as the Supreme Court on this question.

12. In a recent decision rendered by the Supreme Court in **Punjab Urban Planning & Development Authority v. Karamjit Singh4** it was held:-

"5.5. It is well settled that an order of regularisation obtained by misrepresenting facts, or by playing a fraud upon the competent authority, cannot be sustained in the eye of the law. [*Devendra Kumar v. State of Uttaranchal, (2013) 9 SCC 363 : (2014) 1 SCC (L&S) 270] In Rajasthan Tourism Development Corpn. Ltd. v. Intejam Ali Zafri [Rajasthan Tourism Development Corpn. Ltd. v. Intejam Ali Zafri,* (2006) 6 SCC 275 : 2006 SCC (L&S) 1314] , it was held that if the initial appointment itself is void, then the provisions of the Industrial Disputes Act, 1947 are not applicable for terminating the services of such workman. In a similar case, this Court in Bank of India v. Avinash D. Mandivikar [Bank of India v. Avinash D. Mandivikar, (2005) 7 SCC 690 : 2005 SCC (L&S) 1011] , held that since the respondent had obtained his appointment by playing fraud, he could not be allowed to get the benefits thereof.

6. In the present case, the Single Judge had held that "rightly or wrongly", the respondent had obtained regularisation, and was therefore entitled to a disciplinary enquiry. The Division Bench [Punjab Urban Planning and Development Authority v. Karamjit Singh, 2018 SCC OnLine P&H 2677] affirmed the judgment of the Single Judge [Karamjit Singh v. Punjab Urban Planning & Development Authority, 2018 SCC OnLine P&H 4694] .

6.1. The High Court however failed to appreciate that the decision in ECIL [ECIL v. B. Karunakar, (1993) 4 SCC 727 : 1993 SCC (L&S) 1184] is applicable to "employees" of government departments. Since the very appointment of the respondent on regular basis was illegal, he could not be treated as an "employee" of the appellant Authority. In Rupa Rani Rakshit v. Jharkhand Gramin Bank [Rupa Rani Rakshit v. Jharkhand Gramin Bank, (2010) 1 SCC 345 : (2010) 1 SCC (L&S) 1094] , this Court held that service rendered in pursuance of an illegal appointment or promotion cannot be equated to service rendered in pursuance of a valid and lawful appointment or promotion.

6.2. The illegality of such an appointment goes to the root of the

respondent's absorption as a regular employee. The respondent could not be considered to be an "employee", and would not be entitled to any benefits under the Regulations applicable to employees of the appellant Authority. Therefore, the High Court erroneously placed reliance on the decision in ECIL [ECIL v. B. Karunakar, (1993) 4 SCC 727 : 1993 SCC (L&S) 1184] , which would not be applicable to the facts of the present case."

13. Again in **State of Bihar Vs. Kirti Narayan Prasad 5** the Supreme Court observed:-

16. In the instant cases, the writ petitioners have filed the petitions before the High Court with a specific prayer to regularise their service and to set aside the order of termination of their services. They have also challenged the report submitted by the State Committee. The real controversy is whether the writ petitioners were legally and validly appointed. The finding of the State Committee is that many writ petitioners had secured appointment by producing fake or forged appointment letter or had been inducted in government service surreptitiously by the Civil Surgeon-cum-Chief Medical Officer concerned by issuing a posting order. The writ petitioners are the beneficiaries of illegal orders made by the Civil Surgeon-cum-Chief Medical Officer. They were given notice to establish the genuineness of their appointment and to show-cause. None of them could establish the genuineness or legality of their appointment before the State Committee. The State Committee on appreciation of the materials on record has opined that their appointment was illegal and void ab initio. We do not find any ground to disagree with the finding of the State Committee. In the circumstances, the question of regularisation of their services by invoking para 53 of the judgment in *Umadevi (3) [State of Karnataka v. Umadevi* (3), (2006) 4 SCC 1 : 2006 SCC (L&S) 753] does not arise. Since the appointment of the petitioners is ab initio void, they cannot be said to be the civil servants of the State. Therefore, holding disciplinary proceedings envisaged by Article 311 of the Constitution or under any other disciplinary rules shall not arise.

14. In **Raj Kumar Saxena Vs. Basic Shiksha Parishad6** a learned Judge of the Court noticed the legal position in the following terms:-

24. The three Judge Bench in *R. Vishwanatha Pillai v. State of Kerala (Vishwanatha Pillai case) and Union of India v. Dattatray (Dattatray case)* laid down the principle of law that where a benefit is secured by an individual, such as, an appointment to a post on the basis of fraud and misrepresentation, would result in the appointment being rendered void or non est.

25. In Vishwanatha Pillai, the appellant therein came to be selected Deputy Superintendent of Police on a forged caste certificate, consequently, upon cancellation of the caste certificate by the Scrutiny Committee, services of the appellant came to be terminated. The Central Administrative Tribunal directed that the appellant should not have been terminated without following the procedure under Article 311 of the Constitution. The High Court reversed the decision and the appellant was dismissed from service. Before the Supreme Court, the appellant, inter alia, sought protection of Article 311 of the Constitution. Rejecting the submission, the Supreme Court held: (para 15)

"15. This apart, the appellant obtained the appointment in the service on the basis that he belonged to a Scheduled Caste community. When it was found by the Scrutiny Committee that he did not belong to the Scheduled Caste community, then the very basis of his appointment was taken away. His appointment was no appointment in the eyes of law. He cannot claim a right to the post as he had usurped the post meant for a reserved candidate by playing a fraud and producing a false caste certificate. ..... The position, therefore, is that the appellant has usurped the post which should have gone to a member of the Scheduled Caste. In view of the finding recorded by the Scrutiny Committee and upheld upto this Court he has disqualified himself to hold the post. Appointment was void from its inception. It cannot be said that the said void appointment would enable the appellant to claim that he was holding a civil post within the meaning of Article 311 of the Constitution of India, As appellant had obtained the appointment by playing a fraud he cannot be allowed to take advantage of his own fraud in entering the service and claim that he was holder of the post entitled to be dealt with in terms of Article 311 of the Constitution of India or the Rules framed thereunder. Where an appointment in a service has been acquired by practicing fraud or deceit such an appointment is no appointment in law, in service and in such a situation Article 311 of the Constitution is not attracted at all."

26. The Bench of three Judges also rejected the submission that since the appellant had rendered 27 years of service, the order of dismissal should be substituted with order of compulsory retirement to protect his pensionary benefits. The Court observed: (Para 19)

"19.....The rights to salary, pension and other service benefits are entirely statutory in nature in public service. Appellant obtained the appointment against a post meant for a reserved candidate by producing a false caste certificate and by playing a fraud. His appointment to the post was void and non est in the eyes of law. The right to salary or pension after retirement flow from a valid and legal appointment. The consequential right of pension and monetary benefits can be given only if the appointment was valid and legal. Such benefits cannot be given in a case where the appointment was found to have been obtained fraudulently and rested on false caste certificate. A person who entered the service by producing a false caste certificate and obtained appointment for the post meant for Scheduled Caste thus depriving the genuine..... A person who, seeks equity must come with clean hands. He. who comes to the Court with false claims, cannot plead equity nor the Court would be justified to exercise equity jurisdiction in his favour. A person who seeks equity must act in a fair and equitable manner. Equity jurisdiction cannot be exercised in the case of a person who got the appointment on the basis of false caste certificate by playing a fraud. No sympathy and equitable consideration can come to his rescue. We are of the view that equity or compassion cannot be allowed to bend the arms of law in a case where an individual acquired a status by practising fraud."

27. In *Bank of India v. Avinash D. Mandivikar*, the Supreme Court held that no case was made out for protecting the services of a bank employee who had obtained employment on the basis of a false claim. Further, the employee having perpetrated a fraud, a claim for protection will not be legally sustainable and a person who had obtained employment by illegitimate means could not continue to

enjoy the fruits of the appointment and that he does not even have a shadow of a right even to be considered for appointment. Reliance was placed upon the earlier decision in *Vishwanatha Pillai* in coming to its conclusion.

28. The position in law was reaffirmed in a subsequent decision of a Bench of three Judges in Dattatray10 case. The respondent was appointed Assistant Professor of Psychiatry in a government hospital on the strength of a claim to belong to a Scheduled Tribe, which was subsequently found to be false by the Scrutiny Committee. The High Court upheld the invalidation of the claim but held that the respondent would not be entitled to any benefit as a member of the Scheduled Tribe from the date of its decision. In consequence, the services of the respondent was directed not to be disturbed. The Supreme Court set aside the judgment of the High Court directing the continuance of the first respondent in service and observed: (para 5)

"5...When a person secures employment by making a false claim regarding caste/tribe, he deprives a legitimate candidate belonging to scheduled caste/tribe, of employment. In such a situation, the proper course is to cancel the employment obtained on the basis of the false certificate so that the post may be filled up by a candidate who is entitled to the benefit of reservation."

29. A three Judge Bench in a recent judgment rendered in *Chairman and Managing Director Food Corporation of India v. Jagdish Balaram Bahira* on considering the precedents on the subject held that appointment/admission obtained on the basis of fraud and misrepresentation of caste or otherwise, is not entitled to such an appointment/admission being rendered void or non est. The exception to the above doctrine was in those cases where the Supreme Court exercises its powers under Article 142 of the Constitution to render complete justice. In other words a person who has played fraud and misrepresentation is not entitled to continue in service irrespective of the length of service rendered by him. In case he is permitted to continue it would perpetrate the fraud and misrepresentation. The principles enshrined under Article 311 of the Constitution or service rules pertaining to dismissal/removal upon recording a finding of misconduct would also not apply, for the reason that the appointment is non est and void ab initio and has no grounds to sustain.

30. In the facts of the case at hand the basis of the appointment is the unregistered adoption deed which has been held to be invalid in view of Section 11(i) of Act, 1956. The foundation of the appointment goes being non est in the eye of law, termination of service is the consequence. Petitioner has not been imposed major penalty of termination upon recording a finding of misconduct committed during the course of his employment. The Rules, 1973 in the circumstances has no application. In the admitted facts no real prejudice has been caused to the petitioner and no other conclusion is possible in respect of the deed recording adoption in such situation no fault can be found with the impugned order. (Refer: *K.L. Tripathi v. State Bank of India; State Bank of Patiyala v. S.K. Sharma, Biecco Lawrie Limited v. State of West Benga).*

15. Similarly another learned Judge of the Court struck a consistent note with the legal position noticed above in **Narendra Kumar Gond Vs. State of U.P.7** observing:-

"10. The contention of the petitioner that disciplinary proceedings should have been held in the matter and as this has not been done the impugned order is vitiated, is not tenable in law for the reason the factum of employment of petitioner's mother at the time of his father's death and the petitioner's compassionate appointment is undisputed and secondly, in view of the provisions contained in the appointment letter itself and even otherwise in the facts of the case it is the appointment which has been cancelled for the reasons disclosed hereinabove, rightly so, after giving due opportunity of hearing to the petitioner which cannot be faulted and also as it is not a case of misconduct having been committed during the course of service but it is a case of cancellation of his appointment on the ground that the same was obtained by misrepresentation/concealment and incorrect facts...."

16. It is thus manifest that it has been the consistent view of our Courts that where the appointment is alleged to have been secured by fraud or misrepresentation, the normal rules governing the conduct of disciplinary proceedings were not liable to be followed. This since the termination in such a situation is not on account of a misconduct committed during the course of employment. All that is required in such a situation is to place the employee on notice and comply with the fundamental principles of natural justice.

17. **Parmi Maurya** was a case where the charge of fabrication was seriously disputed and challenged by the employee who had also not been provided access to the material on the basis of which that charge was sought to be established. It becomes pertinent to recollect that contrary to the above, the petitioner here does not dispute the charge of fabrication. The decision is thus clearly distinguishable and does not come to the aid of the petitioner. The decision in **Abhiram** merely follows the aforesaid decision without noticing the other decisions of this Court as well as the Supreme Court which have consistently held to the contrary and in unequivocal terms laid down the law to be that a regular departmental enquiry is not liable to be drawn where the initial appointment has been obtained by practise of fraud and is thus void and non-est. This of course subject to the caveat and as held herein above, that the rudimentary principles of natural justice must necessarily be adhere to and followed.

18. Lastly the Court draws sustenance for its conclusion of the employer being justified to effect recoveries upon it being found that the initial appointment had been obtained by fraud or fabrication from the judgment of the Court in **Vinay Kumar Singh Vs. State of U.P.8**

28. So far as contention of learned counsel for petitioner that petitioner has worked during the period 20.7.2004 to May, 2007 and, therefore, he is entitled to get salary for the said period and no recovery of paid amount shall be made is concerned, it is to be noted mat there is allegation that appointment of petitioner was itself based on fraud and he had no right to work on the basis of said appointment as unless and until it is established that appointment of petitioner was genuine, he had no right to get salary.

29. In the case of *Kailash Singh* (2005 AIR SCW 3273) (supra) the facts were that the person had overstayed in service after having completed the age of

superannuation. He had actually worked for a period of five years without any dispute as to age. The opposite parties had conceded before the Supreme Court that there would be no recovery of salary paid. In these circumstances, the Court had directed that no recovery of salary paid to the appellant shall be made, as such, the aforesaid judgment is of no help to petitioner.

This extract is taken fromVinay Kumar Singh v. State of U.P., 2012 SCC OnLine All 4171 : (2013) 3 All LJ 305 : 2013 Lab IC 1984 at page 309

30. In the case of *Sushil Kumar Pandey* (2010 (5) ALJ 554) (supra), me Division Bench while modifying the order of learned single Judge wherein direction was issued to terminate the service and recovery of the amount paid as salary had observed that the direction of learned single Judge so far as it relates to termination of service does not require interference. However, since the petitioner has worked for more than 10 years, it would be too severe for the acts and omission on his part as there is also omission and negligence on the part of the authorities in granting appointment to the appellant, as such, no recovery of the amount paid as salary shall be made. The Court has also observed that even otherwise under Article 23 of the Constitution the "Begar' is prohibited. In that case the recovery order was issued on the basis of direction issued by the Court. There was no dispute to the payment given by the opposite parties. However, in the present case it is the specific case of the opposite parties that the petitioner has obtained appointment and transfer from Agra on the basis of forged documents and he was not entitled to get salary. He had worked during the period 20.7.2004 to May, 2007 on the basis of forged documents and, as such, the amount paid as salary during the said period shall be recovered."

19. Accordingly and for all the aforesaid reasons the Court fails to find in favour of the petitioner. The orders impugned merit no interference.

20. The writ petition shall in consequence stand **dismissed.**

(2021)02ILR A205
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.01.2021

BEFORE

THE HON'BLE YASHWANT VERMA, J.

Writ A No. 15559 of 2019

Sri Kapil Kumar Sharma ...Petitioner
Versus
Commissioner/Chairman, Meerut Dev. Authority, Meerut & Anr. ...Respondents

Counsel for the Petitioner:
Sri Alok Kumar Srivastava

Counsel for the Respondents:
Sri Bhupeshwar Dayal

A. Constitution of India – Article 19 (1) (a) and (6) – Fundamental right of freedom of speech and expression – Right to make a demonstration is covered by Article 19 (1) (a) as it is in effect a form of speech or of expression – Held, merely, because the petitioner had taken part in the demonstration, he cannot be dealt with under the Service Rules as petitioner has fundamental right under Article 19 (1) (a) of the Constitution of India. (Para 18 and 19)

B. Service Law – Disciplinary Enquiry – Punishment – Charge of shouting slogan and misbehavior – Non-supply of enquiry report – No opportunity to cross

examination – No regular enquiry – Punishment order without reason, merely on the basis of summary enquiry – Validity – Principle of natural justice – Application – Held, unless a regular enquiry is conducted by providing reasonable opportunity to the delinquent and unless the alleged charge is proved in the enquiry, no punishment can be imposed, otherwise – It amounts to violation of principles of natural justice. (Para 19, 21, 22 and 23)

Writ Petition allowed. (E-1)

Cases relied on :-

1. Rajendra Kumar Sharma Vs St. of M.P., Gwalior, 2019 SCC Online MP 4664

2. O.K. Bhardwaj Vs U.O.I., (2001) 9 SCC 180

3. F.C.I. Vs A . Prahalada Rao, (2001) 1 SCC 165

4. St. of Bombay Vs Gajanaj Mahadev Badley, AIR 1954 Bom 351

5. Managing Director ECIL Hyderabad Vs B Karunakar, AIR 1994 SC 1074

6. Salahuddin Ansari Vs St. of U.P. & ors., 2008 (3) ESC 1667

7. St. of U.P. & anr. Vs T.P. Lal Srivastava, 1997 (1) LLJ 831

8. Subhash Chandra Sharma Vs Managing Director & anr. , 2000 (1) UPLBEC 541

9. Kameshwar Prasad Vs St. of Bihar & anr., 1962 (1) LLJ 294,

(Delivered by Hon'ble Shekhar Kumar Yadav, J.)

1. To assail correctness of the order dated 18.07.2019 passed in appeal and order dated 29.08.2019 passed in review application passed by Commissioner/Chairman, Meerut Region Meerut, Meerut Development Authority, District Meerut-respondent no.1 and order dated 23.06.2018 passed by Vice Chairman, Meerut Development Authority, District Meerut-respondent no.2 (Annexure Nos.22, 19 and 14 respectively), this writ petition under Article 226 of the Constitution of India, has been preferred.

2. In a nut-sell, the case of the petitioner is that he was appointed as Clerk in the office of Meerut Development Authority in the year 1983. On 17.08.2018, one Sri Baijnath posted as Additional Secretary, Meerut Development Authority lodged a complaint (Annexure No.1 to the writ petition) in Police Station Meerut at about 11.30 a.m. alleging that when the officers of the authority were busy in meeting, at that time, some of the members of the Meerut Development Authority Employees Union (hereinafter referred to as the "Union") entered into the office and started shouting slogan and also misbehaved with the officers, as a result of which, work was hampered about half an hours. On the basis of said complaint, on the same day, first information report was lodged under Sections 342 and 353 of I.P.C. at Police Station Civil Lines, Meerut ((Annexure No.2 to the writ petition) for causing hindrance in government work. It is alleged that in the said FIR, the petitioner was not named. In pursuance of the said FIR, the respondent no.2-Vice Chairman Meerut Development Authority on 19.06.2017 (Annexure No.3 to the writ petition) passed an order by which the petitioner was suspended on the ground that in the said incident he was involved. On 21.08.2017, the Enquiry Officer/Chief Town Planner, Meerut Development Authority, Meerut sent a charge-sheet dated 19.08.2017 (Annexure No.4 to the writ petition) with the charge that petitioner without permission entered into the office of Vice Chairman and started shouting slogans and misbehaved with senior official and also caused hindrance in official work,

and as such, violates the rules provided under U.P. Government Servants Conduct Rules, 1956. Copy of charge-sheet was served upon the petitioner on 21.08.2017 (Annexure No.5 to the writ petition). As a consequence, the petitioner has filed his reply on 21.08.2017 before Inquiry Officer/Chief Town Planner, Meerut Development Authority, Meerut. The Inquiry Officer submitted his Enquiry Report on 23.09.2017 (Annexure No.6 to the writ petition) in which no credible evidence was found against the petitioner. Thereafter, the Vice Chairman rejected the Enquiry Report on 28.09.2017 (Annexure No.7 to the writ petition) with the direction to the Inquiry Officer to issue a fresh charge sheet alongwith evidence. Thereafter, the Inquiry Officer issued amended charge sheet on 17.10.2017 containing two charges (Annexure No.8 to the writ petition). Against the amended charge sheet, on the same day i.e. on 17.10.2017, the petitioner has filed his reply (Annexure No.9 to the writ petition). Upon reply submitted by the petitioner, the Vice Chairman, Meerut Development Authority passed the order dated 06.01.2018 (Annexure No.10 to the writ petition) by which the suspension order dated 19.06.2017 was revoked with the direction the the departmental enquiry will continue.

3. It is further alleged that when suspension order was revoked, the Inquiry Officer again submitted amended Enquiry Report dated 28.09.2017 (Annexure No.12 to the writ petition) holding that since the suspension order has been revoked, as such, Inquiry Officer drawn conclusion that since no criminal case was lodged against the petitioner, he is guilty only for minor misconduct. The Enquiry Officer/Chief Town Planner, Meerut Development Authority submitted his enquiry report before the Vice Chairman on 20.06.2019 (Annexure No.13 to the writ petition) stating that suspension of the petitioner was revoked by order dated 28.09.2017 since no criminal case was lodged against the petitioner. Neither he misbehaved with the officer nor he shouted slogan and also he did not use any foul language as such he is guilty for minor misconduct. The Vice Chairman passed the order dated 23.06.2018 holding guilty of misconduct as provided under U.P. Government Servants and punished the petitioner as under:

i. Suspension period wages and allowances will not be payable.

ii. Adverse entry in service record is to be made.

iii. If in future petitioner repeats the same he will be terminated ex-parte.

iv. The petitioner will not be posted on important work/table.

4. Aggrieved by the order dated 23.06.2018 passed by Vice Chairman, Meerut Development Authority, the petitioner preferred an appeal on 20.09.2018 (Annexure No.15 to the writ petition) before Commissioner/President, Meerut Region/Meerut Development Authority with the prayer that his case may be considered sympathetically and order dated 23.06.2018, by which punishment has been awarded, may be recalled. The appeal of the petitioner was dismissed vide order dated 18.07.2019.

5. On 19.07.2019, the petitioner has filed an application before the appellate authority stating that final report has been filed in Criminal Case No.252 of 2017 and by order dated 12.04.2019, the Chief Judicial Magistrate, Meerut held that according to final report, no evidence was

found, as such, final report is accepted and Criminal Case No.250 of 2017 lodged in Thana Civil Lines, Meerut is consigned to record. The petitioner on the basis of order dated 12.04.2019 prayed that the punishment given by Vice Chairman, Meerut Development Authority Meerut may be recalled. However, it is stated that the application filed by the petitioner was rejected on the ground that appeal has already been decided. Feeling aggrieved, the petitioner filed review application before Commissioner/President, Meerut Region/ Meerut (Annexure No.20 to the writ petition). During pendency of review application, the petitioner filed Civil Misc. Writ Petition No.13096 of 2019 before this Court for early disposal of review application, which was dismissed as withdrawn vide order dated 11.09.2019.

6. The petitioner received copy of order dated 29.08.2019 sent by Office of Commissioner, Meerut Region, Meerut that his review application has been rejected by order dated 30.07.2019 (Annexure No.22 to the writ petition).

7. Submission of learned counsel for the petitioner is that since the petitioner was not named in the FIR, the appellate authority without considering the grounds of appeal, dismissed the appeal vide order dated 18.07.2017 as well as without considering the enquiry report filed by Inquiry Officer in which petitioner was exonerated from all the charges. Further submission is that while deciding the review application, the contesting respondent failed to consider that petitioner produced evidence alongwith review application the order dated 12.04.2019 passed by Special Chief Judicial Magistrate, Meerut, which is illegal and arbitrary. Further submission is that Inquiry Officer submitted the enquiry report before the disciplinary authority and it was the duty of the disciplinary authority to supply a copy of enquiry report to the petitioner and non-supply of enquiry report to petitioner to make representation against it, amounts to violation of principle of natural justice. Submission further is that it was mandatory on the part of disciplinary authority before passing the punishment order, a reasonable opportunity should have been granted to the petitioner. The impugned order is in violation of Article 311 of the Constitution of India, and as such, the same is not sustainable. Before passing the impugned punishment order, no ground has been given by contesting respondent, as such, the impugned order is cryptic and liable to be set aside. The enquiry itself was defective as charge sheet given to the petitioner, the petitioner was required to submit his reply within 15 days. Neither date was fixed for enqiury nor any date was fixed in amended charge sheet as such the impugned order is wholly illegal and liable to be set aside. Holding of oral enquiry is mandatory before imposing penalty, but no such enquiry was conducted. The entire disciplinary proceeding against the petitioner is in utter violation of principle of natural justice.

8. In support of his submission, learned counsel for the petitioner has relied upon the judgment in the case of ***Rajendra Kumar Sharma vs. State of M.P., Gwalior, 2019 SCC Online MP 4664.***

9. Countering the above said submissions, on the other hand, Sri Bhupeshwar Dayal, learned counsel for the Meerut Development Authority has vehemently opposed the writ petition and submitted that it is admitted by the petitioner that he was part of the agitated

group, who forced illegal entry in the chamber of Vice Chairman, when a meeting was going on. The agitated group also shouted slogans and the office bearers of the employee's association also while pressing their demands, used unparliamentarily language, which was not denied and the same is also proved by the footage of the CCTV and Videography, which has been produced before the Enquiry Officer. Further submission is that the amended charge sheet was served upon the petitioner and it is further stated that conduct of the petitioner was against the Government Servant Conduct Rules, 1956. However, no proceeding for enquiring into the charge sheet was directed to continue and the same has been directed to drop and only departmental enquiry was directed to be continued. Further submission is that sufficient opportunity was given to the petitioner to represent his case and the petitioner also filed several representations, appeal as well as review in which the petitioner has admitted his presence with the agitated group.

10. In paragraph 9 of the counter affidavit, it is stated that the appellate authority of punishment, the Commissioner, Meerut Division, Meerut and Chairman, Meerut Development Authority after considering the entire evidence, rejected the appeal of the petitioner as petitioner was found guilty of minor misconduct of accompanying the agitated group of employee, who illegally entered into the chamber of Vice Chairman while he was in the meeting and used unparliamentarily language for pressing their demands, therefore, the punishment imposed against the petitioner is found to be justified.

11. I have heard Sri Alok Kumar Srivastava, learned counsel for the petitioner, Sri Bhupeshwar Dayal, learned counsel for the Meerut Development Authority and perused the material available on record.

12. Now the only question for consideration is that whether the matter should be remanded back to the respondent-authority for holding a proper departmental enquiry or not?

13. At this stage, it would be appropriate to notice some authorities in point rendered by this Court in ***O.K. Bhardwaj vs. Union of India (2001) 9 SCC 180 and Food Corporation of India vs. A . Prahalada Rao (2001) 1 SCC 165,*** the court held as under:

"16. The position as can be gathered from the Rules and the aforesaid decisions can be summarised thus:

(i) In a summary inquiry, a show cause notice is issued informing the employee about the proposal to take disciplinary action against him and of the imputations of misconduct or misbehaviour on which such action is proposed to be taken. The employee is given an opportunity of making a representation against the proposal. The Disciplinary Authority considers the records and the representation and records of findings on each of the imputations of misconduct.

(ii) In a regular inquiry, the Disciplinary Authority draws up the articles of charge and it is served on the employee with a statement of imputation of misconduct, list of witnesses and list of documents relied on by the Department. The Disciplinary Authority calls upon the employee to submit his defence in writing. On considering the defence; the Disciplinary Authority considers the same and decides whether the inquiry should be

proceeded with, or the charges are to be dropped. If he decides to proceed with the enquiry, normally an Inquiring Authority is appointed unless he decides to hold the inquiry himself. A Presenting Officer is appointed to present the case. The employee is permitted to take the assistance of a co-employee or others as provided in the rules. An inquiry is held where the evidence is recorded in the presence of the employee. The employee is permitted to inspect the documents relied upon by the employer. The employee is also permitted to call for other documents in the possession of the Management which are in his favour. The delinquent employee is given an opportunity to rebut the evidence of the management by cross-examining the management witnesses and by producing his evidence both documentary and oral. Arguments written and/or oral-are received/heard. The delinquent employee is given full opportunity to put forth his case. Therefore, the Inquiring Authority submits his report. The copy of the report is furnished to the employee and his representation is received. Thereafter the Disciplinary Authority considers all the material and passes appropriate orders. The detailed procedure for such inquiries is contained in sub-rules (6) to (25) of Rule 9 of the Railway Servants (Discipline & Appeal) Rules, 1968 corresponding to sub-rules (3) to (23) of Rule 14 of the Central' Civil Services (CCA) Rules, 1965 and M.R Civil Services (CCA) Rules, 1966.

(iii) The normal rule, except where the employee admits guilt, is to hold a regular inquiry. But where the penalty proposed is a 'minor penalty', then the Rules give the Disciplinary Authority a discretion to dispense with a regular inquiry for reasons to be recorded by him, and hold only a summary enquiry.

(iv) Though the Rules contemplate imposing a minor penalty without holding a regular enquiry, where the Disciplinary Authority is of the opinion that such enquiry is not necessary, such decision not to hold an enquiry can be only for valid reasons, recorded in writing. Dispensation with a regular enquiry where minor penalty is proposed, should be in cases which do not in the very nature of things require an enquiry, for example, (a) cases of unauthorised absence where absence is admitted but some explanation is given for the absence;(b) non-compliance with or breach of lawful orders of official superiors where such breach is admitted but it is contended that it is not wilful breach; (c) where the nature of charge is so simple that it can easily be inferred from undisputed or admitted documents; or (d) where it is not practicable to hold a regular enquiry.

(v) But, even where the penalty proposed is categorized as minor penalty, if the penalty involves withholding increments of pay which is likely to affect adversely the amount of pension (or special contribution to provident fund payable to the employee), or withholding increments of pay for a period exceeding three year or withholding increments of pay with cumulative effect for any period, then it is incumbent upon the disciplinary authority to hold a regular inquiry.

(vi) Position before decision in FCI: Where the charges are factual and the charges are denied by the employee or when the employee requests for an inquiry or an opportunity to put forth the case, the discretion of the Disciplinary Authority is virtually taken away and it is imperative to hold a regular inquiry.

After decision in FCI: Where the Rules give a discretion to the Disciplinary Authority to either hold a summary enquiry or regular enquiry, it is not possible to say that the Disciplinary Authority should

direct only a regular enquiry, when an employee denies the charge or requests for an inquiry. Even in such cases, the Disciplinary Authority has the discretion to decide, for reasons to be recorded, whether a regular enquiry should be held or not. If he decides not to hold a regular enquiry and proceeds to decide the matter summarily, the employee can always challenge the minor punishment imposed, on the ground that the decision not to hold a regular enquiry was an arbitrary decision. In that event, the Court or Tribunal will in exercise of power of judicial review, examine whether the decision of the Disciplinary Authority not to hold an enquiry was arbitrary. If the Court/Tribunal holds that the decision was arbitrary, then such decision not to hold an enquiry and the consequential imposition of punishment will be quashed. If the Court/Tribunal holds that the decision was not arbitrary, then the imposition of minor penalty will stand. 17. It is also possible to read the decisions in Bharadwaj and FCI harmoniously, if Bharadwaj is read as stating a general principle, without reference to any specific rules, that it is incumbent upon the Disciplinary Authority to hold a regular enquiry, even for imposing a minor penalty, if the charge is factual and the charge is denied by the employee. On the other hand, the decision in FCI holding that the Disciplinary Authority has the discretion to dispense with a regular enquiry, even where the charge is factual and the employee denies the charge, is with reference to the specific provisions of a Rule vesting such discretion."

14. So far as opportunity of hearing to the petitioner is concerned, in the case of ***State of Bombay vs. Gajanaj Mahadev Badley, AIR 1954 Bom 351,*** the Court observed that public servant must have an opportunity to show cause not only against the punishment but also against the grounds on which the State proposes to punish him. The grounds on which the State proposes to act must be communicated to the public servant.

15. In ***Managing Director ECIL Hyderabad vs. B Karunakar, AIR 1994 SC 1074,*** the Court held that it has to be held that when the Inquiry Officer is not the disciplinary authority, the delinquent employee has right to receive a copy of the inquiry officer's report before the disciplinary authority arrives at its conclusion with regard to the guilt or innocence of the employee with regard to the charges levelled against him. That right is a part of the employee's right to defend himself against the charges levelled against him. A denial of Inquiry Officer's report before the disciplinary authority takes its decision on the charges is a denial of reasonable opportunity to the employee to prove his innocence and is a breach of the principles of natural justice.

16. So far as holding of oral enquiry, which is mandatory before imposing penalty is concerned, in the case of ***Salahuddin Ansari vs. State of U.P. and others, 2008 (3) ESC 1667,*** the Court has clearly held that non-holding of oral inquiry is a serious flaw which vitiates the entire disciplinary proceeding including the order of punishment. Non holding of oral inquiry in such a case is a serious matter and goes to the root of the case.

17. The Apex Court in ***State of U.P. and another vs. T.P. Lal Srivastava, 1997 (1) LLJ 831*** as well as in ***Subhash Chandra Sharma vs. Managing Director and another, 2000 (1) UPLBEC 541,*** it is

clearly held that holding of oral enqiury is mandatory before imposing a major penalty.

18. In ***Kameshwar Prasad vs. State of Bihar and another, 1962 (1) LLJ 294,*** the Court held that no government servant shall participate in any demonstration or resort to any form of strike in connection with any matter pertaining to his conditions of service, was held to be violative of Article 19 of the Constitution of India as infringing the protection guaranteed by Article 19 (1) (a) and (6) of the Constitution. The Court specifically held that right to make a demonstration is covered by Article 19 (1) (a) (b) as it is in effect a form of speech or of expression. It was also recognized that demonstration may take various forms and that a peaceful and ordinary demonstration to draw attention to their grievance would fall within the freedom guaranteed under these clauses.

19. Bare perusal of record shows that no reason has been given by contesting respondents before passing the impugned punishment order. Neither evidence was led in presence of the petitioner nor he was given opportunity to cross examine the witnesses against him or lead his own evidence and, as such, the impugned punishment order is excessive and illegal. Merely, because the petitioner had taken part in the demonstration, he cannot be dealt with under the Service Rules as petitioner has fundamental right under Article 19 (1) (a) of the Constitution of India.

20. It is admitted fact that petitioner's suspension order was revoked, thereafter, the Inquiry Officer again submitted amended Enquiry Report dated 28.09.2017 holding that since the suspension order has been revoked, as such, Inquiry Officer drawn conclusion that since no criminal case was lodged against the petitioner, he is guilty only for minor misconduct, thereafter, the Enquiry Officer/Chief Town Planner, Meerut Development Authority submitted his Enquiry Report before the Vice Chairman on 20.06.2019 stating that there is no criminal case lodged against the petitioner. Neither he misbehaved with the officer nor he shouted slogan and also he did not use any foul language, as such, he is guilty for minor misconduct, but instead of minor punishment, authority concerned passed the impugned order against the petitioner, which would so affect in future service of the petitioner.

21. True, it is that before passing the impugned punishment order, no opportunity was accorded to the petitioner to represent himself as it was mandatory on the part of the disciplinary authority. From perusal of record, it transpires that enquiry itself was defective as no independent witness was named in the charge-sheet nor produced during the inquiry proceeding. The Inquiry Officer submitted the enquiry report before the disciplinary authority and it was the duty of the disciplinary authority to supply the copy of enquiry report to the petitioner and non-supply of enquiry report to the petitioner to make representation against it, amounts to violation of principles of natural justice. It is clear that wherever there has been an Inquiry Officer and he has furnished a report to the disciplinary authority at the conclusion of the inquiry holding the delinquent guilty of all or any of the charges with proposal for any particular punishment or not, the delinquent is entitled to a copy of such report and will also be entitled to make a representation against it, if he so desires, and non-furnishing of the report would

amount to violation of rules of natural justice.

22. Admittedly, no regular enquiry was conducted against the petitioner and only on the basis of summary enquiry, the respondent-authority has passed the impugned order.

23. It is settled proposition of law that unless a regular enquiry is conducted by providing reasonable opportunity to the delinquent and unless the alleged charge is proved in the enquiry, no punishment can be imposed, otherwise. it amounts to violation of principles of natural justice.

24. In view of aforesaid observations, the writ petition succeeds and the same is **allowed.** The impugned order dated 18.07.2019 passed in appeal is hereby set aside.

25. The matter is remanded back to the disciplinary authority to proceed from the stage prior to the passing of the impugned order and conclude the regular enquiry within a period of six months from the date of production of copy of this order.

26. However, on the facts and in the circumstances of the case, there will be no order as to costs.

(2021)02ILR A213
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.02.2021

BEFORE

THE HON'BLE VIVEK KUMAR BIRLA, J.

Writ A (Rent Control) No. 9686 of 2020

Om Prakash ...Petitioner
Versus
Smt. Prayagwati Devi Agrawal & Ors. ...Respondents

Counsel for the Petitioner:
Sri Nikhil Mishra, Sri Manish Goyal

Counsel for the Respondents:
Sri Kshitij Shailendra

A. Civil Law - U.P. Urban Building (Regulation of Letting, Rent and Eviction) Act, 1972 – Section 21 (1) (a) – Eviction suit – Relationship of landlord and tenant – Ownership – Relevancy – Capacity of plaintiff as the landlord admitted – Effect – Ownership of a person is immaterial for the purpose of the Act – Held, although the landlord has placed evidence of his ownership on record and has been upheld by both the courts below and there is a concurrent finding on record in this regard, however, I have discussed the abovenoted law for the reason that the case of the petitioner holds no ground that the plaintiff, who had filed the suit is not the landlord and therefore, the release application was not maintainable – No jurisdictional error or perversity in the findings recorded and the conclusion drawn by the courts below. (Para 14, 16 and 20)

B. Civil Law - U.P. Urban Building (Regulation of Letting, Rent and Eviction) Act, 1972 – Section 21 (1) (a) – Eviction – Bona fide need – Younger son of landlord is in some private job, no independent business of his own – Held, need to settle younger son in a business on a shop in dispute is genuine and bonafide. (Para 18)

C. Civil Law - U.P. Urban Building (Regulation of Letting, Rent and Eviction) Act, 1972 – Section 21 (1) (a) – Eviction – Comparative hardhip – No effort to search alternative accommodation by tenant – Effect – Held, it is not in dispute that no effort was made by the tenant to search any other alternative accommodation during pendency of the litigation, it cannot be said that the tenant has any comparative hardship – Court, below, correctly decided the issue. (Para 18)

Writ Petition dismissed . (E-1)

Cases relied on :-

1. Junaid Ahmed Vs IInd A.D.J., Allahabad, 1986 (1) ARC 418

2. Mohiuddin Vs IInd A.D.J, Allahabad 1986 (1) ARC

420

3. Sushil Kumar Soni Vs Smt. Sheela, 2016 (1) ARC 284

4. Narender Kumar Manchanda Vs Hemant Kumar Talwar, 2012 SCC Online Del 6125 : 2013 (197) DLT 171

5. Kedarnath Agarwal (dead) & anr. Vs Dhanraji Devi (dead) by Lrs & anr., (2004) 8 SCC 76

6. Management of Madurantakam Sugar Mill Ltd. Vs S. Vishwanathan, (2005) 3 SCC 193

7. Kanaklata Das & ors. Vs Naba Kumar Das & ors., (2018) 2 SCC 352

8. Tapeshwari Mal Vs Rishikesh Varma, (2018) 131 ALR 517

9. K.D. Dewan Vs Harbhajan S. Parihar, AIR 2002 SC 67

10. Lakshmi Traders Akbarpur Mandi & ors. Vs Navin Rastogi & anr., 2019 (1) ADJ 801

11. Raj Mohan Krishna Vs The Second A.D.J. & ors. AIR 1993 Allahabad 40

12. Vijay Lata Sharma Vs Raj Pal & anr., AIR 2004 SC 4390

13. Jeet Kaur & anr. Vs Bala Ji Builders & ors., 2019 (4) AWC 3123

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

1. Heard Sri Manish Goyal, learned Senior Counsel assisted by Sri Nikhil Mishra, learned counsel for the petitioner-tenant and Sri Kshitij Shailendra, learned counsel for the respondents-landlord.

2. Present petition has been filed for quashing the order dated 1.9.2020 passed by the District Judge, Hathras in UPUB Appeal No. 1 of 2019. Further prayer has been made seeking quashing of the order dated 9.1.2019 passed by the Prescribed Authority / Civil Judge (Senior Division), Hathras in P.A. Case No. 12 of 2004.

3. Shorn of details, facts in brief are that the landlord filed release application under Section 21(1)(a) of U.P. Act 13 of 1972 (hereinafter referred to as the Act) against the petitioner-tenant herein seeking release of the shop in favour of the landlord on the ground of bona fide requirement of the shop no. 1 at Bengali Mandir Ramleela Chauk Veniganj, Hathras for the purpose of business of her younger son Pankaj Agarwal. It was asserted that the tenant is not carrying on any business in the shop in dispute and the same is lying vacant. The petitioner-tenant contested the matter on the ground that no default has been committed in payment of rent; the plaintiff-respondent is not the owner of the shop in question; the shop in question is owned by Swami Thakur Bihari Ji Maharaj Virajman Bangali Mandir, Ramleela Maidan, Hathras and the only role of the plaintiff no. 1 was to collect the rent on behalf of the Trust, therefore, the release application itself was not maintainable at the instance of the plaintiff-landlord-respondent; the respondents are merely Managers of the Trust property which includes the shop in question; Pankaj Agarwal for whose alleged need release is being claimed is gainfully employed in a private job; business is being carried on in the shop and is not lying vacant.

4. The release application was allowed by the trial court by the Prescribed Authority vide impugned judgment dated 9.10.2019. The appeal filed by the petitioner-tenant under Section 22 of the Act was dismissed by the lower appellate

court vide judgment and order dated 1.9.2020.

5. The trial court framed three issues; whether the defendant is tenant of the plaintiff in the shop in dispute; whether the need of the landlady is genuine and bonafide; and in case the application is allowed or rejected, who will suffer greater hardship.

6. On issue no. 1 it was found that the defendant has accepted the applicant as landlady and in municipal assessment paper no. 95-c name of the landlady is recorded as owner, therefore, the petitioner herein is the tenant of the plaintiff. On issue no. 2 regarding genuine and bonafide need of the landlady it was found that Pankaj Agarwal son of the applicant no. 1 is admittedly working as an employee in ready-made garments shop of Ashok Khurana and as such need to establish him in his own business on the shop in question is bonafide and genuine. Insofar as issue of comparative hardship is concerned, it was found that there was specific allegation levelled by the landlady that the shop is lying vacant and no business is being done. It was found that the tenant did not produce any evidence to establish that he is carrying business in the shop in question. That apart, it was found that no attempt to search alternative accommodation was also made by the tenant and therefore, as per the settled law the issue of comparative hardship was also decided in favour of the plaintiff.

7. In the appeal the appellate court recorded concurrent findings of fact. After considering the documents municipal assessment paper no. 48-c filed by the tenant and copy of assessment paper no. 95-c filed by the defendant it was found that the municipal assessment 48-c relates to some 'Balakhana' and it is not related to the disputed shop. It was found that in respect of shop in question the plaintiff was recorded in the capacity of owner. After appreciating the documents relating to SCC No. 25 of 2003 it was further found by the appellate authority that the tenant has accepted the applicant no. 1 as landlady and it was specifically admitted that she was collecting the rent from the tenant. Insofar as the bonafide need of Pankaj Agarwal younger son of the plaintiff is concerned it was found that in the written statement it was alleged that Pankaj Agarwal is not unemployed and is working in the shop of Ashok Khurana since long. Therefore, it was found that Pankaj Agarwal is working as an employee with another person and need to establish him in a business in the shop in question is genuine and bonafide. Insofar as working of Pankaj Agarwal since 1995-96 is concerned, it was found that at that point of time Pankaj Agarwal was aged about only 11 years and therefore, the tenant has failed to dispute the bonafide need of Pankaj Agarwal. It was also found that one Komal Prasad vacated the shop on 31.10.1995 according to his own free will, which was rented out to one Rakesh Agarwal in the same year as at that point of time Pankaj Agarwal was only 11 years of age and was studying in Class-7 only, therefore, at that point of time there was no occasion to establish him in business on the shop in question. The lower appellate court further found that although there are several other shops of the plaintiff, however, admittedly none of the shop is in vacant stage for the landlady or any member of her family. Insofar as contention of the tenant that he was carrying on business in the shop is concerned, it was found that no document whatsoever relating to tax, registration,

income tax papers, bills of purchase, bank account or bills of sale have been filed by the tenant to establish that he is doing any business in the shop in question, therefore, the appeal was dismissed.

8. Challenging the impugned orders submission of Sri Manish Goyal, learned Senior Counsel appearing for the petitioner is that the courts below have committed a gross mistake of law in holding that plaintiff is landlady; placing reliance on paper no. 48-c it was submitted that the property belongs to Thakur Bihari Ji Maharaj Virajman Trust and the plaintiff is merely Manager of the Trust and therefore, the shop can be released only for the bonafide need of the Trust and release application at the instance of the plaintiff was not maintainable; paper no. 95-c has incorrectly been relied on by the courts below as it is only for the purpose of taxation and does not confer any ownership of the shop in question on the plaintiff; thus, findings recorded by the courts below are based on misreading of the evidence on record; in any case, Thakur Bihari Ji Maharaj Virajman Trust was a necessary party and therefore, release application was bad for non-joinder of necessary parties and was not maintainable; plaintiff no. 1 was admitted as landlady to the extent that she collects the rent from the petitioner-tenant and it is not the ground that the tenant has accepted relationship of the applicant no. 1; need of Pankaj Agarwal son of applicant no. 1 has incorrectly been considered by the courts below as the applicant could have been considered only for the bonafide need of the Trust; findings recorded by the courts below on bonafide need of Pankaj Agarwal is perverse in nature as he is not unemployed; courts below have incorrectly decided the issue of comparative hardship by casting negative burden of proof on the tenant-petitioner by asking the proof that he is running the shop in question or not. Submission, therefore, is that the impugned judgments are illegal and are liable to be set aside.

9. Learned counsel for the petitioner has placed reliance on judgments in the cases of **Junaid Ahmed vs. IInd Additional District Judge, Allahabad 1986 (1) ARC 418, Mohiuddin vs. IInd Additional District Judge, Allahabad 1986 (1) ARC 420, Sushil Kumar Soni vs. Smt. Sheela 2016 (1) ARC 284, Narender Kumar Manchanda vs. Hemant Kumar Talwar 2012 SCC Online Del 6125 2013 (197) DLT 171, Kedarnath Agarwal (dead) and another vs. Dhanraji Devi (dead) by Lrs and another 2004 (8) SCC 76 and Management of Madurantakam Sugar Mill Ltd. vs. S. Vishwanathan 2005 (3) SCC 193.**

10. Per contra, Sri Kshitij Shailendra, learned counsel appearing on behalf of the landlord-respondent submitted that the findings of fact have been recorded on merits and warrants no interference; by the documentary evidence it was proved that the tenant has accepted the respondent as landlady as admitted in categorical terms that she used to collect the rent from the tenant; municipal assessment paper no. 95-c clearly shows that the name of the applicant no. 1 was recorded as owner of the shop in question, wherein the tenant-petitioner was shown to be the tenant; not only this even in the SCC proceedings the tenant has admitted the applicant no. 1 as landlady of the shop in question; in release application proceedings only tenant and landlord relationship is to be seen; in any case, the court is not bound to go into the dispute regarding title; status of the tenant-petitioner herein as tenant was never in

question and infact, is admitted to him; insofar as bonafide need of Pankaj Agarwal is concerned, admittedly, he is in a private job working on a shop of a different person and he has no business of his own, therefore, need of Pankaj Agarwal s/o applicant no. 1 is genuine and bonafide; no other shop in vacant stage is available to the applicants; insofar as comparative hardship is concerned, the electricity bill filed in evidence clearly shows that huge arrears towards electricity charges is mentioned in every bills which clearly indicates that shop is not being used for any purpose and no other document to indicate that any business is being run in the shop in question was ever filed before the courts below; moreover, there is nothing on record to indicate that the tenant made any effort to search any alternative accommodation during pendency of the release application, therefore, as per the settled law the issue of comparative hardship has been correctly decided in favour of the applicants.

11. Learned counsel for the respondent has placed reliance on judgments in the cases of **Kanaklata Das and others s. Naba Kumar Das and others 2018 (2) SCC 352, Tapeshwari Mal vs. Rishikesh Varma 2018 (131) ALR 517, K.D. Dewan vs. Harbhajan S. Parihar AIR 2002 SC 67, Lakshmi Traders Akbarpur Mandi and others vs. Navin Rastogi and another 2019 (1) ADJ 801, Raj Mohan Krishna vs. The Second Additional District Judge and others AIR 1993 Allahabad 40, Vijay Lata Sharma vs. Raj Pal and another AIR 2004 SC 4390 and Jeet Kaur and another vs. Bala Ji Builders and others 2019 (4) AWC 3123.**

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

13. The findings recorded by the courts below have taken into consideration in the earlier part of this judgment. The admitted position in the present case is that the tenant has accepted the applicant no. 1 as his landlady in his written statement itself. Further, as per **Kanaklata Das (supra)** it is the settled law that for existence of landlord and tenant relationship, the landlord is required to plead and prove only two things (i) existence of relationship of landlord and tenant between the parties; and (ii) grounds of eviction mentioned under relevant rent law as in case of these two things proved, the eviction suit is bound to succeed. Paragraph 11 of **Kanaklata Das (supra)** is quoted as under:-

"11. There are some well-settled principles of law on the question involved in this appeal, which need to be taken into consideration while deciding the question arose in this appeal. These principles are mentioned infra:

11.1. First, in an eviction suit filed by the plaintiff (Landlord) against the defendant(Tenant) under the State Rent Act, the landlord and tenant are the only necessary parties. In other words, in a tenancy suit, only two persons are necessary parties for the decision of the suit, namely, the landlord and the tenant.

11.2. Second, the landlord (plaintiff) in such suit is required to plead and prove only two things to enable him to claim a decree for eviction against his tenant from the tenanted suit premises. First, there exists a relationship of the landlord and tenant between the plaintiff and the defendant and second, the ground(s) on which the plaintiff-landlord has sought defendant's-tenant's eviction under the Rent Act exists. When these two things are proved, the eviction suit succeeds.

11.3. Third, the question of title to the suit premises is not germane for the decision of the eviction suit. The reason

being, if the landlord fails to prove his title to the suit premises but proves the existence of relationship of the landlord and tenant in relation to the suit premises and further proves existence of any ground on which the eviction is sought under the Tenancy Act, the eviction suit succeeds. Conversely, if the landlord proves his title to the suit premises but fails to prove the existence of relationship of the landlord and tenant in relation to the suit premises, the eviction suit fails. (See: Ranbir Singh vs. Asharfi Lal, 1995(6) SCC 580).

11.4. Fourth, the plaintiff being a dominus litis cannot be compelled to make any third person a party to the suit, be that a plaintiff or the defendant, against his wish unless such person is able to prove that he is a necessary party to the suit and without his presence, the suit cannot proceed and nor can be decided effectively. In other words, no person can compel the plaintiff to allow such person to become the co-plaintiff or defendant in the suit. It is more so when such person is unable to show as to how he is a necessary or proper party to the suit and how without his presence, the suit can neither proceed and nor it can be decided or how his presence is necessary for the effective decision of the suit. (See-Ruma Chakraborty vs. Sudha Rani Banerjee, 2005(8) SCC 140)

11.5. Fifth, a necessary party is one without whom, no order can be made effectively, a proper party is one in whose absence an effective order can be made but whose presence is necessary for a complete and final decision on the question involved in the proceeding. (See-Udit Narain Singh Malpaharia vs. Board of Revenue AIR 1963 SC 786)

11.6. Sixth, if there are co-owners or co-landlords of the suit premises then any co-owner or co-landlord can file a suit for eviction against the tenant. In other words, it is not necessary that all the owners/landlords should join in filing the eviction suit against the tenant. (See-Kasthuri Radhakrishnan vs. M. Chinniyan, 2016(3) SCC 296)"

14. In **K.D. Dewan (supra)** Hon'ble Supreme Court has held that Act deals with the rights and obligations of a landlord only as defined therein and that ownership of a person is immaterial for the purpose of the Act. Paragraphs 7 and 14 whereof are quoted as under:-

"7. A perusal of the provision, quoted above, shows that the following categories of persons fall within the meaning of landlord : (1) any person for the time being entitled to receive rent in respect of any building or rented land; (2) a trustee, guardian, receiver, executor or administrator for any other person; (3) a tenant who sub-lets any building or rented land in the manner authorised under the Act; and (4) every person from time to time deriving title under a landlord. Among these four categories of persons, brought within the meaning of "landlord", Mr. Sharma sought to derive support from the last category. Even so, that category refers to a person who derives his title under a landlord and not under an owner of a premises. For purposes of the said category the transferor of the title referred to therein must fall under any of the categories (1) to (3). To be a landlord within the meaning of clause (c) of Section 2 a person need not necessarily be the owner; in a vast majority of cases an owner will be a landlord but in many cases a person other than an owner may as well be a landlord. It may be that in a given case the landlord is also an owner but a landlord under the Act need not be the owner. It may be noted that for purposes of the act the legislature has made a

distinction between an owner of a premises and a landlord. The Act deals with the rights and obligations of a landlord only as defined therein. Ownership of a premises is immaterial for purposes of the Act.

14. From the above discussion it follows that such a truncated meaning of the term "landlord" cannot be imported in clause (c) of Section 2 of the Act having regard to the width of the language employed therein and there is no other provision in the Act to restrict its meaning for purposes of Section 13(3)(a) thereof to an owner of the premises alone. The appellant has been paying monthly rent of the premises to the respondent from 1976. The respondent is thus the landlord of the premises under the Act and is entitled to seek relief under Section 13(3)(a) of the Act. In this view of the matter, we find no illegality in the order of this High Court under challenge. The appeal is without merit and it is liable to be dismissed."

15. In **Tapeshwari Mal (supra)** I have held that since the status of the petitioner as tenant has not been disputed, thus, there is no legal infirmity in the impugned order of eviction.

16. Although the landlord has placed evidence of his ownership on record and has been upheld by both the courts below and there is a concurrent finding on record in this regard, however, I have discussed the abovenoted law for the reason that the case of the petitioner holds no ground that the plaintiff, who had filed the suit is not the landlord and therefore, the release application was not maintainable.

17. The law as quoted above clearly covers the argument of learned counsel for the petitioner on the question of title and landlordship both.

18. Insofar as the bonafide need of Pankaj Agarwal is concerned, it is admitted that he is in some private job in a shop, therefore, he is not having any independent business of his own and therefore, need to settle him in a business on a shop in dispute is genuine and bonafide. Insofar as comparative hardship is concerned, bare perusal of electricity bill annexed with the present petition clearly indicates that in every bill huge arrears of electricity towards minimum charges have been indicated, which clearly indicates that the shop in question was not in use and there was no material consumption of electricity units, which may indicate that shop is in use for business purposes. The appellate authority has also noticed the fact that no document whatsoever towards payment of tax, income tax, bills of purchase, sales bill and registration of shop have been placed on record to indicate that infact, any business is being carried on. That apart, it is also not in dispute that no effort was made by the tenant to search any other alternative accommodation during pendency of the litigation. Therefore, in view of the settled law on this issue it cannot be said that the tenant has any comparative hardship. It is held that this issue has been correctly decided by the courts below.

19. I have gone through the rulings relied on by learned Senior Counsel appearing for the petitioner. For the discussions made hereinabove, I do not find that the rulings relied upon by the learned Senior Counsel appearing for the petitioner are of any help to him.

20. In such view of the matter, I do not find any jurisdictional error or perversity in the findings recorded and the conclusion drawn by the courts below.

Present petition is devoid of merits and is accordingly dismissed.

21. Having considered the facts and circumstances of the case, subject to filing of an undertaking by the petitioner-tenant before the Court below, it is provided that:

(1) The tenant-petitioner shall handover the peaceful possession of the premises in question to the landlord-opposite party on or before 31.7.2021;

(2) The tenant-petitioner shall file the undertaking before the Court below to the said effect within two weeks from the date of receipt of a self verified copy of this order;

(3) The tenant-petitioner shall pay entire decretal amount, if any, within a period of two months from the date of receipt of certified copy of this order.

(4) The tenant-petitioner shall pay damages @ Rs. 4,000/- per month by 07th day of every succeeding month and continue to deposit the same in the Court below till 31.7.2021 or till the date he vacates the premises, whichever is earlier and the landlord is at liberty to withdraw the said amount;

(5) In the undertaking the tenant-petitioner shall also state that he will not create any interest in favour of the third party in the premises in dispute;

(6) Subject to filing of the said undertaking, the tenant-petitioner shall not be evicted from the premises in question till the aforesaid period;

(7) It is made clear that in case of default of any of the conditions mentioned herein-above, the protection granted by this Court shall stand vacated automatically.

(8) In case, the premises is not vacated as per the undertaking given by the petitioner, he shall also be liable for contempt.

22. There shall be no order as to costs.

(2021)02ILR A220
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.02.2021

BEFORE

THE HON'BLE SURYA PRAKASH KESARWANI, J.
THE HON'BLE AJAY BHANOT, J.

Writ C No. 11738 of 2020

All U.P. Stamp Vendors Association ...Petitioner

Versus

Union of India & Ors. ...Respondents

Counsel for the Petitioner:
Sri Vishesh Rajvanshi, Sri Rajkishore Singh, Sri N.C. Rajvanshi

Counsel for the Opposite Party:
C.S.C., Sri Sumit Kakkar

A. Uttar Pradesh e-Stamping Rules 2013, Rule 12, 13 - Appointment of Authorized Collection Center - Constitution of India, Art. 226 - locus standi - challenge to proposed contract - Association of licenced stamp vendors challenged agreement executed by the State Government with the stock holding corporation of India for the appointment of authorised collection centers under the E - Stamp Rules - Held - Petitioners are still not Authorised Collection Centre, as such they have no right to dictate the terms of contract & have no locus standi to challenge the proposed contract under Article 226 - It is wholly within stamp vendors choice to apply for appointment as "Authorised Collection Centre" and enter into contract, if they find it beneficial to them - They have no fundamental or legal right to trade in E-Stamp. (Para 20)

B. Constitution of India , Art. 226 - Writ of mandamus - Sale of E stamp - stamp duty being a tax and sale of physical stamp or

E-stamp for collection of revenue being policy decision of the Government in fiscal matter, no mandamus under Article 226 of the Constitution of India can be issued to the Government at the instance of petitioner (licenced stamp vendors) to print physical stamp when the Government has taken a policy decision backed by statutory provision for E-stamp - a writ lies when any fundamental or legal rights are infringed - petitioners failed to demonstrate that any of their fundamental rights are infringed or that they have any legally protected and judicially enforceable subsisting right to ask for mandamus or that action of the State suffers from patent lack of jurisdiction. (Para 26, 26)

C. Constitution of India - Fundamental Rights Article 19(1)(g), Article 21, Article 38 - lower rate of commission & apprehension of lower income does not infringes fundamental right - Apprehension of lower income than the desired income as an agent under E stamp rules does not attract Article 21 of the Constitution. (Para 33)

D. Constitution of India, Art. 226 - Pleadings - If the facts are not pleaded or the evidence in support of such facts not annexed to the writ petition or to the counter-affidavit, as the case may be, the Court will not entertain the point. (Para 20)

E. The Uttar Pradesh e-Stamping Rules 2013 -U.P. Stamp Rules 1942 - commission on sale of E- Stamp as per the U.P. Stamp Rules 1942-petitioners are licenced stamp vendors for sale of physical stamp governed by U.P. Rules 1942 - they cannot claim same discount as provided in the Rules 1942 for sale of e-Stamp which is entirely a different scheme - Court under Article 226 cannot direct the to pay commission/service charge/fee as may be demanded by the petitioners in contrast to the mutually agreed amount under Rule 12 of the E-stamp Rules. (Para 30,31)

F. E-Stamp sale is a policy decision of the Government for collection of stamp duty - licenced stamp vendors cannot dictate the Government for collection of stamp duty in the manner as per their desire - mandamus not to discontinue printing of judicial and non-judicial stamp in physical form. (Para 24)

Writ Petition dismissed. (E-4)

List of Cases cited:-

1.Bharat Singh Vs St. of Har. (1988) 4 SCC 534

2.Hindustan Steel Ltd. Vs Dilip Construction Co. (1969) 1 SCC 597

3. St. of A.P. Vs P. Laxmi Devi (2008) 4 SCC 720

4. St. of M.P. Vs Rakesh Kolhi (2012) 6 SCC 312

5. St. of Guj. Vs Akhil Gujarat Pravasi V.S. Mahamandal (2004) 5 SCC 155

6. R.K. Garg Vs U.O.I. 1981 (4) SCC 675

7. Director of Settlements Vs M.R. Apparao 2002 4 SCC 638

8. U.O.I. Vs Upendra Singh 1994 (3) SCC 357

9. S Govind Menon Vs U.O.I. AIR 1967 SC 1274

10. U.O.I. Vs Prabhakaran Vijaya Kumar & ors. C.A. No.6898 of 2002 dt 05.05.2008 S.C.

11. Minakshi Yadav Vs St. of M.P. & ors. Writ Petition No.13723 of 2019 dt 24.07.2019 M.P. H.C.

12. Ripu Daman Singh Yadav Vs St. of M.P. & ors. W.A. No.1141 of 2019 dt. 16.07.2019 M.P. H.C.

Constitution of India, Art. 226 - Judicial Review - The Uttar Pradesh e-Stamping Rules 2013 - Central Record-keeping Agency and Authorized Collection Centre, discharge public functions. Consequently, their actions including the proposed agreement can be judicially reviewed, and

the same are accountable to public law. (Para 25)

Constitution of India - Article 19(1)(g) - phrases "practise any profession" or "carry on any occupation, trade or business" - Only those activities which are "res extra commercium" are excluded from the scope of Article 19(1)(g) of the Constitution of India. (Para 44)

Constitution of India, Art. 226 - Aggrieved Person - locus standi - A party cannot be left without remedy in law when it faces threatened injury and loss is imminent, on the foot that it should approach the court after irreversible damage has been done. The petitioner is an aggrieved party, and has the locus standi to file this writ petition. (Para 51)

List of cases cited: -

1. D. A. V. College Bathinda, Etc Vs St. of Pun. 1971 (2) SCC 261

2. Roop Chand Vs St. of Pun., AIR 1963 SC 1503

3. Peerless General Finance & Investment Co. Ltd. Vs R.B.I. 1992 (2) SCC 343

4. Oil & Natural Gas Corporation Ltd. Vs Saw Pipes Ltd. 2003 (5) SCC 705

5. Mahabir Auto Stores & ors. Vs Indian Oil Corporation AIR 1990 SC 1031

6. Udai Singh Dagar & ors. Vs U.O.I. 2007 (10) SCC 306

7. Zee Telefilms Ltd. & anr. Vs U.O.I. 2005 (4) SCC 649

(Delivered by Hon'ble Surya Prakash Kesarwani, J. & Hon'ble Ajay Bhanot,J.)

1. Heard Sri N.C. Rajvanshi, learned Senior Advocate assisted by Sri Vishesh Rajvanshi, learned counsel for the petitioners, Sri Sanjay Goswami, learned Addl. Chief Standing Counsel for the State respondents and Sri Sumit Kakkar, learned counsel for the respondent No.4. **Learned counsel for the parties were heard at length on 06.08.2020 and 07.08.2020. Orders dated 06.08.2020 and 07.08.2020 were passed incorporating their arguments.** The judgment was reserved on 07.08.2020.

2. This writ petition has been filed praying for the following relief:-

"(1) Issue a writ, order or direction in the nature of certiorari quashing the agreement issued by the respondent no. 4 for the appointment of authorised collection centers which has been marked as Annexure no. 4 to this writ petition.

(2) Issue a writ, order or direction in the nature of mandamus directing the respondent no. 4 to reconsider the agreement under challenge and to disclose the commission earned by the respondent no. 4 by the State Government.

(3) Issue a writ, order or direction in the nature of certiorari quashing the impugned Circular dated 17.01.2020 marked as Annexure no. 5 to this writ petition.

(4) Issue a writ, order or direction in the nature of mandamus directing the respondents nos. 2 and 3 not to discontinue the printing of physical judicial and non judicial stamps.

(5) Issue a writ, order or direction in the nature of certiorari quashing the impugned letter/order dated 25.02.2020 issued by the respondent no. 3, which has been marked as Annexure no. 7 to this writ petition.

(6) Issue a writ, order or direction in the nature of mandamus directing the respondents nos. 2 and 3 to

reconsider the claim of the petitioner as per Annexure no. 6 to this writ petition.

(7) Issue a writ, order or direction in the nature of mandamus whereby directing the respondents nos. 2 and 3 to fix the commission of the petitioner's members as per Rule 161 of the Rules, 1942."

Facts

3. Petitioners claim themselves to be an association of licenced stamp vendors to sell stamps in physical form under licences granted under chapter IV of the U.P. Stamp Rules 1942 (hereinafter referred to as "the U.P. Rules 1942"). They have no licence or authority to sell E-stamp.

4. Section 10 of the Indian Stamp Act 1899 (hereinafter referred to as "the Stamp Act") provides the method of payment of stamp duty in respect of instruments chargeable under the Stamp Act. Clause (b) of sub Section 1 of Section 10 of the Act empowers the State Government to make rules for payment of stamp duty. Section 74 of the Act empowers the State Government to make rules for regulating the supply and sale of stamps and stamp papers, the person by whom such sale is to be conducted and the duties and remuneration and the fees chargeable from such persons. Section 75 of the Stamp Act confers powers upon the State Government to make rules to carry out generally the purpose of the Stamp Act and to prescribe the fines which shall in no case exceed Rs.5000/-, to be incurred in breach of the provisions of the Stamp Act.

5. Under the Rule 152 of the U.P. Rules 1942, the licenced Stamp Vendors under the U.P. Rules 1942 are authorised to sell Court Fee Stamps and non judicial stamps not exceeding the aggregate value of Rs. 15,000/- to a person for one document or instrument.

6. The Government of India has appointed the respondent no. 4 (Stock Holding Corporation of India) as "Central Record Keeping Agency" (for short CRA) for computerization of Stamp duty Administration system. The respondent No.4 is a Government of India Company in which majority shares are held by the Industrial Finance Corporation of India Ltd. (IFCI) and the balance shares are held by the Life Insurance Corporation of India, United India Insurance Company, General Insurance Corporation of India, National India Assurance Company Ltd. and National Insurance Company Ltd.

7. In exercise of powers conferred under Sections 10, 74 and 75 of the Stamp Act, the State Government framed "The Uttar Pradesh e-Stamping Rules 2013 (hereinafter referred to as "e-Stamp Rules 2013").

8. The aforesaid E-Stamping Rules 2013, initially has not made eligible the licenced stamp vendors to sell E-Stamp. By the Uttar Pradesh E-Stamping (1st amendment rules 2019) Rule 13 of the E-Stamp Rules 2013 has been amended, whereby licenced Stamp Vendors under the U.P. Rules 1942, possessing educational qualification prescribed by the Stamp Commissioner, Uttar Pradesh; have been made eligible for appointment as "Authorised Collection Centre" subject to the prior approval of the appointing authority under Rule 12 of the E-Stamp Rules 2013. Now they may apply for "Authorised Collection Centre" for appointment as an agent by the "Central Record Keeping Agency", with the prior approval of the State Government, to act as

an intermediary between the "Central Record Keeping Agency" and the stamp duty payer for collection of stamp duty.

9. There is no averment in the writ petition that the petitioners have applied or have been appointed as "Authorised Collection Centre" to act as an intermediary between the "Central Record Keeping Agency" and the stamp duty payer.

10. Briefly, on the above noted facts and legal position the petitioners have filed the present writ petition praying for the relief as aforequoted.

Submissions on behalf of the petitioners

11. Learned counsel for the petitioners submitted as under:-

(i) The lowering of commission under the Rules 2013 on sale of E-Stamp papers, is violative under Article 19(1) (g) of the Constitution of India inasmuch as the lower rate of commission shall adversely affect petitioners right to run business.

(ii) The scheme of the proposed agreement framed by the respondent no. 4 for being entered with the Authorised Service Centre is violative of Article 21 of the Constitution of India, inasmuch as due to lowering of commission the members of the petitioners shall lose their right to live with dignity as they shall have less income due to lowering of commission on sell of E-stamp.

(iii) The Rules 2013 do not contain any provision for commission on sale of E-stamp, Therefore, the Uttar Pradesh Stamp Rules, 1942 shall apply which provides for one percent commission of physical sale of stamp papers.

(iv) The State Government has duty to secure and protect economic justice and to minimise inequalities in income and endeavour to eliminate inequalities in status, facilities and opportunities. The present action of the government would amount to lowering the income of Authorised Collection Centre inasmuch as petitioners could be getting higher commission on sale of physical stamp upto Rs.15,000/- whereas on sale of E-stamp, they shall be getting a lower commission irrespective of the amount. Thus, the provisions of Article 38 of the Constitution of India which are part of directive principles of State Policy, shall stand violated.

12. In support of his submissions, learned senior advocate has relied upon a judgment of Hon'ble Supreme Court **dated 05.05.2008 in Union of India vs. Prabhakaran Vijaya Kumar and others (Civil Appeal No.6898 of 2002) (Paras-44 and 45), a judgment dated 24.07.2019** of Madhya Pradesh High Court **in Writ Petition No.13723 of 2019 (Minakshi Yadav vs. State of M.P. and others)** and **another judgment** of Madhya Pradesh High Court d**ated 16.07.2019 in W.A. No.1141 of 2019 (Ripu Daman Singh Yadav vs. State of M.P. and others).**

Submissions on behalf of respondents

13. Sri Sanjay Goswami, learned Additional Chief Standing Counsel submitted as under:

(i) Under the E-Stamping Rules, 2013, the stamp vendors were not included and were not authorised to sell E-stamp but by the First Amendment Rules, 2019, the stamp vendors have been included under the E-stamping Rules, 2013 and thus, they may take advantage of selling E-stamp.

Therefore, by First Amendment Rules, a benefit has been conferred upon stamp vendors and they may get more business by way of selling of E-Stamp.

(ii) Presently, the State Government has stock of physical stamp of more than Rs.17,000 crores which as per prevailing rate of consumption, shall take more than two years to exhaust. Thus, the petitioner's business cannot be said to be adversely affected by sale of E-stamp.

(iii) The petitioners being stamp vendors have the only right for enforcement of their conditions of licence. They have no right beyond the conditions of their licence and the relevant provisions of the Act and Rules.

(iv) The petitioners as stamp vendors are governed by the U.P. Rules, 1942. By the E-stamping Rules, 2013 as amended by the First Amendment Rules, 2019, they have been made eligible to sell E-stamp. Therefore, for sale of physical stamp, they shall be governed by the provisions of U.P. Rules, 1942. In the event, they apply for registration as Authorised Collection Centre for sale of E-stamp, then they shall be governed by the provisions of U.P. E-Stamping Rules, 2013.

(v) The Rules, 2013 do not infringe Article 19(1)(g) of the Constitution of India. The entire argument of the petitioners is wholly without factual foundation.

(vi) The U.P. E-stamping Rules, 2013 and the proposed agreement framed by the respondent No.4 are not violative of Article 21 of the Constitution of India inasmuch as it is wholly within the choice of the petitioners either to apply for Authorised Collection Centre or not. If they find it beneficial for them, then they may apply and get them registered as Authorised Collection Centre.

(vii) The provisions of Article 38 of the Constitution of India have no application in the present facts and circumstances of the case. Article 38 is in Part-IV of the Constitution of India, which is directive principle of State Policy. It is mere apprehension of the petitioners that they may get lower commission if they apply for Authorised Collection Centre for sale of E-Stamp. In any case, it does not fall within the ambit of Article 38 of the Constitution of India.

(viii) By the E-stamping Rules, 2013, the stamp vendors have been made eligible to apply for Authorised Collection Centre. None of the petitioners have yet applied. Therefore, even no cause of action arose to the petitioners to file the present writ petition inasmuch as they are not even Authorised Collection Centre under the Rules, 2013.

14. Sri Sumit Kakkar, learned counsel for the respondent No.4 has adopted the submissions made by the learned Additional Chief Standing Counsel.

Discussion and findings

15. We have carefully considered the submissions of learned counsels for the parties.

16. The petitioners have not challenged the validity of the e-Stamp rules. They have merely challenged the agreement executed by the State Government with the stock holding corporation of India limited (respondent no. 4), the letter of the Commissioner Stamp, dated 17.01.2020 addressed to the Chief Treasury Officer, Kanpur Nagar, returning his indent for printing of Court Stamps, until further orders and rejection of petitioner's representation by the Stamp Commissioner received under Public Grievance Cell. The petitioners have also

prayed for writ of mandamus to the respondent nos. 2 and 3 not to discontinue printing of judicial and non judicial stamps and to fix the commission of the petitioners on E-Stamp sales as per Rule 161 of the Rules 1942.

17. The provisions of the Indian Stamp Act, 1899, the U.P. Stamp Rules 1942 and the U.P. E-Stamping Rules 2013, which are relevant for the purposes of the present controversy, are reproduced below:-

(a) **The Indian Stamp Act 1899**

Section 10. Duties how to be paid.- *(1) Except as otherwise expressly provided in this Act, all duties with which any instruments are chargeable shall be paid, and such payment shall be indicated on such instruments, by means of such stamps,-*

(a) according to the provisions herein contained;or

(b) when no such provision is applicable thereto, ***as the [State Government] may by rules direct.***

(2) The rules made under sub-section (1) may, among other matters, regulate,-

(a) in the case of each kind of instrument - the description of stamps which may be used;

(b) in the case of instruments stamped with impressed stamps - the number of stamps which may be used;

(c) in the case of bills of exchange or promissory notes written in any Oriental language - the size of the paper on which they are written.

Section 74. Power to make rules relating to sale of stamps. -

The State Government may make ***rules for regulating,-***

(a) the supply and sale of stamps an stamped papers;

(b) the persons by whom alone such sale is to be conducted;

(c) the duties and remuneration of and the fees chargeable from such person.

Provided that such rules shall not restrict the sale of ten paise or five paise adhesive stamps.

Section 75 Powers to make rules generally to carry out Act.

The State Government may make rules to carry out generally the purposes of this Act, and may, by such rules, prescribe the fines, which shall in no case exceed five hundred rupees, to be incurred on breach thereof.

(b) **The Uttar Pradesh Stamp Rules, 1942**

Section 150. Only authorised persons to sell stamps *: Exceptions.- No person, who is not duly authorized in the manner hereinafter provided, shall be entitled to sell stamps of any description other than ten naye paise revenue stamps. This prohibition shall not apply-*

(i) to a legal practitioner or a banker, who buys a stock of stamps for uses in his own business, and affixes them, when occasion requires, to the document he has to draw up in the course of that business, the cost of the stamps being recovered from his client or customer with the rest of his charges:

Provided that every court-fee label affixed by a legal practitioner to a document shall be enfaced by him in the name of the client on whose behalf the document is presented to the court. A label once so enfaced shall not be enfaced a second time.

(ii) to Government offices or Incorporated Companies or other body corporate in respect of stamped paper used

for printed forms of instruments for use by the persons concerned with the business of that office, company or body, the cost of the stamp being recovered from those persons.

151. Classes of vendors.- There shall be two classes of vendors, *namely-****(a)*** *ex officio vendors, and* ***(b)*** *l****icensed vendors.***

(a) The following persons shall be deemed to be ***ex officio vendors:***

(i) the treasurer of each district with his salaried assistant or the agent of the treasurer approved on his behalf by the Collector. When the treasurer's approved agent is appointed as ex officio vendor, the treasurer shall remain in every respect responsible as surety for the said agent;

(ii) the Tahsildar of each Tahsil;

(iii)any salaried vendor who may be appointed by the Provincial Government ;

(iv)the officer-in-charge of every Post Office at which letters are received for despatch (for the sale of adhesive revenue stamps of ten naye paise denomination only).

(b) The Collector may grant a license for vend to any of the following persons, namely:

(i) lambardars of village;

(ii) bakshis in towns under the provisions of the United Provinces Town Areas Act, 1914 (ll of 1914);

(iii) pound- keepers;

(iv) kurk amins;

(v) Postmasters at places other than the headquarters of the district or a tehsil;

(vi) village school masters;

(vii) the Nazir, head copyist or other responsible official attached to a Civil, Criminal or Revenue court at which no salaried vendor has been appointed and where there is no other liscensed vendor;

(viii) an official on the staff of Presiding Officer of a Court in camp;

(ix) patwaris in the districts of Almora, Naini Tal and Garhwal; and

(x) ***any other persons deemed by the collector to be a fit and proper person for the sale of the stamps :***

Approval to appointment required in certain cases- Provided that in the case of the appointment of postmasters and school masters the previous approval of the "Postmaster - General" and the "Chairman of the Education Committee of the District Board" respectively shall be obtained.

151-A. Period of license and fee .- *(1) Liscense for vend of stamps shall be granted for a financial year.*

(2) A license granted during the course of the financial year shall be terminated on March 31, next following.

(3)The Collector may on a written application of the licensed vendor to that effect, moved within a period of one month prior to the date on which the license expires, renew the license for the succeeding financial year :

Provided that if the application for renewal of license is moved and the renewal is not granted till the expiry of the period of license, the license granted shall remain valid till the same is renewed or renewal is refused.

(4) A license fee of one hundred rupees for every financial year for which the license is granted or renewed shall be paid to the government through the Collector concerned :

Provided that if a new license is applied for, during a financial year, the licence fee for the remainder period of that financial year shall be calculated at the rate of twenty five rupees for each quarter or a part of a quarter.

(5) If a license is lost, destroyed, defaced, torn or becomes illegible, licensed vendor shall forthwith apply to the Collector for grant of a duplicate license. The Collector may, on being satisfied that the issue of duplicate license is justified, issue a duplicate license on payment of twenty-five rupees. Every such duplicate license shall be stamped "DUPLICATE".

151-B. License for more than one financial year .- *Notwithstanding anything contained in Rule 151-A, a license for vend of stamps may be granted for a* ***period of five financial years*** *on payment of a lump sum license fee of two hundred and fifty rupees.*

152. Sale of stamps by licensed vendors and restrictions therefor.- *(a) Licensed vendors shall be allowed to sell court fee stamps or non-judicial stamps* ***not exceeding the aggregate value of fifteen thousand rupees for one document or instrument,*** *as the case may be, and to an individual member of the public.*

(b) Any person aggrieved by an order of the Collector under clause (a) may, within thirty days thereof prefer an appeal to the Board of Revenue, Uttar Pradesh, Allahabad or any officer authorised by the Board in this behalf, whose decision thereon shall be final and conclusive.

157. Method of supply of stamps to licensed vendor.- *Licensed vendors shall obtain stamps from ex officio vendors at local and branch depots on payment of ready money (less the discount hereinafter prescribed):*

Provided that persons in the service of the Crown licensed under Rule 151 (b) may obtain stamps as an advance, without payment, in accordance with rule 158.

161. Discount.- *Every licensed vendor who purchases non- judicial, court-fee or copy stamps from the Government treasury by payment of ready money shall receive the same at a discount of Rs. 1.00 per cent of the face value of the stamps.*

If the discount permissible contains a fraction of a rupee, any such fraction, in excess of the nearest lower multiple of five paise shall be ignored :

Provided that no discount shall be allowed :

(a) on any stamps supplied on any material furnished by the purchaser himself;

(b) unless stamps of an aggregate value of not less than Rs.5 are purchased at one time;

(c) on the fraction of only one rupee; and

(d) on account of purchase of adhesive revenue stamps.

167. Stamps to be delivered on demand by Collector.- Every licensed vendor shall, at anytime, on the demand of the Collector deliver all stamps, or any class of stamps, remaining in his possession together with his registers.

(c) The Uttar Pradesh E-Stamping Rules 2013

2. Definitions- (1) (b) ***"Agreement"*** *means the agreement executed between the Appointing Authority and the Central Record-keeping Agency describing the terms and conditions of appointment of the Central Record-keeping Agency;*

(d) ***"Approved Intermediaries"*** *means the Central Record - keeping Agency and the Authorised Collection Centres including all its offices and branches as appointed with the prior approval of the Government to act as an intermediary between the Government and the Stamp duty payer for the collection of Stamp duty under these rules ;*

(e) ***"Authorised Collection Centre"*** *means an agent appointed by the Central Record-keeping Agency, with the*

prior approval of the Government, ***to act as an intermediary between the Central Record-keeping Agency and the Stamp duty payer for collection of stamp duty;***

(f) ***"Central Record-keeping Agency"*** *means an agency appointed by the appointing authority for computerization of Stamp Duty Administration System in the State or at such places as the Government may determine from time to time;*

(i) ***"E-Stamp"*** *means an electronically generated impression on paper to denote the payment of Stamp duty;*

3. ***Eligibility criteria for appointment of Central Record-Keeping Agency****- Any public Financial Institution, Indian Scheduled Bank or a Company engaged in providing depository services appointed by Central Government, a company recognized by the Government either individually or in consortium may be eligible for appointment as Central Record-keeping Agency.*

4.Appointment of Central Record Keeping Agency - *The appointing Authority shall select and appoint by notification a suitable agency to function as Central Record -keeping Agency for the State to implement the Computerisation of Stamp Duty Administration System in specified places of the State as declared by him from time to time, in order of as mentioned below-*

(a) on the basis of recommendations, if any, of the Central Government regarding appointment of Central Record-Keeping Agency, issued from time to time;

(b) by inviting technical and commercial bids through a duly constituted expert Selection Committee.

5.Term of appointment*- The term of the Central Record-keeping Agency appointed under the rules shall be five years.*

6. Central record-keeping Agency to execute Agreement and Undertaking and Indemnity Bond- *(1) The appointment of the Central Record-keeping Agency shall be* ***on the contract basis and the agency shall enter into an Agreement in Form-1 with the Appointing Authority or the Government.***

(2) The Central Record-keeping Agency shall along with the agreement referred to in sub-rule (1) execute an Undertaking & indemnity Bond in the Form-2, in favour of the Appointing Authority or in any other form as may be determined by the Government from time to time.

9. ***Duties of Central Record-keeping Agency-****(1) The Central Record-keeping Agency shall be responsible for-*

(a) creating need based infrastructure, hardware and software in designated places in consultation with the Appointing Authority and its connectivity with its main server;

(b) creating need based software in the offices of Registering Officers, and Supervisory and Controlling Officers, of the department and at authorised Collection centres, the point of contact for payment of Stamp duty, within the State or at such places as may be specified from time to time by the appointing authority;

(c) providing suitable and adequate training for operation and the use of the system to the personnel of the department as may be specified from time to time by the Appointing Authority;

(d) facilitating in selection of authorized collection centres for collection of stamp duty and issuing E-stamp certificates;

(e) co-ordinating between the central server of Central Record-keeping Agency Authorized collection centres (banks, etc.) and the offices of the Registering Officers, and Supervisory

Controlling Officers of the Department or any other office or places as may be specified by the Appointing Authority;

(f) collecting stamp duty and remitting it to the Head of Account of the state in accordance with these rules and as directed from time to time by the Government as the case may be;

(g) preparing and providing various reports as required under these rules and as required by the Commissioner of Stamps from time to time.

(2) (a) The Central Record-keeping Agency shall not provide, transfer or share any hardware; software or any other technology or details in respect of the E-stamping project undertaken by it in the State to anybody without written permission of the Appointing Authority other than the duly appointed Authorized Collection Centers.

(b) Deploy the E-stamping application software after getting the security audit conducted by the agency empowered by the Government. The security audit shall also be required whenever there is any change in the E-stamping application software's subsequently. (c) Maintain the logs of all the activities on the server dedicated for E-stamping under guidelines of Indian Computer Emergency Response Team "CERT in" on regular basis.

10. Commission allowable to the Central Record-keeping Agency - *(1) The Central Record-keeping Agency shall be entitled to such agreed percentage of Commission on the amount of Stamp duty collected by Approved Intermediaries. The rate of Commission shall be notified by the Government in the Gazette.*

(2) The Commission to the Central Record-keeping Agency shall be subject to the condition of rule - 20 hereunder mentioned.

12. ***Appointment of Authorized Collection Center -*** *The Central Record keeping Agency may appoint agent(s), herein after called Authorized Collection Centers, with prior approval of the Appointing Authority;* ***to act as an intermediary between the Central Record-keeping Agency and the stamp duty payer for collection of stamp duty. The service changes, commission or fee etc. payable to Authorized Collection Centers shall be paid by the Central Record-keeping Agency at their own level as mutually agree between them.***

13. Unamended Rule

Eligibility criteria for appointment of Authorized Collection Center-

Any Scheduled Bank, any Financial Institution or undertaking controlled by the Reserve Bank of India or the Financial Institution or undertaking controlled by the Government, or a Post Office will be eligible for appointment as Authorized Collection Center, subject to prior approval of the Appointing Authority under rule 12.

13. Substituted Rule by Ist Amendment Rule 2019

Eligibility criteria for appointment of Authorized Collection Center-

Any Scheduled Bank, any Financial Institution or undertaking controlled by the Reserve Bank of India or the Financial Institution or undertaking controlled by the Government, or a Post Office ***or a stamp vendor having license under Uttar Pradesh Stamp Rules, 1942,*** *and Possessing educational qualifications prescribed by the Stamp Commissioner, Uttar Pradesh will be eligible for appointment as Authorized Collection Center, subject to the prior approval of the Appointing Authority under rule 12.*

Whether proposed Agreement of "Authorised Collection Centre" can be quashed or interfered at the instance of the Petitioners:

18. By notification F No. 16/1/ 2004 - CY. 1. Government of India Ministry of Finance Department of Economic Affairs (C & C, Division) New Delhi, dated 28.12.2005, the Stock Holding Corporation of India Limited (for short SHCIL) was selected and authorised to act as Central Record Keeping Agency (CRA) for Computerization of Stamp Duty Administration System (CSDAS). This was an step towards sale of E-Stamp. The Uttar Pradesh Government by Notification No. 473/K.N./11-7/2013-500(97)/2008, Lucknow, dated 28.05.2013, appointed the respondent no.4 i.e. M/s. Stock Holding Corporation of India limited as the Central Record Keeping Agency under Rule 4 of the E-stamp Rules, to implement the computerization of Stamp Duty Administration System in the State. Thus, the appointment of the respondent no. 4 has been made by the State Government under Rule 4 of the E-Stamp Rules to act as the Central Record Keeping Agency. Under Rule 6 of the E-Stamp Rules the appointment of the respondent No. 4 is on contract basis and the respondent no.4 has entered into agreement with the Appointing Authority/the Government in terms of Rule 6 in prescribed form I.

19. Initially, under Rule 13 of the E - Stamp Rules 2013, six category of persons were eligible to apply for appointment as "Authorised Collection Centre. Subsequently by **1st Amendment Rules 2019 (Notified on 15.11.2019) Rule 13 was amended by including Stamp Vendors having lisence under the Uttar Pradesh Stamp Rules 1947.** Thus, Stamp Vendors having lisence under the Uttar Pradesh Stamp Rules, 1942 became eligible for appointment as "Authorised Collection Centre" under the E - Stamp Rules 2013 from 15.11.2019. **Out of seven categories of persons eligible for appointment as "Authorised Collection Centre" under Rule 13 of the E - Stamp Rules 13, only the petitioners i.e. Stamp Vendors having lisence under the Uttar Pradesh Stamp Rules 1942, have filed the present writ petition for Commission as per Uttar Pradesh Rules 1942 for Collection of Stamp duty as intermediary on e-Stamp under the E - Stamp Rules, 2013.**

20. There is no averment in the writ petition that members of the petitioner's Association have applied for appointment as "Authorise Collection Centre" under the E - Stamp Rules, 2013. The allegation of bank charges and expenses are also not supported by any evidence. It has been well settled by Hon'ble Supreme Court in **Bharat Singh Vs. State of Haryana (1988) 4 SCC 534 (Para 13) that "If the facts are not pleaded or the evidence in support of such facts is not annexed to the writ petition or to the counter-affidavit, as the case may be, the Court will not entertain the point." The petitioners are still not Authorised Collection Centre. They have no right to dictate the terms of contract. It is wholly within their choice to apply for appointment as "Authorised Collection Centre" and enter into contract under Rule 12 to act as an intermediary between the Central Record Keeping Agency and the Stamp duty payer for collection of stamp duty, if they find it beneficial to them. They have no fundamental or legal right to trade in E-Stamp or to act an intermediary for collection of stamp duty which is a tax**

and is within the exclusive domain of the Government. They have no *locus standi* to challenge the proposed contract under Article 226 of the Constitution of India. **Besides above, as per clause (vii) of the proposed agreement, the "Authorised Collection Centre" shall be entitled to 23% of the commission earned by the respondent No.4 from the State of U.P. for such e-stamps generated by the ACC in Uttar Pradesh which is neither unreasonable looking into the duties of the respondent No.4 specified under the aforequoted Rule 9 nor it could be demonstrated by the petitioners to be unreasonable.**

21. Therefore, for all the reasons aforestated the **relief nos.1 and 2 sought by** the petitioners deserves to be rejected and are hereby rejected.

Regarding letter of the Addl. Chief Secretary date 17.01.2020:

22. So far as the relief No.3 is concerned, we find that it is a correspondence between the Additional Chief Secretary, Board of Revenue, Uttar Pradesh, Prayagraj and Chief Treasury Officer, Kanpur Nagar, regarding stamps printing. **There is no factual foundation in the writ petition that any licenced stamp vendor under the U.P. Rules 1942 has been denied sale of physical stamp under their licence.** Learned counsel for the petitioners has also not disputed the submissions of learned Additional Chief Standing Counsel that the State Government has very huge stock of stamps in physical form. Under the circumstances, the challenge to the impugned letter of the Additional Chief Secretary, dated 17.01.2020 is wholly misconceived. Therefore, the relief No.3 sought for its quashing has no merit and is, rejected.

Regarding mandamus not to discontinue printing of stamps:

23. The relief no. 4 sought by the petitioners is that the mandamus may be issued to the respondent nos.2 and 3 not to discontinue printing of judicial and non judicial stamp in physical form

24. The relief so sought by the petitioners is wholly misconceived in as much as, ***firstly,*** no material has been placed or pleaded in the writ petition which may indicate that despite demand the physical stamp has not been issued to any licenced vendor under the U.P. Rules 1942 and, ***secondly***, the aforementioned notification of the Central Government dated 28.12.2005 indicates that E-Stamp sale is a **policy decision of the Government for collection of stamp duty which has been taken pursuant to the announcement made in the Parliament in the wake of stamp paper scam. Now e-stamp is governed by the E-Stamp Rules 2013. The petitioners being licenced stamp vendors under the U.P. Rules 1942 have the right for enforcement of conditions of their licence. They can not dictate the Government for collection of stamp duty under Section 10 of the Act, in the manner as per their (petitioners) desire.**

25. In view of Article 246(1) of the Constitution of India the Parliament has exclusive power to make laws for stamp duty with respect to matters specified in Entry 91 of List-I of the VIIth Schedule. The State legislature has exclusive power under Article 246(3) to legislate for stamp duty with respect to matters specified in Entry 63 of List II. The concurrent power to legislate has been provided under Art. 246(2). Entry 44 of the concurrent list of

the VIIth Schedule provides for stamp duties other than duties of fees collected by means of judicial stamps, but not including rates of stamp duty. Article 268 of Constitution of India provides that such stamp duties as are mentioned in the Union list shall be levied by the Government of India but shall be collected (a) in the case where such duties are leviable within any Union Territory, by the Government of India, and (b) in other cases, by the States within which such duties are respectively levied. Thus, Stamp duty levied within a State is collected by the respective State as per relevant Act and Rules.

26. **The Stamp Act is a fiscal measure enacted to secure revenue for the State on certain classes of instruments, vide Hindustan Steel Ltd. Vs. Dilip Construction Co. (1969) 1 SCC 597 (Para 7).** Stamp duty is a Tax and a taxing statute has to be constructed strictly, vide **State of Andhra Pradesh Vs. P. Laxmi Devi (2008) 4 SCC 720 (para 19) and State of M.P. Vs. Rakesh Kolhi (2012) 6 SCC 312 (para 20). Tax is compulsory exaction of money** by a public authority for public purposes enforceable by law, vide **State of Gujarat Vs. Akhil Gujarat Pravasi V.S. Mahamandal (2004) 5 SCC 155 (para 11). Thus, stamp duty being a tax and sale of physical stamp or E-stamp for collection of revenue being policy decision of the Government in fiscal matter, no mandamus under Article 226 of the Constitution of India can be issued to the Government at the instance of the petitioner to print physical stamp when the Government has taken a policy decision backed by statutory provision for E-stamp** and to permit "ACC" to issue e-stamp of any amount to a person under the E-Stamp Rules.

27. **The petitioners have not disputed that the E-Stamp Rules 2013 has been validly framed**. The decision of the Government for sale of E-Stamp and the legislation made in this regard relates to economic matter/activities which should be viewed with greater latitude than laws touching civil rights such as freedom of speech, religion etc. While dealing with economic limitation, Hon'ble Supreme Court in the case of **R.K. Garg Vs. Union of Inida 1981 (4) SCC 675 (para 8)** observed that the court must always remember that legislation is directed to practical problems, that the economic mechanism is highly sensitive and complex, every legislation particularly in economic matters is essentially empiric and it is based on experimentation. There, may be crudities and inequities in complicated experimental economic legislation but on that account alone it cannot be struck down as invalid.

28. It is settled law that **a writ lies when any fundamental or legal rights are infringed. Writ of mandamus can be issued in favour of a person when he has legally protected and judicially enforceable subsisting right, vide Director of Settlements Vs. M.R. Apparao 2002 4 SCC 638. A writ of prohibition can be issued only when patent lack of jurisdiction is made out, vide Union of India Vs. Upendra Singh 1994 (3) SCC 357 (para 4) and S Govind Menon Vs. Union of India AIR 1967 SC 1274. None of the above circumstances exists in the case of the present petitioners which may entitle them for relief in the nature of mandamus.** The petitioners have completely failed to make out a case that any of their fundamental rights are infringed or that they have any legally protected and judicially enforceable

subsisting right to ask for mandamus or that action of the State - respondents suffers from patent lack of jurisdiction. Therefore, **the relief no.4** as sought by the petitioners deserves to be rejected and **is hereby rejected.**

Claim of petitioners for commission on sale of E- Stamp as per the U.P. Stamp Rules 1942

29. The petitioners are licenced stamp vendors under the U.P. Rules 1942. There are two class of persons who may be granted licence for sale of stamps in physical form under the U.P. Rules 1942. Members of the petitioners are a class under Rule 151 of the U.P. Rules 1942. The period of licnecee under Rule 151 A read with Rule 151 B may be one year or 5 years. **Under Rule 152, the licenced Stamp vendors are allowed to sell Court Fee Stamps or non judicial stamps not exceeding the aggregate value of Rs.15,000/-** on one document or instruments, as the case may be, to an individual member of the public. Thus, the highest limit for sale of stamps by a licence stamp vendors to an individual member of the public for one document or instrument is Rs.15,000/- only. **Under Rule 161 of the Rules a licence stamp vendor get one percent discount on the face value of the stamps purchased by him. Under the U.P. Rules 1942, the licence stamp vendors/members of the petitioners have neither any authority to sell E-Stamp nor under the said Rules there is any provisions for licence of E-Stamp.** Therefore, the relief in the nature of mandamus sought by the petitioners for a direction to the respondent nos. 2 and 3 to fix a Commission on sale of E-Stamp as per Rule 161 of U.P. Rules 1942 is wholly misconceived.

30. **Since the licence of the members of the petitioners for sale of physical stamp is governed by the provisions of U.P. Rules 1942, therefore, they can not claim that the discount as provided in the Rules 1942 for sale of stamp of limited amount should be applied to "Authorised Collection Center" under the e-Stamp Rules 2013, which is entirely a** different scheme exclusively governing sale of E-Stamps. Therefore, the relief **Nos. 6 & 7** sought by the petitioners are wholly misconceived and **are hereby rejected.**

Whether apprehension of lower income infringes fundamental rights under Article 19(1)(g), Article 21 and Article 38 of the Constitution of India ?

31. Rule 12 of the E-Stamp Rules 2013 provides that the Central Record Keeping Agency **may appoint agent(s) called "Authorised Collection Centre" to act as an intermediary** between the Central Record - Keeping Agency and the Stamp duty payer for collection of Stamp duty. Thus, if members of the petitioners apply for and are appointed as "Authorised Collection Centre" by the respondent No.4, then their status shall be of an agent of the respondent No.4. As per the aforesaid Rule 12 the **Service Charges, Commission or fee etc.** payable to the "Authorized Collection Centre" **shall be paid by the Central Record - Keeping Agency** i.e. the respondent No.4 at their own level as mutually agreed between them. Thus it is wholly within the choice of licenced stamp vendors either to agree to work as agent of respondent No. 4 on the commission/service charge/fee as may be offered to them by the respondent no.4 or not to agree. By no stretch of imagination it infringe Article 19(1) (g) or Article 21 or Article 38 of the Constitution of India. The

entire submissions of learned counsel for the petitioners in this regard is totally baseless and without substance. This Court under Article 226 of the Constitution of India cannot direct the respondent no.4 to agree to pay to ACC commission/service charge/fee as may be demanded by the petitioners in contrast to the mutually agreed amount under Rule 12 of the E-stamp Rules and enter into contract on that basis with a licensed stamp vendor for his appointment as agent (A.C.C.).

32. Article 19(1)(g) of the Constitution accords fundamental right to carry on any profession, occupation, trade or business which is subject to imposition of reasonable restriction in general public interest by the State under Article 19(6). The petitioners have no fundamental right to sell E-Stamp or for appointment as an agent under Rule 12 of the E-Stamp Rules. Amount of commission/service charge/fee as may be or has been offered by the respondent no.4 to persons for appointment as agent under Rule 12, does not infringe Article 19(1)(g).

33. Article 21 of the Constitution provides that no person shall be deprived of his life or personal liberty except according to procedure established by law. Apprehension of lower income than the desired income as an agent under Rule 12 does not attract Article 21 of the Constitution.

34. Article 38 is the directive principle of State Policy. Learned counsel for the petitioner has completely failed to demonstrate as to how Article 38 is attracted and is enforceable under the facts and circumstances of the present case. Therefore, his submission with regard to Article 38 is also rejected.

35. Judgment in the case of **Prabhakaran Vijaya Kumar and others (Supra)** relied by learned counsel for the petitioner relates to Railway accident claim. The judgment of Madhya Pradesh High Court in the case of **Minakshi Yadav (supra)** relied by learned counsel for the petitioner relates to transfer order of a supervisor when his daughter was pursuing her academic career in Class 12th. Another judgement of Madhya Pradesh High Court in the case of **Ripudaman Singh Yadav (supra)** relied by him, also relates to transfer of a government servant. All theses judgments have no relevance in the present matter.

36. For all the reasons aforestated, there is no merit in the present writ petition. Hence the writ petition is **dismissed.**

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

1. I have the pleasure of reading the opinion rendered by my learned Brother on the Bench. I am in respectful disagreement with the same. Calling for a counter affidavit does not require elaborate reasons. But in view of the lengthy and erudite opinion of my learned Brother, I am constrained with all humility to set out some reasons why calling for counter affidavits from the respondents is necessary to subserve the ends of justice in this case.

2. Heard Shri N. C. Rajvanshi, learned Senior Counsel assisted by Shri Vishesh Rajvanshi, learned counsel for the petitioner, Shri Sanjay Goswami, learned Additional Chief Standing Counsel for the State-respondents and Shri Sumit Kakkar, learned counsel for the respondent no. 4-Stock Holding Corporation of India Limited.

3. The opinion will be structured in the following sequence:

I.	**The stamp duty as a Levy and the U.P. E-Stamping Rules, 2013:**
II.	**Facts:** **i.** Agencies engaged in collection of stamp duty and their functions **ii.** Proposed agreement
iii.	Legal issues and analysis of facts in light of such legal perspectives : **i.** Public functions and concept of authorities **ii.** Public law and contracts **iii.**Fundamental rights **iv.** Locus standi and maintainability
IV.	**Directions**

I. Stamp Duty as a Levy and the U.P. E-Stamping Rules:-

4. Stamp duty is levied on various transactions under the Indian Stamp Act, 1899 (hereinafter referred to as the "Act"). The stamp duty so levied is a compulsory exaction made from the citizens upon happening of the taxing event. The levy, measure, exaction and collection of the stamp duty like any other tax is a sovereign function of the State.

5. With the introduction of e-stamping system, the Uttar Pradesh E-Stamping Rules, 2013 (hereinafter referred to as the "Rules of 2013") were promulgated. The Rules of 2013 effectuate the purpose of the Act. Validly framed Rules are an integral part of the parent statute. The Hon'ble Supreme Court in the case of **Udai Singh Dagar & Ors vs Union Of India,** reported at **2007 (10) SCC 306** held:

"75.....inasmuch as a legislative Act must be read with the regulations framed. A subordinate legislation, as is well known, when validly framed, becomes a part of the Act."

6. Some of the relevant provisions of the Rules of 2013 are being extracted hereinunder for ease of reference and to facilitate the discussion.

7. Rule 2 of the Rules of 2013 is the definition clause, and provides for various definitions including agreement, appointing authority, Authorized Collection Centre, Central Record-keeping Agency :

"2. **Definitions.---** (1) In these rules unless there is anything repugnant in the subject or context,--

(a) *"Act"* means the Indian Stamp Act, 1899 (Act No. 2 of 1899), as amended from time to time in its application to Uttar Pradesh;

(b) *"Agreement"* means the agreement executed between the Appointing Authority and the Central Record keeping Agency describing the terms and conditions of appointment of the Central Record- keeping Agency;

(c) *"Appointing authority"* means the Government or the Commissioner of Stamps, authorized by the Government in this behalf by notification in the Gazette for any specific purpose under these rules;

(d) *"Approved Intermediaries"* means the Central Record keeping Agency and the Authorized Collection Centers including all its offices and branches as appointed with the prior approval of the Government to act as an intermediary between the Government and the Stamp duty payer for collection of Stamp duty under these rules;

(e) *"Authorized Collection Center"* means an agent appointed by the Central Record keeping Agency, with the prior approval of the Government, to act as an intermediary between the Central Record-keeping Agency and the Stamp duty payer for collection of Stamp duty;

(f) *"Central Record-keeping Agency"* means an agency appointed by the appointing authority for computerization of Stamp duty Administration System in the State or in such places as the State Government may determine from time to time;"

8. The procedure for appointment of the Central Record-keeping Agency, is described in Part II of the Rules of 2013:

PART II

APPOINTMENT OF CENTRAL RECORD KEEPING AGENCY

"Rule 3: Eligibility criteria for appointment of Central Record-keeping Agency.- Any Public Financial Institution, Indian Scheduled Bank or a company engaged in providing depository services appointed by Central Government a company recognized by the Government either individually or in consortium may be eligible for appointment as Central Record-keeping Agency.

4. Appointment of Central Record-keeping Agency.-The Appointing Authority shall select and appoint by notification a suitable agency to function as Central Record-keeping Agency for the State to implement the Computerization of Stamp duty Administration System in specified places of the State as declared by him from time to time, by adopting in order of as mentioned below -

(a) on the basis of recommendations, if any, of the Central Government regarding appointment of Central Record-keeping Agency, issued from time to time;

(b) by inviting technical and commercial bids through a duly constituted expert Selection Committee.

5. Term of appointment.--The term of the Central Record-keeping Agency appointed under these rules shall be five years.

6. Central Record-keeping Agency to execute Agreement and Under- taking and Indemnity Bond.-(1) The appointment of the Central Record-keeping Agency shall be on the contract basis and the Agency shall enter into an Agreement in Form-1 with the Appointing Authority or the Government.

(2) The Central Record-keeping Agency shall alongwith the Agreement referred to in sub-rule (1) execute an Undertaking & Indemnity Bond in Form-2 appended to these rules, in favour of the Appointing Authority or in any other form as may be determined by the Government from time to time.

7**. Termination of appointment of Central Record-keeping Agency.-(1)** The appointment of the Central Record-keeping Agency may be terminated earlier than the agreed term of appointment, on the ground of any breach of obligation, or terms of agreement, or the provisions of these rules or the Act or, financial irregularity or for any other sufficient reason;

(2) However, the decision to terminate the appointment will be taken only--

(a) after the Central Record-keeping Agency has been given a three months show-cause notice specifying the details of grounds under sub-rule (1) and,

(b) after the Central Record-keeping Agency has been given a reasonable opportunity of being heard.

(c) after the explanation offered by the Central Record-keeping Agency has not been found to be satisfactory or,

(d) in case of breach of obligation, if the Central Record-keeping Agency fails to cure the breach within the three months period from the date of show-cause notice.

(3) lf the ground, on which the Appointing Authority has decided to terminate the appointment is such that it has also caused loss of revenue to the State, the Central Record-keeping Agency shall be bound to pay the complete amount of revenue loss, in addition to such amount of penalty as may be imposed by such authority;

(4) The amount of penalty that may be imposed under sub-rule (3) will not exceed up to an amount equal to twice the loss of revenue;

(5) On termination of appointment under this rules, the Central Record-keeping Agency shall transfer all the data generated during the period of appointment to the Government. After the termination of the appointment of the Central Record-keeping Agency, shall not use or cause to be used the data generated during the period of appointment for its business or a other purpose whatsoever.

8. Renewal of appointment of Central Record-keeping Agency.-(1) The application for renewal of appointment of the Central Record-keeping Agency will be made to the Appointing Authority at least three months before the expiry of the running term of appointment,

(2) The Appointing Authority may, before taking decision on the application for renewal of the appointment of the Central Record-keeping Agency, call for any information or record from the Department or the Central Record-keeping Agency or the Authorized Collection Centers or any other person or body,

(3) On being satisfied about the suitability of renewal the Appointing Authority may renew the appointment,

(4) If the appointing Authority decides to renew the appointment, a fresh agreement referred in Rule 6(1) and undertaking and in Indemnity Bond referred to in Rule 6(2) will be executed with suitable amendments, if any.

(5) The Appointing Authority shall have power to refuse the renewal of the term of appointment for reasons to be recorded in writing."

9. Part III of the Rules of 2013 details the duties of the Central Record-keeping Agency.

PART-III

DUTIES OF THE CENTRAL RECORD KEEPING AGENCY

9. Duties of Central Record-keeping Agency.--(1) The Central Record- keeping Agency shall be responsible for--

(a) creating need based infrastructure, hardware and software in designated places in consultation with the Appointing Authority and its connectivity with its main server;

(b) creating need based software in the offices of Registering Officers, and supervisory and controlling officers of the Department and at authorized collection centers, the point of contact for payment of Stamp duty, within the State or in such places of the State as specified from time to time by the Appointing Authority:

(c) Providing suitable and adequate training for operation and the

use of the system to the personnel of the department as specified from time to time by the Appointing Authority;

(d) facilitating in selection of authorized collection centers for Collection of stamp duty and issuing e-stamp certificates;

(e) Co-ordinating between the central server of Central Record-keeping Agency Authorized collection centers (banks, etc.) and the office of the Registering Officers, and supervisory and controlling officers of the Department or any other office or, place in the state as may be specified by the Appointing Authority.

(f) collecting stamp duty and remitting it to the prescribed Head of Account of the State in accordance with these rules or else from time to time by the Government as the case may be;

(g) preparing and providing various reports as required under these rules and as required by the Commissioner of Stamps from time to time.

(2) The Central Record-keeping Agency shall-

(a) not provide, transfer or share any hardware, software, or any other technology or details in respect of the E-stamping project undertaken by it in the state to anybody without written permission of the Appointing Authority other than the duly appointed Authorized Collection Centers;

(b) deploy the E-stamping application after getting the security audit conducted by agency empanelled by the Government. The Security audit shall also be required whenever there is any change in the E-stamping application software's subsequently.

(c) maintain the logs of all the activities on the server dedicated for e-stamping and guidelines of Indian Computer Emergency Response Team "CERT.in" on regular basis.

10. Commission allowable to the Central Record-keeping Agency.- (1) The Central Record-keeping Agency shall be entitled to such agreed percentage of Commission on the amount of Stamp duty collected by Approved Intermediaries. The rate of Commission shall be notified by the Government in the Official Gazette.

(2) The Commission to the CRKA shall be subject to the condition of Rule 20 hereunder mentioned.

11. Specification of software to be used by Central Record-keeping Agency.-(1) The Central Record-keeping Agency shall have to design and use such software that the following minimum details are shown on the E-stamp certificate--

(a) distinguished Unique Identification number of the Certificate so that it is not repeated on any other certificate during the lifetime of the E-stamping system,

(b) date and time of issue,

(c) amount of stamp duty paid through the certificate in words and figures,

(d) name and address of the purchaser or authorized representative of the purchaser obtaining the E-stamp certificate,

(e) brief description of the instrument on which the stamp duty is intended to be paid,

(f) brief description of the property, if any, which is subject-matter of the instrument,

(g) code, location and district of the issuing branch of the Approved Intermediary,

(h) any other distinguishing mark of the certificate e.g. bar code etc., if any,

(i) space on the paper for signature and seal of the issuing officer/

authorized signatory of the Approved Intermediary.

(2) The software to be used by the Central Record-keeping Agency shall also provide for--

(a) facility to the Registering Officer to lock the E-stamp certificate used in an instrument which is to be presented for verification by him,

(b) facility to cancel spoiled, unused or not required for use E-stamp certificate,

(c) necessary user ID passwords and codes to be used by the designated officials of the department to search, access and view any E-stamp certificate and to access Management Information System and the Decision Support System. The Central Record- keeping Agency shall provide these passwords and codes to the concerned officials of the Department as directed by the Appointing Authority,

(d) availability of details of the issued E-stamp certificate on the E-Stamping Server maintained by the Central Record-keeping Agency,

(e) availability of the different transaction details and reports relating to E-stamping, on the website of the Central Record-keeping Agency which will be accessible to the officers mentioned in clause (c) of sub-rule (2)."

10. Part IV of the Rules of 2013 provides for appointment and duties of the Authorized Collection Centre:

PART IV

AUTHORIZED COLLECTION CENTERS

"Rule 12. Appointment of Authorized Collection Center.-The Central Record- keeping Agency may appoint agent(s), herein called Authorized Collection Centers, with prior approval of the Appointing Authority, to act as an intermediary between the Central Record-keeping Agency and the stamp duty payer for collection of stamp duty. The service charges or commission or Fee etc. payable to Authorized Collection Centers shall be paid by the Central Record- keeping Agency at their own level as mutually agreed between them.

13. Eligibility criteria for appointment of Authorized Collection Centre.-- Any scheduled bank, any financial institution or undertaking controlled by the Reserve Bank of India or Financial Institution or Undertaking controlled by the Government, or the Post Office will be eligible for appointment Collection Centre, subject to prior approval of the Appointing Authority under Rule 12.

14. Branches of Central Record-keeping Agency also to collect Stamp duty.--All the offices/branches of the Central Record-keeping Agency in specified places of the State, as declared by Appointing Authority from to time collect the payment of Stamp duty for which separate approval from Appointing Authority under Rule 12 will not be required.

15. Infrastructure.---All such Approved Intermediaries shall be equipped with the required computers, printers, internet connectivity and other related infrastructure which is necessary to implement the E-stamping system a specified by the Central Record-keeping Agency from time to time.

16. Cost of Infrastructure.---- The cost of providing equipment and infrastructure referred to in Rule 15 will be borne by the concerned Approved Intermediaries.

17. State to provide necessary hardware and infrastructure in the offices of the Department.----The

Government shall make arrangements for necessary infrastructure at the Offices of Registering Officers, and offices of their supervisory and controlling officers, which would include the Computers, printers, bar code scanners, internet connection, etc as specified by the Central Record- keeping Agency from time to time.

18. Termination of agency of Authorized Collection Centre.----The Appointing Authority may at any time, for reasons to be recorded in writing, advice the Central Record-keeping Agency to terminate the agency of any Authorized Collection Centre and the Central Record-keeping Agency shall on such advice terminate the agency of such Authorized Collection Centre.

19. Minimum Value limit of e-stamp certificate.----(i) The e-stamp certificates may be issued only for amounts exceeding Rs. 9999 (Rupees nine thousand nine hundred ninety nine) or such other minimum amount as may be specified by the Appointing Authority from time to time.

(ii) The limit referred to in sub rule (i) shall not apply to issue of e-stamp certificate for payment of additional stamp duty under Rule 28."

II. Facts:-

i. Agencies engaged in collection of stamp duty and their functions:-

11. The Rules of 2013 provide for a mechanism for collection of stamp duty, and also for appointment of agencies to accomplish the said task. Sale of e-stamps and collection of stamp duty involves the State, the Central Record-keeping Agency and Authorized Collection Centre. The aforesaid entities are interconnected with a chain of contracts which delineate the interse rights and obligations of the aforesaid parties. This is in brief the scheme of the Rules of 2013.

12. The Authorized Collection Centre is essentially a private citizen who is engaged in the business of stamp vending. The petitioner is the union of stamp vendors in the State of Uttar Pradesh. There are almost forty five thousand stamp vendors who are the members of the petitioner Union. All members of the petitioner Union are desirous of being appointed as Authorized Collection Centres under the Rules of 2013. The petitioner has approached this Court in a representative capacity, claiming to represent all stamp vendors in the State of Uttar Pradesh.

13. The Stock Holding Corporation of India Limited (hereinafter referred to as SHCIL) has been appointed as the Central Record-keeping Agency by the appointing authority under the Rules of 2013. From the record of the writ petition the attributes of SHCIL cannot be determined with certainty. The website of SHCIL informs that it is a public sector undertaking.

ii. Proposed agreement:-

14. The SHCIL/Central Record-keeping Agency has taken out a proforma of an agreement proposed between the SHCIL/ Central Record-keeping Agency and the prospective Authorized Collection Centre. The agreement is purportedly relatable to Rule 12 of the Rules of 2013. Clause 7 of the proposed agreement provides for commission to the Authorized Collection Centre is extracted hereinunder:

COMMISSION TO THE ACC:-

"i. The ACC shall be entitled to 23% of the commission earned by SHCIL

from the State of UTTAR PRADESH for such e-Stamps generated by the ACC in the State of UTTAR PRADESH. The commission will be paid separately to the ACC after the end of every month by SHCIL. This amount is inclusive of any tax and other statutory levies that may be imposed at any time or from time to time for the collections through e-Stamping mechanism. Any change shall be made with mutual consent.

(ii) Service charges may be levied by the ACC and collected from the purchaser/customer as and when permitted by the State Government."

15. The commission received by the Central Record-keeping Agency/SHCIL, from the State of Uttar Pradesh is not revealed in the said proforma agreement, nor has it been otherwise disclosed to the petitioner either by the State Government or by the SHCIL. Consequently the amount of commission to which the Authorized Collection Centre is entitled under the proposed contract with SHCIL cannot be determined. This makes the proposed agreement between the Authorized Collection Centre and the Central Record-keeping Agency / SHCIL vague and uncertain.

16. The petitioner has pointed out a further anomaly resulting from the contract which goes to the root. The pleadings in the writ petition assert that as per the knowledge of the petitioner, the amount of commission to which the SHCIL/Central Record-keeping Agency is entitled from the State Government is at the rate of 0.5% on the sale of e-stamps worth Rupees one lakh. As per the proposed contract the Authorized Collection Centre is entitled to 23% of the said amount towards commission. Accordingly, the commission to which the Authorized Collection Centre will be entitled upon the sale of e-stamps worth Rs. 1 lakh is Rs. 115/-. The Authorized Collection Centre is required to predeposit an amount of Rs. 1 lakh in its bank account as advance, for purchase of e-stamps from the SHCIL / Central Record-keeping Agency of equivalent value. Upon deposit of said amount, a sum of Rs. 250/- is charged by the bank as cash handling charge. Hence the Authorized Collection Centre is sure to suffer a certain financial loss on each transaction of purchase and sale of stamps.

17. The proposed agreement thus creates an assurance of certain losses for the Authorized Collection Centre. Ordinary prudence would have it that no private entity will enter into a contract where loss is certain. (These consequences are being drawn on a plain reading of the writ petition, and without the benefit of pleadings from the respondents by counter affidavits).

III. Legal issues and analysis of facts in light of such legal perspectives:-

i. Public functions and concept of authorities:-

18. Rapid advances in science and technology in modern times, have caused far-reaching changes in administration and concepts of governance. Hitherto sovereign and public functions were the exclusive monopoly of the State and at times its instrumentalities. No private entities or parties entered into the fray. Changes wrought by the economic development and technological progress, opened up the space of public functions to private players as well. Public functions no longer remain in the exclusive domain of the State. In many instances private entities have been

either exclusively performing public functions, or supporting the State in performance of such functions.

19. Private entities which discharge public functions, in pursuance of and under the framework of a statute, may be called hybrid instrumentalities. They are not State instrumentalities in the current understanding of Article 12 of the Constitution of India. Such hybrid instrumentalities are defined by the nature of functions they perform, and not by organizational attributes. These hybrid instrumentalities pose a challenge to our existing concepts of public law or administrative law. The advantage of exists good authority to guide the discussion in this regard. The courts have addressed these challenges creatively, and have not approached these issues pedantically.

20. Courts today recognize that private entities can discharge public functions. Judicial pronouncements have brought such bodies under the regime of public law. Authorities in point hold that actions of such bodies are subject to judicial review, and the public functions performed by these hybrid instrumentalities are to be tested on established principles of public law. The hybrid instrumentalities discharging public functions cannot claim immunity from judicial review, in regard to the public functions they perform.

21. The narrative shall now be fortified by cases in point.

22. The Hon'ble Supreme Court in the case of **Zee Telefilms Ltd. & Anr vs Union Of India,** reported at **2005 (4) SCC 649**, deduced the concept of public functions from the cumulative consideration of various factors, including the nature of duties being discharged by a body and held these bodies amenable to writ jurisdiction:

"143. Governmental functions are multifacial. There cannot be a single test for defining public functions. Such functions are performed by a variety of means.

144.Furthermore, even when public duties are expressly conferred by statute, the powers and duties do not thereunder limit the ambit of a statute, as there are instances when the conferment of powers involves the imposition of duty to exercise it, or to perform some other incidental act, such as obedience to the principles of natural justice. Many public duties are implied by the courts rather than commanded by the legislature; some can even be said to be assumed voluntarily. Some statutory public duties are "prescriptive patterns of conduct" in the sense that they are treated as duties to act reasonably so that the prescription in these cases is indeed provided by the courts, not merely recognised by them.

145. A.J. Harding in his book Public Duties and Public Law summarised the said definition in the following terms:

"1. There is, for certain purposes (particularly for the remedy of mandamus or its equivalent), a distinct body of public law.

2. Certain bodies are regarded under that law as being amenable to it.

3. Certain functions of these bodies are regarded under that law as prescribing as opposed to merely permitting certain conduct.

4. These prescriptions are public duties."

146. In Donoghue [2002 QB 48 : (2001) 4 All ER 604 : (2001) 3 WLR 183 (CA)] it is stated: (All ER p. 619, para 58)

"58. We agree with Mr Luba's submissions that the definition of who is a public authority, and what is a public function, for the purposes of Section 6 of the 1998 Act, should be given a generous interpretation."

147. There are, however, public duties which arise from sources other than a statute. These duties may be more important than they are often thought or perceived to be. Such public duties may arise by reason of (i) prerogative, (ii) franchise, and (iii) charter. All the duties in each of the categories are regarded as relevant in several cases. (See A.J. Harding's Public Duties and Public Law, pp. 6 to 14.)

148. The functions of the Board, thus, having regard to its nature and character of functions would be public functions.

149. All public and statutory authorities are authorities. But an authority in its etymological sense need not be a statutory or public authority. Public authorities have public duties to perform.

150. In Aston Cantlow and Wilmcote with Billesley Parochial Church Council v. Wallbank [(2004) 1 AC 546 : (2003) 3 WLR 283 : 2003 UKHL 37] albeit in the context of the (British) Human Rights Act, 1998, it was held:

"... This feature, that a core public authority is incapable of having convention rights of its own, is a matter to be borne in mind when considering whether or not a particular body is a core public authority...."

See also Hampshire County Council v. Graham Beer t/a Hammer Trout Farm [2003 EWCA Civ 1056] and Parochial Church Council of the Parish of Aston Cantlow v. Wallbank[(2004) 1 AC 546 : (2003) 3 WLR 283 : 2003 UKHL 37] , UKHL para 52. There, however, exists a distinction between a statutory authority and a public authority. A writ not only lies against a statutory authority, it will also be maintainable against any person and a body discharging public function who is performing duties under a statute. A body discharging public functions and exercising monopoly power would also be an authority and, thus, writ may also lie against it.

152. Judicial review forms the basic structure of the Constitution. It is inalienable. Public law remedy by way of judicial review is available both under Articles 32 and 226 of the Constitution. They do not operate in different fields. Article 226 operates only on a broader horizon.

153. The courts exercising the power of judicial review both under Articles 226, 32 and 136 of the Constitution act as a "sentinel on the qui vive". (See Padma v. Hiralal Motilal Desarda [(2002) 7 SCC 564] , SCC at p. 577.)

154. A writ issues against a State, a body exercising monopoly, a statutory body, a legal authority, a body discharging public utility services or discharging some public function. A writ would also issue against a private person for the enforcement of some public duty or obligation, which ordinarily will have statutory flavour.

155. Judicial review casts a long shadow and even regulating bodies that do not exercise statutory functions may be subject to it. [Constitutional and Administrative Law, by A.W. Bradley and K.D. Ewing (13th Edn.), p. 303.]

156. Having regard to the modern conditions when the Government is entering into business like the private sector and also undertaking public utility services, many of its actions may be State

action even if some of them may be non-governmental in the strict sense of the general rule. Although the rule is that a writ cannot be issued against a private body but thereto the following exceptions have been introduced by judicial gloss:

(a) Where the institution is governed by a statute which imposes legal duties upon it.

(b) Where the institution is "State" within the meaning of Article 12.

(c) Where even though the institution is not "State" within the purview of Article 12, it performs some public function, whether statutory or otherwise.

157. Some of the questions involved in this matter have recently been considered in an instructive judgment by the Delhi High Court in Rahul Mehra v. Union of India [(2004) 114 DLT 323 (DB)] . Having regard to the discussions made therein, probably it was not necessary for us to consider the question in depth but its reluctance to determine as to whether the Board is a State within the meaning of Article 12 of the Constitution necessitates further and deeper probe.

158. The power of the High Court to issue a writ begins with a non obstante clause. It has jurisdiction to issue such writs to any person or authority including in appropriate cases any Government within its territorial jurisdiction, directions, orders or writs specified therein for the enforcement of any of the rights conferred by Part III and for any other purpose. Article 226 confers an extensive jurisdiction on the High Court vis-à-vis this Court under Article 32 in the sense that writs issued by it may run to any person and for purposes other than enforcement of any rights conferred by Part III; but having regard to the term "authority" which is used both under Article 226 and Article 12, we have our own doubts as to whether any distinction in relation thereto can be made. (See Rohtas Industries Ltd. v. Rohtas Industries Staff Union [(1976) 2 SCC 82 : 1976 SCC (L&S) 200 : AIR 1976 SC 425] .)"

23. Recognizing the fact that the phrase "public function" eludes precise definition, the Hon'ble Supreme Court in the case of **G. Bassi Reddy Vs. International Crops Research Institute,** reported at **2003 (4) SCC 225,** attempted to understand it from a consideration of an aggregate of various factors. But explained it mainly in terms of the nature function discharged and duty owed to the public by a body:

"28. A writ under Article 226 can lie against a "person" if it is a statutory body or performs a public function or discharges a public or statutory duty *(Praga Tools Corpn. v. C.A. Imanual* [(1969) 1 SCC 585 : AIR 1969 SC 1306], *Shri Anadi Mukta Sadguru Trust v. V.R. Rudani* [(1989) 2 SCC 691] SCC at p. 698 and *VST Industries Ltd. v. Workers' Union*[(2001) 1 SCC 298 : 2001 SCC (L&S) 227]). ICRISAT has not been set up by a statute nor are its activities statutorily controlled. ***Although, it is not easy to define what a public function or public duty is, it can reasonably be said that such functions are similar to or closely related to those performable by the State in its sovereign capacity.(emphasis supplied)***. The primary activity of ICRISAT is to conduct research and training programmes in the sphere of agriculture purely on a voluntary basis. A service voluntarily undertaken cannot be said to be a public duty. Besides ICRISAT has a role which extends beyond the territorial boundaries of India and its activities are designed to benefit people from all over the world.

While the Indian public may be the beneficiary of the activities of the Institute, it certainly cannot be said that ICRISAT owes a duty to the Indian public to provide research and training facilities. In *Praga Tools Corpn. v. C.V. Imanual* [(1969) 1 SCC 585 : AIR 1969 SC 1306] this Court construed Article 226 to hold that the High Court could issue a writ of mandamus "to secure the performance of a public or statutory duty in the performance of which the one who applies for it has a sufficient legal interest".

24. The two entities, namely, Central Record-keeping Agency and Authorized Collection Centre are appointed by the manner prescribed in the Rules of 2013, and thus have a statutory origin. Under the Rules of 2013, these two agencies support the State Government in performance of its sovereign function, namely, the exaction/collection of the stamp duty through sale of e-stamps. The Rules of 2013 reveal that the Central Record-keeping Agency and Authorized Collection Centre, are an integral part of and play a critical role in the statutory mechanism of collection of stamp duty through sale of e-stamps. An agreement is executed between the State Government, and the Central Record-keeping Agency as provided in the Rules of 2013. Similarly, an agreement is also contemplated under Rule 12 of the Rules of 2013, between the Central Record-keeping Agency and the Authorized Collection Centre. The contract between the Central Record-keeping Agency and the Authorized Collection Centre creates the framework of interse rights and obligations between the parties. The covenants of the said agreement enable both entities to discharge their statutory functions, in furtherance of the larger sovereign function of collection of stamp duty.

25. The cumulative effect of the aforesaid facts is that the Central Record-keeping Agency and Authorized Collection Centre, discharge public functions. Consequently their actions including the proposed agreement can be judicially reviewed, and the same are accountable to public law.

ii. Public law and contracts:-

26. It is well settled that the court cannot rewrite the contract between the parties. Moreso, in this case it is not the ken of the court to determine the commission to be paid to either party. However, it is very much concern of the court to enquire whether the proposed agreement between the Central Record-keeping Agency/SHCIL and the Authorized Collection Centre is consistent with the law of the land or not.

27. The first principle of contracts is party autonomy. The parties are free to decide the terms of any mutual agreement, and give it the shape of a contract. However, the freedom to contract is restricted by law. The Indian Contract Act, 1872, contains a restriction on the terms of a contract. Section 23 of the Indian Contract Act, 1872, voids certain contracts for various reasons. A specific prohibition exists in Section 23 against contracts which are contrary to existing law. The provision is being extracted hereinunder:

" **Section 23. What consideration and objects are lawful, and what not.--** The consideration or object of an agreement is lawful, unless--

it is forbidden by law; or

is of such a nature that, if permitted, it would defeat the provisions of any law; or is fraudulent; or

involves or implies, injury to the person or property of another; or the Court regards it as immoral, or opposed to public policy.

In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void."

28. There are other limitations on the creation of contracts under the public law. Some salient aspects of the proposed agreement between the Central Record-keeping Agency /SHCIL, and the Authorized Collection Centre will now be considered. The proposed agreement is not a simplicitor commercial contract. Public functions will be discharged by the parties in the framework of the said contract. There is a dominant public law element in the aforesaid contract. The parties to the contract also perform statutory functions under the Rules of 2013. The said agreement fulfills a statutory purpose. A contract between the Authorized Collection Centre, and the Central Record-keeping Agency is critical to the existence of the Authorized Collection Centre, and for its efficient functioning to implement the scheme of the Act and the Rules of 2013. The proposed agreement has to be compliant with the requirements of public law.

29. It has to be seen whether on the basis of plain assertions in the writ petition, the proposed agreement between the Central Record-keeping Agency and the Authorized Collection Centre is in accord with the provisions of the Indian Contract Act, and the demands of public law. The requirements posed by the public law are infact an extension of Section 23 of the Indian Contract Act. This discussion can profit from good authority in point.

30. The scope of judicial interference in cases where public law is applicable to a contract, and conformity of such contracts to requirements of public law arose for consideration before the Hon'ble Supreme Court in **Mahabir Auto Stores & Ors vs Indian Oil Corporation** reported at **AIR 1990 SC 1031.** The Hon'ble Supreme Court while exhaustively determining the contours of public law in a contract held:

"12. 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 *Radha Krishna Agarwal v. State of Bihar* [(1977) 3 SCC 457] . It 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 parties. 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. See *Radha Krishna Agarwal v. State of Bihar*[(1977) 3 SCC 457] 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 hearing 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 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 unreasonable. In this connection reference may be made to *E.P. Royappa v. State of Tamil Nadu* [(1974) 4 SCC 3 : 1974 SCC (L&S) 165], *Maneka Gandhi v. Union of India* [(1978) 1 SCC 248],*Ajay Hasia v. Khalid Mujib Sehravardi*[(1981) 1 SCC 722 : 1981 SCC (L&S) 258], *R.D. Shetty v. International Airport Authority of India* [(1979) 3 SCC 489] and also *Dwarkadas Marfatia 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.

18. Having considered the facts and circumstances of the case and the nature of the contentions and the dealing between the parties and in view of the present state of law, we are of the opinion that decision of the State/public authority under Article 298 of the Constitution, is an administrative decision and can be impeached on the ground that the decision is arbitrary or violative of Article 14 of the Constitution of India on any of the grounds available in public law field. It appears to us that in respect of corporation like IOC when without informing the parties concerned, as in the case of the appellant-firm herein on alleged change of policy and on that basis action to seek to bring to an end to course of transaction over 18 years involving large amounts of money is not fair action, especially in view of the monopolistic nature of the power of the respondent in this field. Therefore, it is necessary to reiterate that even in the field of public law, the relevant persons concerned or to be affected, should be taken into confidence. Whether and in what circumstances that confidence should be taken into consideration cannot be laid down on any strait-jacket basis. It depends on the nature of the right involved and nature of the power sought to be exercised in a particular situation. It is true that there is discrimination between power and right

but whether the State or the instrumentality of a State has the right to function in public field or private field is a matter which, in our opinion, depends upon the facts and circumstances of the situation, but such exercise of power cannot be dealt with by the State or the instrumentality of the State without informing and taking into confidence, the party whose rights and powers are affected or sought to be affected, into confidence. In such situations most often people feel aggrieved by exclusion of knowledge if not taken into confidence."

31. Certainty is both a virtue and a requirement for a valid contract in private law and public law. A contract may be voided for uncertainty. The mandate of Section 29 of the Indian Contract Act in regard to the consequences of uncertainty in an agreement, was explained by the Hon'ble Supreme Court in **Delhi Development Authority, vs Joint Action Committee, Allottee** reported at **2008 (2) SCC 672** in the following manner:

"80. A definite price is an essential element of binding agreement. A definite price although need not be stated in the contract but it must be worked out on some premise as was laid down in the contract. A contract cannot be uncertain. It must not be vague. Section 29 of the Contract Act reads as under:

"29. Agreements void for uncertainty.--Agreements, the meaning of which is not certain, or capable of being made certain, are void."

A contract, therefore, must be construed so as to lead to a conclusion that the parties understood the meaning thereof. The terms of agreement cannot be vague or indefinite. No mechanism has been provided for interpretation of the terms of the contract. When a contract has been worked out, a fresh liability cannot be thrust upon a contracting party.

81. It is well settled that a definite price is an essential element of a binding agreement. Although a definite price need not be stated in the contract, but assertion thereof either expressly or impliedly is imperative."

32. A contract cannot be opposed to public policy. Public policy is also a term that has eluded precise definition. However, there is good authority to enable us to distill the import of the term as applicable to the facts of the case. Suffice it to say that the concept of public policy takes its colour from the facts of the case, and draws its content from felt needs of the time. Law enacted by the legislature is most often the best guide to public policy.

33. The Hon'ble Supreme Court after setting its face against an unconscionable term in a contract and voiding a contract opposed to public policy, in the case of **Central Inland Water vs Brojo Nath Ganguly,** reported at **AIR 1986 SC 1571,** made the following exposition on public policy:

"76. Under which head would an unconscionable bargain fall? If it falls under the head of undue influence, it would be voidable but if it falls under the head of being opposed to public policy, it would be void. No case of the type before us appears to have fallen for decision under the law of contracts before any court in India nor has any case on all fours of a court in any other country been pointed out to us. The word "unconscionable" is defined in the *Shorter Oxford English Dictionary*, 3rd Edn., Vol. II, p. 2288, when used with reference to actions etc. as "showing no regard for

conscience; irreconcilable with what is right or reasonable". An unconscionable bargain would, therefore, be one which is irreconcilable with what is right or reasonable.

77. Although certain types of contracts were illegal or void, as the case may be, at common law, for instance, those contrary to public policy or to commit a legal wrong such as a crime or a tort, the general rule was of freedom of contract. This rule was given full play in the nineteenth century on the ground that the parties were the best judges of their own interests, and if they freely and voluntarily entered into a contract, the only function of the court was to enforce it. It was considered immaterial that one party was economically in a stronger bargaining position than the other; and if such a party introduced qualifications and exceptions to his liability in clauses which are today known as "exemption clauses" and the other party accepted them, then full effect would be given to what the parties agreed. Equity, however, interfered in many cases of harsh or unconscionable bargains, such as, in the law relating to penalties, forfeitures and mortgages. It also interfered to set aside harsh or unconscionable contracts for salvage services rendered to a vessel in distress, or unconscionable contracts with expectant heirs in which a person, usually a money lender, gave ready cash to the heir in return for the property which he expects to inherit and thus to get such property at a gross undervalue. It also interfered with harsh or unconscionable contracts entered into with poor and ignorant persons who had not received independent advice (See *Chitty on Contracts,* 25th Edn., Vol. I, paras 4 and 516).

92. The Indian Contract Act does not define the expression "public policy" or "opposed to public policy". From the very nature of things, the expressions "public policy", "opposed to public policy", or "contrary to public policy" are incapable of precise definition. Public policy, however, is not the policy of a particular government. It connotes some matter which concerns the public good and the public interest. The concept of what is for the public good or in the public interest or what would be injurious or harmful to the public good or the public interest has varied from time to time. As new concepts take the place of old, transactions which were once considered against public policy are now being upheld by the courts and similarly where there has been a well recognized head of public policy, the courts have not shirked from extending it to new transactions and changed circumstances and have at times not even flinched from inventing a new head of public policy. There are two schools of thought-- "the narrow view" school and "the broad view" school. According to the former, courts cannot create new heads of public policy whereas the latter countenances judicial law-making in this area. The adherents of "the narrow view" school would not invalidate a contract on the ground of public policy unless that particular ground had been well-established by authorities. Hardly ever has the voice of the timorous spoken more clearly and loudly than in these words of Lord Davey in *Janson v. Driefontein Consolidated Gold Mines Ltd.*[(1902) AC 484, 500] : "Public policy is always an unsafe and treacherous ground for legal decision". That was in the year 1902. Seventy-eight years earlier, Burrough, J., in *Richardson v. Mellish* [(1824) 2 Bing 229, 252 : 130 ER 294, 303 and (1824-34) All ER 258, 266] described public policy as "a very unruly horse, and when once you get astride it you never

know where it will carry you". The Master of the Rolls, Lord Denning, however, was not a man to shy away from unmanageable horses and in words which conjure up before our eyes the picture of the young Alexander the Great taming Bucephalus, he said in *Enderby Town Football Club Ltd. v. Football Assn. Ltd.* [(1971) Ch 591, 606] : "With a good man in the saddle, the unruly horse can be kept in control. It can jump over obstacles." Had the timorous always held the field, not only the doctrine of public policy but even the common law or the principles of Equity would never have evolved. Sir William Holdsworth in his *History of English Law* Vol. III, p. 55, has said:

"In fact, a body of law like the common law, which has grown up gradually with the growth of the nation, necessarily acquires some fixed principles, and if it is to maintain these principles it must be able, on the ground of public policy or some other like ground, to suppress practices which, under ever new disguises, seek to weaken or negative them."

It is thus clear that the principles governing public policy must be and are capable, on proper occasion, of expansion or modification. Practices which were considered perfectly normal at one time have today become obnoxious and oppressive to public conscience. If there is no head of public policy which covers a case, then the court must in consonance with public conscience and in keeping with public good and public interest declare such practice to be opposed to public policy. Above all, in deciding any case which may not be covered by authority our courts have before them the beacon light of the Preamble to the Constitution. Lacking precedent, the court can always be guided by that light and the principles underlying the Fundamental Rights and the Directive Principles enshrined in our Constitution.

93.The normal rule of Common Law has been that a party who seeks to enforce an agreement which is opposed to public policy will be non-suited. The case of *A. Schroeder Music Publishing Co. Ltd. v. Macaulay* [(1974) 1 WLR 1308] however, establishes that where a contract is vitiated as being contrary to public policy, the party adversely affected by it can sue to have it declared void. The case may be different where the purpose of the contract is illegal or immoral. In *Kedar Nath Motani v. Prahlad Rai* [AIR 1960 SC 213 : (1960) 1 SCR 861] reversing the High Court and restoring the decree passed by the trial court declaring the appellants' title to the lands in suit and directing the respondents who were the appellants' benamidars to restore possession, this Court, after discussing the English and Indian law on the subject, said: (at p. 873)

"The correct position in law, in our opinion, is that what one has to see is whether the illegality goes so much to the root of the matter that the plaintiff cannot bring his action without relying upon the illegal transaction into which he had entered. If the illegality be trivial or venial, as stated by Williston and the plaintiff is not required to rest his case upon that illegality, then public policy demands that the defendant should not be allowed to take advantage of the position. A strict view, of course, must be taken of the plaintiff's conduct, and he should not be allowed to circumvent the illegality by resorting to some subterfuge or by misstating the facts. If, however, the matter is clear and the illegality is not required to be pleaded or proved as part of the cause of action and the plaintiff recanted before the illegal purpose was achieved, then, unless it be of such a gross nature as to outrage the

conscience of the court, the plea of the defendant should not prevail."

The types of contracts to which the principle formulated by us above applies are not contracts which are tainted with illegality but are contracts which contain terms which are so unfair and unreasonable that they shock the conscience of the court. They are opposed to public policy and require to be adjudged void."

34. An elucidation of the concept of public policy was also made by the Hon'ble Supreme Court in **Oil & Natural Gas Corporation Ltd vs Saw Pipes Ltd** reported at **2003 (5) SCC 705:**

"17.....It is thus clear that the principles governing public policy must be and are capable, on proper occasion, of expansion or modification. Practices which were considered perfectly normal at one time have today become obnoxious and oppressive to public conscience. If there is no head of public policy which covers a case, then the court must in consonance with public conscience and in keeping with public good and public interest declare such practice to be opposed to public policy. Above all, in deciding any case which may not be covered by authority our courts have before them the beacon light of the preamble to the Constitution. Lacking precedent, the court can always be guided by that light and the principles underlying the fundamental rights and the directive principles enshrined in our Constitution."

35. The proposition that true and faithful implementation of the existing statutory provisions is best public policy is applicable to the instant case also.

36. The facts prised out in the earlier part of the narrative may now be considered in light of the preceding authorities.

37. From the pleadings it transpires that the exact commission payable to the SHCIL/Central Record-keeping Agency from the State Government is not known, and remains shrouded in opacity. Consequently, the exact commission to which the Authorized Collection Centre is entitled, cannot be determined. Business decisions cannot be taken in absence of material facts, which are in the knowledge of one of the parties but not disclosed to the other contracting party.

38. These features of the proposed agreement run counter to the requirement of fairness and transparency in contracts coming in the ambit of public law. Vague terms and uncertainty in the contract can exist on the pain of invalidation under Section 29 of the Indian Contract Act.

39. As seen earlier, this is not a business /commercial contract simplicitor. Hence the concept of unequal bargaining power could well apply to the facts of the case. The SHCIL is apparently exerting its superior bargaining power over the Authorized Collection Centre, to induce the latter into an unequal contract. The offending part of the proposed agreement appears to be opposed to public policy, and seems unconscionable. But the issue can be decided with finality only after exchange of pleadings.

40. There is another aspect of the matter. The Rules of 2013 contemplate three agencies, namely, the State, Central Record-keeping Agency and the Authorized Collection Centre, in the mechanism of collection of Stamp Duty. The Authorized Collection Centre has a

critical role, and an important function to discharge under the statutory Rules. The Authorized Collection Centre cannot be eliminated from the said scheme of collection of stamp duty, nor can it be made redundant. The terms of the proposed agreement, has an assurance of certain losses in the functioning of the Authorized Collection Centre. The functionality of the Authorized Collection Centre would become impossible, and its existence would be untenable if the agreement proposed by the Central Record-keeping Agency/SHCIL is made operational.

41. True that Rule 12 of the Rules of 2013 empowers the Central Record-keeping Agency, and the Authorized Collection Centre to create a contract "at their own level as mutually agreed between them". However, the provision does not grant discretion to Central Record-keeping Agency to create an agreement, which will lead to the destruction of the Authorized Collection Centre, or produce a stillborn entity. The agreement under Rule 12 of the Rules of 2013, has to effectuate the purpose of the said Rules, and not frustrate it. In this manner the proposed contract appears to violate the law.

iii. Fundamental rights:-

42. Article 19(1)(g) of the Constitution of India confers a right to practise any profession or to carry on any occupation, trade or business to all citizens. Article 19(1)g of the Constitution of India is extracted hereinunder:

"19 (1) g: All citizens shall have the right to practise any profession, or to carry on any occupation, trade or business."

43. The constitutionally permissible restrictions to the fundamental right to practise any profession or carry on any occupation, trade or business are contained in Article 19(6):

"(6) Nothing in sub clause (g) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the general public, reasonable restrictions on the exercise of the right conferred by the said sub clause, and, in particular, [nothing in the said sub clause shall affect the operation of any existing law in so far as it relates to, or prevent the State from making any law relating to,--

(i) the professional or technical qualifications necessary for practising any profession or carrying on any occupation, trade or business, or

(ii) the carrying on by the State, or by a corporation owned or controlled by the State, of any trade, business, industry or service, whether to the exclusion, complete or partial, of citizens or otherwise]."

44. The phrases "practise any profession" or "carry on any occupation, trade or business" occurring in Article 19(1)(g) of the Constitution of India have a wide ambit. These compendious expressions have been interpreted liberally by the constitutional courts. Only those activities which are "res extra commercium" are excluded from the scope of Article 19(1)(g) of the Constitution of India. The validity of restrictions on the fundamental right which are imposed by law, and regulation of various trades, occupation, professions and business by statutes, have to be tested on the anvil of the permissible restrictions to the fundamental right contemplated in Article 19(6) of the Constitution of India.

45. The right to trade in e-stamps comes within the embrace of Article 19(1)(g) of the Constitution of India. This, however, does not mean that any person has a fundamental right to be appointed as an Authorized Collection Centre. The appointment of Authorized Collection Centre is strictly governed and regulated by the Rules of 2013, and has to be made according to the said Rules.

46. Thus subject to the restrictions imposed by the law, (in this case the Indian Stamp Act, 1899, read with Uttar Pradesh E-Stamping Rules, 2013), the members of the petitioner have a fundamental right to trade in e-stamps. According to the petitioner, the offending condition in the proposed contract and actions of the respondents, curtail the fundamental right of the petitioner in contravention of the permissible restrictions under Article 19(6) of the Constitution of India, and violate Article 19(1)(g) of the Constitution of India.

47. The directions issued by the Reserve Bank of India to regulate the business of finance and investments, came to be assailed before the Hon'ble Supreme Court, in **Peerless General Finance and Investment Co. Ltd. vs Reserve Bank Of India,** reported at **1992 (2) SCC 343,** on the foot that the aforesaid regulation amounted to an unreasonable restriction on the fundamental right of the petitioner to carry on any occupation, trade or business guaranteed by Article 19(1)(g) of the Constitution of India.

48. Reiterating the role of the constitutional courts as the sentinel of fundamental rights, and their scrupulous duty to uphold fundamental rights, the Hon'ble Supreme Court in **Peerless General Finance and Investment Co. Ltd. (supra),** described the scope of the fundamental right under Article 19(1)(g) of the Constitution of India and nature of the enquiry by the court into an allegation of the violation of the same:

"47. The question emerges whether paragraphs (6) and (12) are ultra vires Articles 19(1)(g) and 14 of the Constitution. Article 19(1)(g) provides fundamental rights to all citizens to carry on any occupation, trade or business. Clause (6) thereof empowers the State to make any law imposing, in the interest of the general public, reasonable restrictions on the exercise of the said rights. Wherever a statute is challenged as violative of the fundamental rights, its real effect or operation on the fundamental rights is of primary importance. It is the duty of the Court to be watchful to protect the constitutional rights of a citizen as against any encroachment gradually or stealthily thereon. When a law has imposed restrictions on the fundamental rights, what the Court has to examine is the substance of the legislation without being beguiled by the mere appearance of the legislation. The legislature cannot disobey the constitutional mandate by employing an indirect method. The Court must consider not merely the purpose of the law but also the means how it is sought to be secured or how it is to be administered. The object of the legislation is not conclusive as to the validity of the legislation. This does not mean the constitutionality of the law shall be determined with reference to the manner in which it has actually been administered or operated or probably been administered or operated by those who are charged with its implementation. The Court cannot question the wisdom, the need or desirability of the regulation. The State can

regulate the exercise of the fundamental right to save the public from a substantive evil. The existence of the evil as well as the means adopted to check it are the matters for the legislative judgment. But the Court is entitled to consider whether the degree and mode of the regulation is in excess of the requirement or is imposed in an arbitrary manner. The Court has to see whether the measure adopted is relevant or appropriate to the power exercised by the authority or whether it overstepped the limits of social legislation. Smaller inroads may lead to larger inroads and ultimately result in total prohibition by indirect method. If it directly transgresses or substantially and inevitably affects the fundamental right, it becomes unconstitutional, but not where the impact is only remotely possible or incidental. The Court must lift the veil of the form and appearance to discover the true character and the nature of the legislation, and every endeavour should be made to have the efficacy of fundamental right maintained and the legislature is not invested with unbounded power. The Court has, therefore, always to guard against the gradual encroachments and strike down a restriction as soon as it reaches that magnitude of total annihilation of the right.

48. However, there is presumption of constitutionality of every statute and its validity is not to be determined by artificial standards. The Court has to examine with some strictness the substance of the legislation to find what actually and really the legislature has done. The Court would not be over persuaded by the mere presence of the legislation. In adjudging the reasonableness of the law, the Court will necessarily ask the question whether the measure or scheme is just, fair, reasonable and appropriate or is it unreasonable, unnecessary and arbitrarily interferes with the exercise of the right guaranteed in Part III of the Constitution.

49. Once it is established that the statute is prima facie unconstitutional, the State has to establish that the restrictions imposed are reasonable and the objective test which the Court is to employ is whether the restriction bears reasonable relation to the authorised purpose or is an arbitrary encroachment under the garb of any of the exceptions envisaged in Part III. The reasonableness is to the necessity to impose restriction; the means adopted to secure that end as well as the procedure to be adopted to that end.

50. The Court has to maintain delicate balance between the public interest envisaged in the impugned provision and the individual's right; taking into account, the nature of his right said to be infringed; the underlying purpose of the impugned restriction; the extent and urgency of the evil sought to be remedied thereby; the disproportion of the restriction imposed, the prevailing conditions at the time, the surrounding circumstances; the larger public interest which the law seeks to achieve and all other relevant factors germane for the purpose. All these factors should enter into the zone of consideration to find the reasonableness of the impugned restriction. The Court weighs in each case which of the two conflicting public or private interest demands greater protection and if it finds that the restriction imposed is appropriate, fair and reasonable, it would uphold the restriction. The Court would not uphold a restriction which is not germane to achieve the purpose of the statute or is arbitrary or out of its limits."

49. Final determination into the allegation of violation of fundamental rights, can be made only after exchange of pleadings. At this stage, the petitioner has

made out a case to call for counter affidavits from the respondents.

iv. Locus standi and maintainability:-

50. True at this stage the contract has not been executed between the Authorized Collection Centre, and the Central Record-keeping Agency. True also that the petitioner has prima facie established, that offending part of the contract and actions of the respondents violate Article 14 and Article 19(1)(g) of the Constitution of India and the law. Members of the petitioner cannot be induced or forced into executing an illegal contract. It is idle to contend that the petitioner has a choice not to execute the contract. Execution of an illegal contract may raise other complications. The opposing party could well take this position at a later point in time. The Authorized Collection Centre having executed the contract has accepted its terms, and is estopped from resiling from its terms, and challenging the same before a court of law. This will lead to multiplicity of litigation, which should be avoided.

51. The "heads I win, tails you lose" choice, or a double whammy situation left to the petitioner, cannot be accepted in law. Shutting doors of justice in the present and for the future, leaves a party without any recourse in law. This is not conducive to the administration of justice. A party cannot be left without remedy in law when it faces threatened injury and loss is imminent, on the foot that it should approach the court after irreversible damage has been done. The petitioner is an aggrieved party, and has the locus standi to file this writ petition.

52. This proposition is fortified by the holding of a Constitutional Bench of the Hon'ble Supreme Court rendered in **D. A. V. College Bathinda, Etc vs State Of Punjab** reported at **1971 (2) SCC 261:**

"5. A preliminary objection has been urged on behalf of the respondents that in a petition under Article 32, only where it is shown that there is a violation of fundamental right that the validity of the legislation or of the legislative competence can be raised and determined, but in these cases as there is no violation of Articles 14, 26, 29 and 30 of the Constitution the petitioners ought not be allowed to challenge the vires of the Act on the ground of the competence of the Legislature to enact the impugned law. This question has been dealt with fully in the batch of petitions in which we have just pronounced judgment, where we had also considered the contentions of the learned Advocate-General of Punjab and Shri Tarkunde, the learned Counsel for Respondent 2 in this behalf and hence ***we do not propose again to reiterate the reasons in support of the conclusion that a petition under Article 32 in which petitioners make out a prima facie case that their fundamental rights are either threatened or violated will be entertained by this Court and that it is not necessary for any person who considers himself to be aggrieved to wait till the actual threat has taken place. (emphasis supplied)***. On the other objection that the Arya Samaj is neither a linguistic or religious minority nor is it a religious denomination we held that it was unnecessary to go into the question of whether it is a separate religious denomination for the purpose of Article 26(1)(a) or a linguistic minority for the purposes of Article 30(1) because in our view it would be sufficient for the petitioners if they could establish that they had a distinct script of their own and they

were a religious minority, to invoke the protection of Articles 29(1) and 30(1). We had in those writ petitions held that what constitutes a linguistic or religious minority must be judged in relation to the State inasmuch as the impugned Act is a State Act and not in relation to the whole of India. In this view we rejected the several contentions which are also urged in these petitions, namely, that Hindus being a majority in India are not a religious minority in Punjab and held that the Arya Samajis who are part of the Hindu community in Punjab are a religious minority and that they had a distinct script of their own the Devnagri which entitled them to invoke the guarantees under the aforesaid provisions of the Constitution."

53. Similarly the Constitutional Bench of the Hon'ble Supreme Court in **Roop Chand vs State Of Punjab,** reported at **AIR 1963 SC 1503** opined:

"22....It may be that just now the right has not been affected and there is only a threat that it will be affected. But we think that the threat is sufficiently serious and the petitioner is not bound to wait till his right has actually been affected more particularly as it is not disputed that it would inevitably be affected."

IV. **Directions:-**

54. The respondents are granted four weeks time to file their respective counter affidavits'. While filing the counter affidavit, the respondent no. 4-SHCIL shall also state its organizational details and structure, constitution of its Board, the extent of control of the Government both administrative and financial, and any other like information.

55. The SHCIL and the State Government are directed to make the necessary disclosures regarding the actual commission being given to the Stock Holding Corporation of India Limited by the State Government, and reveal the same to the petitioner within two weeks from the date of receipt of a certified copy of this order.

56. List in the top ten cases in the additional cause list immediately after four weeks before the appropriate Bench.

(2021)02ILR A257
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.11.2020

BEFORE

THE HON'BLE SURYA PRAKASH KESARWANI, J.
THE HON'BLE DR. YOGENDRA KUMAR SRIVASTAVA, J.

Writ C No. 12573 of 2020

M/S Paramount Prop. Build Pvt. Ltd. ...Petitioner

Versus

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

Counsel for the Petitioner:
Sri Syed Imran Ibrahim, Sri Gaurav Tripathi

Counsel for the Respondents:
C.S.C., Sri Ajeet Kumar Singh, Archana Singh, Sri Wasim Masood

Real Estate (Regulation and Development) Act, 2016 - S. 18(1), 38 - Powers of Authority to impose Interest - Petitioner-promoter could not deliver possession of flats to the allottees in time - allottees filed complaints before Real Estate Regulatory Authority, who passed impugned orders awarding interest - *Held* - allottees having not intended to withdraw from the project, the proviso to Section 18(1) casts an obligation on the

promoter to pay to the allottees interest for every month of delay, till the handing over of the possession - Authority exercising powers u/s 38(1) is fully empowered to impose interest in regard to contravention of the obligation cast upon the promoter. (Para 9, 10)

Writ Petition dismissed. (E-4)

(Delivered by Hon'ble Surya Prakash Kesarwani, J.
&
Hon'ble Dr. Yogendra Kumar Srivastava, J.)

1. Heard learned counsel for the petitioner, learned standing counsel for the State-respondents and Sri Wasim Masood, learned counsel for the respondent No.2.

2. The petitioner is a promoter. The respondent Nos.3 to 119 are allottees. The petitioner could not deliver possession of the flats to the allottees in time and there occurred delay. The allottees filed separate complaints before the Uttar Pradesh Real Estate Regulatory Authority, Gautam Buddh Nagar (hereinafter referred to as 'the Authority'), who passed the impugned orders awarding interest.

3. Learned counsel for the petitioner submits that the impugned orders are without jurisdiction inasmuch as the power to grant interest, does not vest with the authority.

4. Learned counsel appearing for the respondent No.2 has controverted the aforesaid contention by submitting that the authority is vested with the power to grant interest and the orders impugned, do not suffer from any error of jurisdiction on this count.

5. We have carefully considered the submissions of learned counsel for the parties.

6. Section 18 and Section 38 of the Real Estate (Regulation and Development) Act, 2016 (hereinafter referred to as 'the Act 2016') are relevant for the purposes of deciding the controversy involved in the present writ petition, which are reproduced below:

"Section 18. Return of amount and compensation. -(1) If the promoter fails to complete or is unable to give possession of an apartment, plot or building,--

(a) in accordance with the terms of the agreement for sale or, as the case may be, duly completed by the date specified therein; or

(b) due to discontinuance of his business as a developer on account of suspension or revocation of the registration under this Act or for any other reason,

he shall be liable on demand to the allottees, in case the allottee wishes to withdraw from the project, without prejudice to any other remedy available, to return the amount received by him in respect of that apartment, plot, building, as the case may be, with interest at such rate as may be prescribed in this behalf including compensation in the manner as provided under this Act:

Provided that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of the possession, at such rate as may be prescribed.

(2) The promoter shall compensate the allottees in case of any loss caused to him due to defective title of the land, on which the project is being developed or has been developed, in the manner as provided under this Act, and the claim for compensation under this

subsection shall not be barred by limitation provided under any law for the time being in force.

(3) If the promoter fails to discharge any other obligations imposed on him under this Act or the rules or regulations made thereunder or in accordance with the terms and conditions of the agreement for sale, he shall be liable to pay such compensation to the allottees, in the manner as provided under this Act.

Section 38. Powers of Authority. (1) The Authority shall have powers to impose penalty or interest, in regard to any contravention of obligations cast upon the promoters, the allottees and the real estate agents, under this Act or the rules and the regulations made thereunder.

(2) The Authority shall be guided by the principles of natural justice and, subject to the other provisions of this Act and the rules made thereunder, the Authority shall have powers to regulate its own procedure.

(3) Where an issue is raised relating to agreement, action, omission, practice or procedure that-

(a) has an appreciable prevention, restriction or distortion of competition in connection with the development of a real estate project; or

(b) has effect of market power of monopoly situation being abused for affecting interest of allottees adversely,

then the Authority, may, suo motu, make reference in respect of such issue to the Competition Commission of India."

7. Section 18 of the Act, 2016 is in respect of return of amount and compensation in case the promoter fails to complete or is unable to give possession of an apartment, plot or building. Sub-section (1) of Section 18 provides for two different contingencies. In case the allottee wishes to withdraw from the project, the promoter shall be liable on demand to return the amount received by him to the allottees in respect of the apartment, plot or building as the case may be with interest at such rate as may be prescribed including compensation in the manner as provided under the Act. Alternatively, where the allottee does not intend to withdraw from the project, the promoter shall, as per the proviso to Section 18(1), be liable to pay interest for every month of delay, till the handing over of the possession, at such rate as the case may be prescribed.

8. Section 38(1) of the Act, 2016 confers powers upon the Authority to impose penalty or interest, in regard to any contravention of obligations cast upon the promoters, the allottees and the real estate agents, under the Act or the Rules or the Regulations made thereunder.

9. The case at hand being one where the promoter has failed to give possession of the apartments, duly completed by the specified date, and the allottees having not intended to withdraw from the project, the proviso to Section 18(1) casts an obligation on the promoter to pay to the allottees interest for every month of delay, till the handing over of the possession, at the prescribed rate.

10. The promoter having contravened the afroesaid obligation with regard to giving possession of the apartment by the specified date, and complaints in this regard having been filed by the allottees, the Authority exercising powers under Section 38(1) is fully empowered to impose interest in this regard to contravention of the obligation cast upon the promoter.

11. We may take notice of the fact that the Act, 2016 was enacted for

establishment of the real estate regulatory authority for regulation and promotion of the real estate sector and to ensure sale of plot, apartment or building, as the case may be, or sale of real estate project in an efficient and transparent manner and to protect the interest of consumers in real estate sector; accordingly, the provisions of the Act have to be read in the manner so as to sub-serve the aforesaid objects.

12. Having regard to the aforesaid facts and circumstances of the case, we are of the considered view, that in case of contravention of any obligation cast upon the promoters, the Authority while exercising jurisdiction under Section 38(1), is fully empowered to award interest. The impugned orders passed by the Authority, therefore, cannot be said to be without jurisdiction.

13. No other point has been argued before us by the learned counsel for the petitioner.

14. For all the reasons afore-stated, we do not find any merit in this writ petition.

15. Consequently, **the writ petition** fails and is hereby **dismissed.**

(2021)02ILR A260
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.11.2020

BEFORE

THE HON'BLE SURYA PRAKASH KESARWANI, J.
THE HON'BLE DR. YOGENDRA KUMAR SRIVASTAVA, J.

Writ C No. 12574 of 2020

M/s Paramount Prop Build Pvt. Ltd. ...Petitioner

Versus

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

Counsel for the Petitioner:
Sri Syed Imran Ibrahim, Sri Gaurav Tripathi

Counsel for the Respondents:
C.S.C., Sri Ajeet Kumar Singh, Archana Singh, Sri Wasim Masood

Real Estate (Regulation and Development) Act (16 of 2016) , S.3, Prior registration of real estate project with RERA - U.P. Real Estate (Regulation and Development) Rules (2016) , R.2(h) - "ongoing project" means a project where development is going on but excludes such projects *where all development works have been completed* and application has been filed with the competent authority for issue of completion certificate - *Held* - mere filing of an application with the competent authority for issuance of completion certificate would not bring project out from the purview of an 'ongoing project', in case development works of a project have not been completed. (Para 18)

Promoter took objection to jurisdiction of RERA on the ground that project is not 'ongoing project' - as petitioner had already filed an application before authority for issuance of completion certificate - *Held* - RERA recorded finding that the development works in respect of the project were not completed & NOC relating to some technical work had not been obtained - project rightly held to be an 'ongoing project' - Order passed by Real Estate Regulatory Authority directing promoter to handover possession of the apartments to the allottees & to pay interest on delayed completion of project, cannot be held to be without jurisdiction. (Para 19, 20)

Writ Petition dismissed. (E-4)

(Delivered by Hon'ble Surya Praksh Kesarwani, J.
&
Hon'ble Dr. Yogendra Kumar Srivastava, J.)

1. Heard learned counsel for the petitioner, learned Standing Counsel for the respondent no. 1 and Sri Wasim Masood, learned counsel for the respondent no. 3.

2. The petitioner is promoter of 'Paramount Golf Foreste' project. The respondent nos. 4 to 50 are allottees, who have filed complaints before the Real Estate Regulatory Authority, Gautam Budh Nagar. By the impugned orders, the authority has directed the petitioner to handover possession of the apartments to the allottees within sixty days and also to pay interest on delayed completion of project.

3. Aggrieved with the impugned orders, the petitioners have filed present writ petition.

4. This Court specifically confronted the learned counsel for the petitioners with the provisions of Section 43 (5) of the Real Estate (Regulation and Development) Act, 2016 (hereinafter referred to as 'the Act, 2016) and as to whether the petitioner would exercise the option to avail the remedy of appeal but the learned counsel for the petitioner stated that he desired to raise a challenge to the jurisdiction of the authority to pass the impugned orders and in light of the same, he may be permitted to press the writ petition and therefore the writ petition may be heard.

5. With the consent of learned counsel for the parties, the writ petition is being finally heard without calling for a counter affidavit.

6. Briefly stated facts of the present case are that the petitioner is promoter of 'Paramount Golf Foreste' project for construction of apartments. The respondent nos. 4 to 50 booked the apartments with the petitioner. The petitioner issued allotment letters dated 10.08.2011 to them. However, the petitioner could not complete the project within the given time and could not handover possession of the apartments to the allottees. Consequently, the respondent allottees filed complaint before the Real Estate Regulatory Authority, Gautam Budh Nagar alleging that the completion of project is delayed by more than four years and they claimed interest and possession of the apartments. Before the authority, the petitioner raised objection as to the jurisdiction on the ground that the project in question does not fall within the definition of 'ongoing project' as defined in Rule 2 (h) of the Uttar Pradesh Real Estate (Regulation and Development) Rules, 2016 (in short 'the Rules, 2016). The authority considered the evidence on record and also the facts noticed in the inspection made by the technical team on 24.07.2019 and recorded a finding of fact that the project is still incomplete and some No Objection Certificates (for short 'NOC') including NOC of fire fighting etc. relating to some technical work had not been obtained. The authority recorded findings of fact and passed the impugned orders dated 18.10.2019.

7. Aggrieved with the impugned orders dated 18.10.2019 directing the petitioner to handover the possession of the apartments to the allottees within sixty days and to pay interest on delayed completion of project, the petitioner has filed the present writ petition.

8. Learned counsel for the petitioner submits that the project of the petitioner is not 'ongoing project' inasmuch as the petitioner had applied for completion certificate with the Uttar Pradesh State Industrial Development Corporation on

13.10.2016 and therefore in terms of the provisions of Rule 2 (h) of the Rules, 2016, the project in question is not 'ongoing project' and consequently, the project was not required to be registered under Section 3 (1) of the Act, 2016, and the RERA Authority did not have the jurisdiction to look into the complaint made by the allottees.

9. No other submissions have been made before us by learned counsel for the petitioners.

10. We have carefully considered the submissions of learned counsel for the petitioners.

11. The provisions of Sections 3 and 59 of the Act, 2016 which are relevant for the purposes of the controversy involved in the present writ petition, are reproduced below:-

"**3. Prior registration of real estate project with Real Estate Regulatory Authority--(1)** No promoter shall advertise, market, book, sell or offer for sale, or invite persons to purchase in any manner any plot, apartment or building, as the case may be, in any real estate project or part of it, in any planning area, without registering the real estate project with the Real Estate Regulatory Authority established under this Act:

Provided that projects that are ongoing on the date of commencement of this Act and for which the completion certificate has not been issued, the promoter shall make an application to the Authority for registration of the said project within a period of three months from the date of commencement of this Act:

Provided further that if the Authority thinks necessary, in the interest of allottees, for projects which are developed beyond the planning area but with the requisite permission of the local authority, it may, by order, direct the promoter of such project to register with the Authority, and the provisions of this Act or the rules and regulations made thereunder, shall apply to such projects from that stage of registration.

(2) Notwithstanding anything contained in sub-section (1), no registration of the real estate project shall be required --

(a) where the area of land proposed to be developed does not exceed five hundred square meters or the number of apartments proposed to be developed does not exceed eight inclusive of all phases:

Provided that, if the appropriate Government considers it necessary, it may, reduce the threshold below five hundred square meters or eight apartments, as the case may be, inclusive of all phases, for exemption from registration under this Act;

(b) where the promoter has received completion certificate for a real estate project prior to commencement of this Act;

(c) for the purpose of renovation or repair or re-development which does not involve marketing, advertising selling or new allotment of any apartment, plot or building, as the case may be, under the real estate project.

Explanation.--For the purpose of this section, where the real estate project is to be developed in phases, every such phase shall be considered a stand alone real estate project, and the promoter shall obtain registration under this Act for each phase separately.

59. Punishment for non registration under section 3--(1) If any promoter contravenes the provisions of section 3, he shall be liable to a penalty

which may extend upto ten percent of the estimated cost of the real estate project as determined by the Authority.

(2) If any promoter does not comply with the orders, decisions or directions issued under sub-section (1) or continues to violate the provisions of section 3, he shall be punishable with imprisonment for a term which may extend upto three years or with fine which may extend upto a further ten percent of the estimated cost of the real estate project, or with both."

12. We may also advert to Rule 2 (h) of the Rules, 2016.

"**2(h)** "ongoing project" means a project where development is going on and for which completion certificate has not been issued but excludes such projects which fulfill any of the following criteria on the date of notification of these rules:

(i) where services have been handed over to the Local Authority for maintenance.

(ii) where common areas and facilities have been handed over to the Association for the Residents Welfare Association for maintenance.

(iii) where all development work have been completed and sale/lease deeds of sixty percent of the apartments/houses/plots have been executed.

(iv) where all development works have beencompleted and application has been filed with the competent authority for issue of completion certificate."

13. It has been admitted before us that clauses (i), (ii) and (iii) of Rule 2 (h) of the Rules, 2016 are not attracted in the present case and that the claim of the petitioner for exclusion from the definition of 'ongoing project' is on the basis of clause (iv) of Rule 2 (h) of the ground that the petitioner had already filed an application before the competent authority for issuance of completion certificate.

14. In the impugned orders, the authority has recorded a finding of fact based on consideration of relevant evidence on record including the inspection report dated 24.07.2019 that the project is still incomplete. The finding recorded by the authority in the impugned orders that the project is still incomplete and occupancy certificate has yet not been issued is the finding of fact based on consideration of evidence on record. For ready reference, the relevant portion of one of the impugned orders dated 18.10.2019 passed in Complaint No. N.C.r. 144030381/2019 (Pinki Sharma and others Vs. M/s Paramount Probuild Private Ltd.) is reproduced below.

"इस सम्बन्ध मे वास्तविक स्थिति स्पष्ट करने के लिए प्राधिकरण की पीठ की ओर से विपक्षी द्वारा यू. पी. एस. आई. डी. सी. में दिनांक 01.05.2017 से पूर्व जमा कराये गये सी.सी. को जारी किये जाने के लिए आवश्यक समस्त अभिलेखों जैसे कि –फायर सेफ्टी सार्टिफिकेट, लिफ्ट सार्टिफिकेट, जनरेटिंग सेट सार्टिफिकेट, सी.ए. एवं इंजीनियर्स सार्टिफिकेट आदि की मांग की गयी। जिस पर विपक्षी द्वारा टॉवर स्टूडियों अपार्टमेन्ट, पाईन व ओक की अग्निशमन अनापत्ति प्रमाण पत्र दिनांक 26.12.2017, टॉवर –ए के अग्निशमन एवं सुरक्षा प्रमाण पत्र दिनांक 15.09.2018, अधिष्ठापित 5 नं0 लिफ्ट का निरीक्षण प्रमाण पत्र दिनांक 07.11.2017, अधिष्ठापित 4 नं0 लिफ्ट का निरीक्षण प्रमाण पत्र दिनांक 07.11.2017, जनरेटिंग सेट का निरीक्षण प्रमाण पत्र दिनांक 11.01.2018, की छायाप्रतियां दाखिल की गयी, परन्तु सी. ए. एवं इंजीनियर्स सार्टिफिकेट, प्रदूषण विभाग, पर्यावरण विभाग, एयरपोर्ट अथॉरिटी के अनापत्ति प्रमाण पत्र की प्रतियां दाखिल नहीं की गयी है। विपक्षी द्वारा पीठ को अवगत कराया गया कि फायर एन.ओ.सी. पूर्व मे प्रोविजनल जारी किये गये थे। उपरोक्त प्रमाण पत्रों के प्राप्त होने के उपरान्त प्राधिकरण के पीठासीन अधिकारी के संज्ञान में यह नया तथ्य प्रकाश में आया कि विपक्षी की परियोजना दिनांक 01.05.2017 से पूर्व

नहीं था और ओ.सी/सी.सी के मानकों को बिना पूर्ण किये विपक्षी द्वारा यू.पी.एस.आई.डी.सी. को ओ.सी हेतु आवेदन किया गया। ऐसे में प्रथम दष्टया यह प्रतीत होता है कि प्रश्नगत परियोजना का रेस में पंजीकृत कराया जाना अपेक्षित है।

इसके अतिरिक्त प्राधिकरण की पीठ की ओर से दिनांक 24.07.2019 को तकनीकी टीम द्वारा स्थलीय जॉच करायी गयी, जिसकी जांच आख्या उपलब्ध होने के पश्चात यह पाया कि परियोजना में कुल 8 टॉवर, जो कि टॉवर – A.B,C,D,OAK,PINE नाम से चिन्हित है और विल्लाज मौजूद है। टॉवर– OAK के अन्तर्गत चार लिफ्ट मौजूद रहेगे, जिनमें से एक लिफ्ट ही ऑपरेशनल है और शेष लिफ्ट में मकेनिकल कार्य होना बाकी है। टॉवर– PINE के अन्तर्गत 7 लिफ्ट का निर्माण कार्य होना है, जिनमे 4 लिफ्ट कार्यरत है व शेष 3 लिफ्ट में कार्य अभी पूर्ण होना बाकी है । टॉवर– A,B,C,D के अन्तर्गत लगभग कार्य पूर्ण है, इन टॉवरों में 2 लिफ्ट में से एक लिफ्ट कार्यरत है व 1 लिफ्ट का कार्य अभी पूर्ण होना बाकी है, टॉवरों के अन्तर्गत अभी फाइनल फिनिशिंग कार्य अभी शेष है।

जहॉ आख्या में निष्कर्ष के रूप में यह पाया गया कि परियोजना के अन्तर्गत अभी निर्माण कार्य जैसे कि लिफ्ट की इंस्टालेशन, फिनिशिंग कार्य आदि होने अभी बाकी है। फायर फाईटिंग के कार्य में अभी स्प्रिंक्लर आदि होना अभी शेष है व फायर फाईटिंग की एन.ओ. सी. कुछ टॉवरों में अभी प्राप्त नहीं की गयी है। परियोजना स्थल पर कार्य बहुत ही धीमी गति से किया जा रहा है। जॉच आख्या से यह भी स्पष्ट है कि परियोजना अभी पूर्ण नहीं है और कुछ टॉवरों की फायर एन.ओ.सी. प्राप्त किया जाना अभी शेष है।

यंह भी उल्लेखनीय है कि उ0प्र0 भू–सम्पदा (विनियमन एवं विकास) नियमावली, 2016 के नियम 2¼h) में रेरा के अन्तर्गत ऑनगोईग परियोजना को परिभाषित करते हुए चार अपवाद भी दिये गये हैं, जो कि निम्नवत हैः–

(h) "ongoing project" means a project where development is going on and for which completion certificate has not been issued but excludes such projects which fulfill any of the following criteria on the date of notification of these rules:

(i) where services have been handed over to the Local Authority for maintenance.

(ii) where common areas and facilities have been handed over to the Association for the Residents Welfare Association for maintenance.

(iii) where all development work have been completed and sale/lease deeds of sixty percent of the apartments/houses/plots have been executed.

(iv) where all development works have beencompleted and application has been filed with the competent authority for issue of completion certificate.

mDr fu;e 2 ¼h½ (iv) where all development works have been completed and application has been filed with the competent authority for issue of completion certificate के अन्तर्गत प्रश्नगत परियोजना के सभी विकास कार्य अभी पूर्ण नहीं किये गये है और विपक्षी द्वारा बिना सी. सी. के मानकों पूर्ण किये हुए सी. सी. हेतु यू.पी. एस. आई. डी. सी. को आवेदन किया गया है, जो कि उचित नहीं है। विपक्षी द्वारा परियोजना को पंजीकरण कराये जाने के सम्बन्ध में पीठ के समक्ष स्वीकारोक्ति की गयी। ऐसे में प्रश्नगत परियोजना को रेरा में पंजीकरण कराये जाना अपेक्षित है।

प्राधिकरण में विपक्षी की परियोजना के सम्बन्ध में जॉच के दौरान यह तथ्य भी प्रकाश में आया है कि विपक्षी द्वारा परियोजना Golf foreste के पंजीकरण हेतु पूर्व में आवेदन किया गया था, परन्तु परियोजना को पंजीकृत कराये जाने हेतु आवश्यक अभिलेख एवं औपचारिकतायें पूर्ण न होने के कारण विपक्षी की परियोजना पंजीकृत नहीं हुई। प्राप्त रिपोर्ट के अनुसार मानचित्र स्वीकृति एवं सेंग्शन लेटर दिनांक 13.06.2011 से 7 वर्ष तक ही वैध है। विपक्षी द्वारा अतिरिक्त निर्माण हेतु पुनरीक्षित भवन मानचित्र पर दिनांक 04.01.2013 को रिवाईज्ड स्वीकृति प्राप्त की गयी, परन्तु मानचित्र एवं सेंग्शन लेटर के विस्तारण हेतु सक्षम प्राधिकरण से अनुमति प्रदान नहीं की गयी। सी. ए. एवं इंजीनियर्स सार्टिफिकेट एवं फायर एन.ओ.सी उपलब्ध नहीं करायी गयी। ऐसे में परियोजना आंशिक रूप से अपूर्ण है, परियोजना का कम्पलीशन/ओक्यूपेन्सी प्रमाण पत्र भी नहीं लिया गया है। विपक्षी समस्त औपचारिकताओं एवं आवश्यक अभिलेखों को पूर्ण कर परियोजना को रेरा में पंजीकृत कराना सुनिश्चित करें।

अतः प्रश्नगत परियोजना रेरा के क्षेत्राधिकार में है। उपरोक्तानुसार से स्पष्ट होता है कि परियोजना को रेरा में पंजीकृत कराया जाना आवश्यक है और विपक्षी द्वारा रेरा अधिनियम की धारा – 3 का उल्लंघन

किया गया है। चूंकि प्रश्नगत परियोजना ऑनगोईग परियोजना की श्रेणी में आता है। इस सम्बन्ध में भू–सम्पदा (विनियमन एवं विकास) अधिनियम 2016 की धारा –03 को पढ़ा जाना अत्यंत महत्वपूर्ण है, जिसमें स्पष्ट रूप से उल्लेखित है किः–

REGISTRATION OF REAL ESTATE PROJECT AND REGISTRATION OF REAL ESTATE AGENTS.

3.--(1) No promoter shall advertise, market, book, sell or offer for sale, or invite persons to purchase in any manner any plot, apartment or building, as the case may be, in any real estate project or part of it, in any planning area, without registering the real estate project with the Real Estate Regulatory Authority established under this Act:

Provided that projects that are ongoing on the date of commencement of this Act and for which the completion certificate has not been issued, the promoter shall make an application to the Authority for registration of the said project within a period of three months from the date of commencement of this Act:

Provided further that if the Authority thinks necessary, in the interest of allottees, for projects which are developed beyond the planning area but with the requisite permission of the local authority, it may, by order, direct the promoter of such project to register with the Authority, and the provisions of this Act or the rules and regulations made thereunder, shall apply to such projects from that stage of registration.

(2) Notwithstanding anything contained in sub-section (1), no registration of the real estate project shall be required --

(a) where the area of land proposed to be developed does not exceed five hundred square meters or the number of apartments proposed to be developed does not exceed eight inclusive of all phases:

Provided that, if the appropriate Government considers it necessary, it may, reduce the threshold below five hundred square meters or eight apartments, as the case may be, inclusive of all phases, for exemption from registration under this Act;

(b) where the promoter has received completion certificate for a real estate project prior to commencement of this Act;

(c) for the purpose of renovation or repair or re-development which does not involve marketing, advertising selling or new allotment of any apartment, plot or building, as the case may be, under the real estate project.

Explanation.--For the purpose of this section, where the real estate project is to be developed in phases, every such phase shall be considered a stand alone real estate project, and the promoter shall obtain registration under this Act for each phase separately.

इसमें रेरा में रजिस्ट्रेशन किये बिना रियल स्अेट प्रोजेक्ट भू–खण्ड या अपार्टमेन्ट की बुकिंग, विक्रय व विज्ञापन आदि न करने सम्बंधी प्राविधान है और ऑनगोईग प्रोजेक्ट्स के रजिस्ट्रेशन हेतु स्पष्ट प्राविधान वर्णित है। अधिनियम के प्राविधानों के अनुसार ऐसे सभी प्रोजेक्ट्स ऑनगोईग परियोजना की श्रेणी में सम्मलित है, जिन्हें रेरा आने से पूर्व सक्षम प्राधिकरण से पूर्णता प्रमाण पत्र प्राप्त नहीं हुआ है। विपक्षी को प्रंश्नाधीन प्रोजेक्ट के सम्बंध में सक्षम प्राधिकरण से पूर्णता प्रमाण पत्र अभी तक प्राप्त नहीं हुआ है। ऐसे में प्रंश्नाधीन प्रोजेक्ट, ऑनगोईग परियोजना होने के कारण इस पर अधिनियम के प्राविधान लागू होगें। निष्कर्षतः अधिनियम की धारा– 3 में वर्णित प्राविधानों के अनुसार प्रश्नाधीन प्रोजेक्ट रेरा की परिधि में आने से रजिस्ट्रेशन होने योग्य है। विपक्षी अपनी परियोजना को रेरा में पंजीकरण कराना सुनिश्चित करें। साथ ही विपक्षी को धारा– 3 के अधीन रजिस्ट्रीकरण ने किये जाने के कारण अधिनियम की धारा– 59 के अन्तर्गत दण्ड का भागी है। अधिनियम की धारा– 59 में स्पष्ट रूप से उल्लेखित है किः–

59--(1) If any promoter contravenes the provisions of section 3, he shall be liable to a penalty which may extend upto ten percent of the estimated cost of the real estate project as determined by the Authority.

(2) If any promoter does not comply with the orders, decisions or directions issued under sub-section (1) or continues to violate the provisions of section 3, he shall be punishable with imprisonment for a term which may extend upto three years or with fine which may extend upto a further ten percent of the estimated cost of the real estate project, or with both.

उपरोक्त से यह स्पष्ट है कि यदि कोई सम्प्रवर्तक धारा–3 के उपबन्धों का उल्लंघन करता है, तो वह ऐसी किसी शास्ति के लिए जो प्राधिकरण द्वारा यथा अवधारित भू–सम्पदा परियोजना की अनुमानित लागत के 10 प्रतिशत तक की हो सकेगी, दायी होगा।

सचिव, रेरा इस सम्बन्ध में सम्प्रर्वतक के विरूद्ध दण्डात्मक कार्यवाही करते हुए अर्थदंड अधिरोपित कर परियोजना को रेरा में पंजीकृत कराये, साथ ही तकनीकी सलाहकार परियोजना के पंजीकरण के सम्बन्ध में आवश्यक कार्यवाही करें।

माननीय उच्च न्यायालय, बाम्बे ने रिट पिटीशन क्रमांक 908/2018'' मोहम्मद जैन खान विरूद्ध महाराष्ट्र रियल एस्टेट अथॉरिटी व अन्य'' के प्रकरण में सुनवाई उपरान्त अपने पारित आदेश दिनांक 31.07.2018 में यह भी स्पष्ट किया गया है कि रेरा में अपंजीकृत रियल एस्टेट प्रोजेक्ट्स के विरूद्ध भी प्राधिकरण द्वारा सुनवाई की जा सकती है। स्पष्ट है कि प्रश्नाधीन प्रोजेक्ट्स के विरूद्ध भी प्राधिकरण द्वारा सुनवाई की जा सकती है। स्पष्ट है कि प्रश्नाधीन प्रोजेक्ट के रेरा में रजिस्टर्ड न होने मात्र के आधार पर शिकायतकर्ता द्वारा प्रस्तुत शिकायत अस्वीकार नहीं की जा सकती है। विपक्षी द्वारा अपने प्रतिवाद पत्र में संलग्नक के रूप में दिये गये पीठ के आदेश दिनांक 31.01.2019, शिकायत संख्या– 9201819806 जसवीर नागर बनाम पैरामाउन्ट प्रोबिल्ड में भी विपक्षी द्वारा गलत तथ्य दिये गये थे कि उनकी परियोजना पूर्ण और दिनांक 13.10.16 को उनके द्वारा पूर्णता प्रमाण पत्र हेतु आवेदन किया जा चुका है, जिसका निस्तारण विपक्षी द्वारा दिये गये तथ्य के आधार पर किया गया, परन्तु बाद में प्राधिकरण के जॉच कराये जाने के उपरान्त पीठासीन अधिकारी के संज्ञान में यह नया तथ्य पाया कि परियोजना अपूर्ण है और अभी विकास कार्य कराये जाने अभी शेष है। अतः प्रश्नाधीन प्रोजेक्ट के विरूद्ध प्रस्तुत शिकायत रेरा में सुनवाई योग्य होने से विपक्षी की आपत्ति स्वीकार योग्य नहीं है। तदनुसार बिन्दु सं0 1 निस्तारित किया जाता है।"

15. As noticed above, Section 3 of the Act, 2016 provides for prior registration of real estate projects with the Real Estate Regulatory Authority, and in terms of sub-section (1) thereof no promoter shall advertise, market, book, sell or offer for sale, or invite persons to purchase in any manner any plot, apartment or building, as the case may be, in any real estate project or part of it, in any planning area, without registering the real estate project with the Real Estate Regulatory Authority established under the Act.

16. Under the proviso to sub-section (1) in respect of projects that are ongoing on the date of commencement of the Act and for which the completion certificate has not been issued, the promoter shall make an application to the Authority for registering the said project within a period of three months from the date of commencement of the Act. This is subject to certain exclusions provided for under the Rule, which are as follows :-

(i) where services have been handed over to the Local Authority for maintenance.

(ii) where common areas and facilities have been handed over to the Association or the Residents Welfare Association for maintenance.

(iii) where all development work have been completed and sale/lease deeds of sixty percent of the apartments/houses/plots have been executed.

(iv) where all development works have been completed and application has been filed with the competent authority for issue of completion certificate.

17. Clause (iv) of Rule 2 (h) excludes from the ambit of the term 'on going project', such projects where all development works have been completed and application has been filed with the

competent authority for issue of completion certificate.

18. It therefore follows that in the case of a project where all development works have not been completed, the mere filing of an application with the competent authority for issuance of completion certificate would not bring it out from the purview of an 'ongoing project', as defined under Rule 2 (h) of the Rules, 2016. Such projects would accordingly be held to be 'ongoing projects' and in terms of the proviso to Section 3 (1) of the Act, 2016, the promoter would be liable to make an application to the authority for registration of the said project within the stipulated time period.

19. In the instant case, the findings recorded by the RERA Authority which are based on a consideration of the material evidence on record are to the effect that the development works in respect of the project were not completed. Accordingly, the project cannot be said to be excluded under Rule 2 (h). The project has therefore rightly been held to be an 'ongoing project' within the meaning of Rule 2 (h) and it would require registration under the proviso to Section 3 (1) of the Act, 2016. Accordingly the matters pertaining thereto would fall within the jurisdiction of the RERA Authority.

20. The impugned orders passed by the RERA Authority, therefore, cannot be held to be without jurisdiction.

21. Counsel for the petitioner has not been able to point out any material error or perversity in the findings of fact recorded by the RERA Authority, in this regard, in the impugned orders.

22. Under the circumstances, no interference can be made with the impugned orders under Article 226 of the Constitution of India inasmuch as the matter is concluded by findings of fact.

23. For all reasons aforestated, the writ petition is dismissed.

(2021)02ILR A267
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 15.12.2020

BEFORE

THE HON'BLE SURYA PRAKASH KESARWANI, J.
THE HON'BLE DR. YOGENDRA KUMAR SRIVASTAVA, J.

Writ C No. 13291 of 2020

M/s Badri Narayan Shukla ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Vikrant Pandey, Sri Santosh Kumar Shukla

Counsel for the Respondents:
C.S.C.

Constitution of India, Art.226 - Writ jurisdiction - extraordinary remedy - Contractual matters - Maintainability - Pure contractual obligation in the absence of any statutory complexion would not be enforceable through a writ. - In case where contract entered into between State & person aggrieved is of non - statutory character and relationship is governed purely in terms of contract between parties, in such situations contractual obligations are matters of private law and writ would not lie to enforce civil liability arising purely out of contract - Proper remedy would be to file civil suit for claiming damages, injunctions or specific performance or such appropriate reliefs in civil court - only

exception may be a case where the amount is admitted and there is no disputed question of fact requiring adjudication of detailed evidence and interpretation of the terms of the contract. (Para 26, 27)

Vide impugned order tender of the petitioner was rejected & contract awarded to him was cancelled – also claim raised for payment of a balance amount to the petitioner in respect of the completed work - Held - petitioner seeks to enforce commercial contractual rights & obligations - reliefs sought require adjudication of serious factual disputes relating to the terms of the contract in respect of the prescribed standards of work and the time schedule for its completion - serious dispute with regard to the extent of the work completed and the payments which are due - writ petition in such matters is, not to be entertained - appropriate remedy is to approach the civil court or to initiate proceedings for arbitration.

Writ Petition dismissed. (E-4)

List of Cases cited: -

1. Radhakrishna Agarwal & ors. Vs St. of Bih. & ors.

2. Bareilly Dev. Auth. & ors. Vs Ajay Pal Singh & ors.

3. L.I.C. of India Vs Escorts Ltd. & ors.

4. Hindustan Petroleum Corporation Limited & ors. Vs. Dolly Das

5. Kerala State Electricity Board & ors. Vs Kurien E. Kalathil & ors.

6. St. of U.P. & ors. Vs Bridge & Roof Co. (India) Ltd.

7. St. of Guj. & ors. Vs Meghji Pethraj Shah Charitable Trust & ors.

8. St. of Bih. & ors. Vs Jain Plastics & Chemicals Ltd.

9. K.K. Saksena Vs International Commission on Irrigation & Drainage & ors.

10. Election Commission, India Vs Saka Venkata Subba Rao & ors.

11. R. (Hopley) Vs Liverpool Health Auth.

12. Joshi Technologies International Inc. Vs U.O.I. & ors.

13. L.I.C. of India & ors. Vs Asha Goel (Smt.) & anr.

14. M/s Lalloo Ji Rajiv Chandra & Sons Vs Meladhikari Prayagraj Mela Authority & ors.

15. M/s Ipjacket Technology India Pvt. Ltd. Vs M.D. Uttar Pradesh Rajkiya Nirman Nigam Limited

16. M/S Bio Tech System Vs St. of U.P. & 4 ors.

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

1. Heard Sri Vikrant Pandey, learned counsel for the petitioner and learned Standing Counsel appearing for the State respondents.

2. The present writ petition has been filed praying for the following reliefs :-

"(i) Issue a writ, order or direction in the nature of certiorari to call for record of the case and to quash the order dated 19.2.2020 passed by the respondent no.5 by which the payment of his earlier work has been denied on false ground that the payment has already been made (annexure no.1 to the writ petition).

(ii) Issue a writ, order or direction in the nature of certiorari to call for record of the case and to quash the order dated 11.2.2020 passed by the respondent no.5 by which the contract of the petitioner has been cancelled (annexure no.2 to the writ petition).

(iii) Issue a writ, order or direction in the nature of mandamus

directing the respondent no.5 to pay the rest amount of the work done by the petitioner immediately.

(iv) Issue a writ, order or direction in the nature of mandamus directing the respondents to not to take any coercive action against the petitioner.

(v) Issue any other and further suitable writ, order or direction, which this Hon'ble Court may deem fit and proper in the circumstances of the case.

(vi) To award of the cost of petition in favour of the petitioner."

3. The writ petition primarily seeks to raise a challenge to an order dated 11.2.2020 passed by respondent no.5 whereunder, the tender of the petitioner was rejected for the reason that at the time of inspection, the work was found to be not in accordance with the prescribed norms and despite repeated directions, neither the shortcomings pointed out were rectified nor was the work completed. The petitioner has also sought to challenge the subsequent order dated 19.2.2020 of the respondent no.5 in terms of which the contract awarded to the petitioner has been cancelled. A further prayer has been made raising a claim for payment of a balance amount stated to be due to the petitioner in respect of the completed work.

4. The aforementioned reliefs which have been sought in the present writ petition indicate that the petitioner seeks to enforce certain contractual rights and obligations for which the appropriate remedy is to approach the civil court or to initiate proceedings for arbitration, and a writ petition in such matters is, ordinarily, not to be entertained. It is not the case of the petitioner that the contract in question was of a statutory nature; rather it has been clearly admitted that the contract was a commercial contract.

5. As per the case set up in the writ petition, the respondent no.4 had invited tenders for a civil work and the petitioner being the lowest bidder, was declared successful and awarded the contract. The pleadings in the writ petition and the documents which have been appended as annexures indicate that there arose serious dispute with regard to the fact that the work was not as per the prescribed standards and that it was not completed within the scheduled time. There is also a serious dispute with regard to the amount due and payable to the petitioner in respect of the work which is stated to have been completed. The petitioner claims to have submitted representations from time to time claiming payment in respect of the work completed. On the other hand, the respondents have issued notices to the petitioner requiring him to complete the work as per the prescribed standards and within the scheduled time.

6. The law with regard to the maintainability of a writ petition in contractual matters is fairly well settled, and it has been consistently held that although there is no absolute bar to the maintainability of a writ petition in such matters, the discretionary jurisdiction under Article 226 of the Constitution of India, may be refused in case of money claims arising out of purely contractual obligations where there are serious disputed questions of fact with regard to the claims sought to be raised.

7. The remedy under Article 226 of the Constitution, has been held, to be available in a limited sphere only when the contracting party is able to demonstrate that the remedy it seeks to invoke is a public law remedy, in contradistinction to a private law remedy under a contract.

8. The legal position in this regard is that where the rights which are sought to be agitated are purely of a private character no mandamus can be claimed, and even if the relief is sought against the State or any of its instrumentality the pre-condition for the issuance of a writ of mandamus is a public duty. In a dispute based on a pure contractual relationship there being no public duty element, a mandamus would not lie.

9. The question as to whether jurisdiction of the High Court under Article 226 of the Constitution would be open to resolve disputes arising out of the contracts between the State and the citizen was considered in **Radhakrishna Agarwal and others vs. State of Bihar and others1** and drawing a distinction with the case of a contract entered into by the State in exercise of a statutory power, it was held that in cases where the contract entered into between a State and the person aggrieved is non-statutory and purely contractual and the rights and liabilities of the parties are governed by the terms of the contract, and the petitioner complains about breach of such contract, the remedy of Article 226 would not be open for such complaints and no writ or order can be issued under Article 226 in such cases to compel the authorities to remedy the breach of contract by the State.

10. The Supreme Court took note of the three types of cases pertaining to breach of alleged obligation by the State or its agents, as referred to in the judgement of the High Court, against which the appeals were before it. The three types were stated as follows :-

"(i) Where a petitioner makes a grievance of breach of promise on the part of the State in cases where on assurance or promise made by the State he has acted to his prejudice and predicament, but the agreement is short of a contract within the meaning of Article 299 of the Constitution;

(ii) Where the contract entered into between the person aggrieved and the State is in exercise of a statutory power under certain Act or Rules framed thereunder and the petitioner alleges a breach on the part of the State; and

(iii) Where the contract entered into between the State, and the person aggrieved is non-statutory and purely contractual and the rights and liabilities of the parties are governed by the terms of the contract, and the petitioner complains about breach of such contract by the State."

11. In respect of cases of the third category where questions purely of alleged breach of contract were involved, it was observed thus :-

"15. It then, very rightly, held that the cases now before us should be placed in the third category where questions of pure alleged breaches of contract are involved. It held, upon the strength of Umakant Saran v. The State of Bihar and Lekhraj Satramdas v. Deputy Custodian-cum-Managing Officer and B.K. Sinha v. State of Bihar that no writ or order can issue under Article 226 of the Constitution in such cases "to compel the authorities to remedy a breach of contract pure and simple."

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17. Learned counsel contends that in the cases before us breaches of public duty are involved. The submission made before us is that, whenever a State or its agents or officers deal with the citizen, either when making a transaction or, after making it, acting in exercise of powers

under the terms of a contract between the parties, there is a dealing between the State and the citizen which involves performance of "certain legal and public duties." If we were to accept this very wide proposition every case of a breach of contract by the State or its agents or its officers would call for interference under Article 226 of the Constitution. We do not consider this to be a sound proposition at all."

12. We may refer to the judgement of the Supreme Court in the case of **Bareilly Development Authority and others vs. Ajay Pal Singh and others2** wherein it was held that even though the development authority had the trappings of a State, in a matter pertaining to determination of the price of the flats constructed by it and the rate of monthly instalments to be paid, the authority after entering into the field of an ordinary contract was acting purely in its executive capacity, and the right and obligations of the parties *inter se* would be governed only as per the terms of the contract. The observations made in the judgment are as follows:-

"21. This finding in our view is not correct in the light of the facts and circumstances of this case because in Ramana Dayaram Shetty Vs. International Airport Authority of India [(1979) 3 SCC 489] there was no concluded contract as in this case. Even conceding that the BDA has the trappings of a State or would be comprehended in 'other authority' for the purpose of Article 12 of the Constitution, while determining price of the houses/flats constructed by it and the rate of monthly instalments to be paid, the 'authority' or its agent after entering into the field of ordinary contract acts purely in its executive capacity. Thereafter the relations are no longer governed by the constitutional provisions but by the legally valid contract which determines the rights and obligations of the parties inter se. In this sphere, they can only claim rights conferred upon them by the contract in the absence of any statutory obligations on the part of the authority (i.e. BDA in this case) in the said contractual field.

22. There is a line of decisions where the contract entered into between the State and the persons aggrieved is non-statutory and purely contractual and the rights are governed only by the terms of the contract, no writ or order can be issued under Article 226 of the Constitution of India so as to compel the authorities to remedy a breach of contract pure and simple -- Radhakrishna Agarwal & Ors. v. State of Bihar (1977) 3 SCC 457, Premji Bhai Parmar & Ors. v. Delhi Development Authority & Ors, (1980) 2 SCC 129 and Divl. Forest Officer v. Bishwanath Tea Company Ltd. (1981) 3 SCC 238."

13. Reference may also be had to the judgment in the case of **Life Insurance Corporation of India vs. Escorts Ltd. and others3** wherein it was held that in a matter relating to the contractual obligations the Court would not ordinarily examine it unless the action has some public law character attached to it. The observations made in the judgment are as follows:-

"102...If the action of the State is related to contractual obligations or obligations arising out of the tort, the court may not ordinarily examine it unless the action has some public law character attached to it. Broadly speaking, the court will examine actions of State if they pertain to the public law domain and refrain from examining them if they pertain to the private law field. The difficulty will lie in

demarcating the frontier between the public law domain and the private law field. It is impossible to draw the line with precision and we do not want to attempt it. The question must be decided in each case with reference to the particular action, the activity in which the State or the instrumentality of the State is engaged when performing the action, the public law or private law character of the action and a host of other relevant circumstances. When the State or an instrumentality of the State ventures into the corporate world and purchases the shares of a company, it assumes to itself the ordinary role of a shareholder, and dons the robes of a shareholder, with all the rights available to such a shareholder. There is no reason why the State as a shareholder should be expected to state its reasons when it seeks to change the management, by a resolution of the company, like any other shareholder."

14. The question of maintainability of a writ petition under Article 226 in the case of a money claim again came up for consideration in the case of **Hindustan Petroleum Corporation Limited and others Vs. Dolly Das4** and it was held that for invoking the writ jurisdiction, involvement of any constitutional or statutory right was essential and in the absence of a statutory right, the remedy under Article 226 could not be availed to claim any money in respect of breach of contract, tort or otherwise. It was reiterated that in absence of any constitutional or statutory rights being involved, a writ proceeding would not lie to enforce a contractual obligation even if it is sought to be enforced against the State or its authorities.

15. The maintainability of writ petition under Article 226 of the Constitution in disputes relating to terms of contract with a statutory body fell for consideration in **Kerala State Electricity Board and others Vs. Kurien E. Kalathil and others5** and it was held that the writ court would not ordinarily be the proper forum for resolution of disputes relating to terms of contract with a statutory body and disputes arising from contractual or commercial activities must be settled according to ordinary principles of law of contract. The observations made in the judgement in this regard are as follows :-

"10...The interpretation and implementation of a clause in a contract cannot be the subject matter of a writ petition. Whether the contract envisages actual payment or not is a question of construction of contract? If a term of a contract is violated, ordinarily the remedy is not the writ petition under Article 226. We are also unable to agree with the observations of the High Court that the contractor was seeking enforcement of a statutory contract. A contract would not become statutory simply because it is for construction of a public utility and it has been awarded by a statutory body. We are also unable to agree with the observation of the High Court that since the obligations imposed by the contract on the contracting parties come within the purview of the Contract Act, that would not make the contract statutory. Clearly, the High Court fell into an error in coming to the conclusion that the contract in question was statutory in nature.

11. A statute may expressly or impliedly confer power on a statutory body to enter into contracts in order to enable it to discharge its functions. Dispute arising out of the terms of such contracts or alleged breaches have to be settled by the ordinary principles of law of contract. The fact that one of the parties to the agreement is a

statutory or public body will not of itself affect the principles to be applied. The disputes about the meaning of a covenant in a contract or its enforceability have to be determined according to the usual principles of the Contract Act. Every act of a statutory body need not necessarily involve an exercise of statutory power. Statutory bodies, like private parties, have power to contract or deal with property. Such activities may not raise any issue of public law. In the present case, it has not been shown how the contract is statutory. The contract between the parties is the realm of private law. It is not a statutory contract. The disputes relating to interpretation of the terms and conditions of such a contract could not have been agitated in a petition under Article 226 of the Constitution of India. That is a matter for adjudication by a civil court or in arbitration if provided for in the contract. Whether any amount is due and if so, how much and refusal of the appellant to pay it is justified or not, are not the matters which could have been agitated and decided in a writ petition."

16. Considering the maintainability of a writ petition under Article 226 of the Constitution in the context of a dispute relating to terms of a private contract where a mandamus was sought seeking to restrain authorities from making any deduction from bills in terms of the contract, it was held in **State Of U.P. and others vs Bridge & Roof Co. (India) Ltd6** that proper course would be to refer the matter to arbitration or institution of a suit and not filing of a writ petition. It was observed thus :-

"15. In our opinion, the very remedy adopted by the respondent is misconceived. It is not entitled to any relief in these proceedings,i.e, in the writ petition filed by it. The High court appears to be right in not pronouncing upon any of the several contentions raised in the writ petition by both the parties and in merely reiterating the effect of the order of the Deputy Commissioner made under the proviso to section 8-D (1).

16. Firstly, the contract between the parties is a contract in the realm of private law. It is not a statutory contract. It is governed by the provisions of the contract Act or, maybe, also by certain provisions of the Sale of Goods Act. Any dispute relating to interpretation of the terms and conditions of such a contract cannot be agitated, and could not have been agitated,in a writ petition. That is a matter either for arbitration as provided by the contract or for the civil court, as the case may be. Whether any amount is due to the respondent from the appellant-Government under the contract and, if so, how much and the further question whether retention or refusal to pay any amount by the Government is justified, or not, are all matters which cannot be agitated in or adjudicated upon in a writ petition. The prayer in the writ petition,viz.,to restrain the Government from deducting particular amount from the writ petitioner's bill(s) was not a prayer which could be granted by the High Court under Article 226. Indeed, the High Court has not granted the said prayer.

17. Secondly, whether there has been a reduction in the statutory liability on account of a change in law within the meaning of sub-clause (4) of clause 70 of the contract is again not a matter to be agitated in the writ petition. That is again a matter relating to interpretation of a term of the contract and should be agitated before the arbitrator or the civil court, as the case maybe. If any amount is wrongly withheld

by the Government,the remedy of the respondent is to raise a dispute as provided by the contract or to approach the civil court, as the case may be, according to law. Similarly if the Government says that any over- payment has been made to the respondent, its remedy also is the same.

18. Accordingly, it must be held that the writ petition filed by the respondent for the issuance of a writ of mandamus restraining the Government from deducting or withholding a particular sum, which according to the respondent is payable to it under the contract, was wholly misconceived and was not maintainable in law (See the decision of this Court in Assistant Excise Commissioner v. Isaac Peter (1994 (4) S.C.C.104), where the law on the subject has been discussed fully.) The writ petition ought to have been dismissed on this ground alone.

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21. There is yet another substantial reason for not entertaining the writ petition. The contract in question contains a clause providing inter a1ia for settlement of disputes by reference to arbitration (Clause 67 of the contract). The Arbitrators can decide both questions of fact as well as questions of law. When the contract itself provides for a mode of settlement of disputes arising from the contract, there is no reason why the parties should not follow and adopt that remedy and invoke the extra-ordinary jurisdiction of the High Court under Article 226. The existence of an effective alternative remedy - in this case, provided in the contract itself - is a good ground for the court to decline to exercise its extraordinary jurisdiction under Article 226. The said article was not meant to supplant the existing remedies at law but only to supplement them in certain well-recognised situations. As pointed out above, the prayer for issuance of a writ of mandamus was wholly misconceived in this case since the respondent was not seeking to enforce any statutory right of theirs nor was it seeking to enforce any statutory obligation cast upon the appellants. Indeed, the very resort to Article 226 - whether for issuance of mandamus or any other writ, order or direction - was misconceived for the reasons mentioned supra."

17. The maintainability of a writ petition in a case where termination of an agreement between the private parties and the State Government was challenged under Article 226 of the Constitution came up for consideration in **State Of Gujarat and others vs Meghji Pethraj Shah Charitable Trust and others7** and it was stated that as the matter was governed by a contract between the parties, the writ petition was not maintainable since it was a public law remedy and was not available in private law field i.e. where the matter is governed by a non-statutory contract. The observations made in the judgement in this regard are as follows :-

"22. We are unable to see any substance in the argument that the termination of arrangement without observing the principle of natural justice (audi alteram partem) is void. The termination is not a quasi-judicial act by any stretch of imagination; hence it was not necessary to observe the principles of natural justice. It is not also an executive or administrative act to attract the duty to act fairly. It was - as has been repeatedly urged by Sri Ramaswamy - a matter governed by a contract/agreement between the parties. If the matter is governed by a contract, the writ petition is not maintainable since it is a public law remedy and is not available in private law field, e.g., where the matter is

governed by a non-statutory contract. Be that as it may, in view of our opinion on the main question, it is not necessary to pursue this reasoning further."

18. In the case of **State of Bihar and others vs. Jain Plastics & Chemicals Ltd.**8 a grievance was sought to be raised against deduction of an amount from the final bill to be paid to the contractor due to breach of contract by him. The petition was allowed by the High Court. The matter was taken to the Supreme Court wherein it was held that even if it was possible to decide the question raised in the petition on the basis of affidavits and counter affidavits, it would not be proper to exercise extraordinary jurisdiction under Article 226 of the Constitution in cases of alleged breach of contract. The observations made by the Supreme Court are as follows:-

"2. Limited question involved in this appeal is -- whether the High Court ought not to have exercised its jurisdiction under Article 226 of the Constitution of India for granting relief in case of alleged breach of contract.

3. Settled law -- writ is not the remedy for enforcing contractual obligations. It is to be reiterated that writ petition under Article 226 is not the proper proceedings for adjudicating such disputes. Under the law, it was open to the respondent to approach the court of competent jurisdiction for appropriate relief for breach of contract...

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7...It is true that many matters could be decided after referring to the contentions raised in the affidavits and counter-affidavits, but that would hardly be a ground for exercise of extraordinary jurisdiction under Article 226 of the Constitution in case of alleged breach of contract. Whether the alleged non-supply of road permits by the appellants would justify breach of contract by the respondent would depend upon facts and evidence and is not required to be decided or dealt with in a writ petition. Such seriously disputed questions or rival claims of the parties with regard to breach of contract are to be investigated and determined on the basis of evidence which may be led by the parties in a properly instituted civil suit rather than by a court exercising prerogative of issuing writs."

19. Distinguishing private law from public law, it was held in **K.K.Saksena vs. International Commission on Irrigation and Drainage and others9** that private law obligations of the State or public authorities are not amenable to writ jurisdiction. The relevant observations made in the judgement are as follows :-

"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 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** 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 Edition; H.W.R. Wade & C.F. Forsyth, page 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."

20. The Constitution Bench Judgement in the case of **Election Commission, India vs. Saka Venkata Subba Rao and others10** and the judgement in the case of **R.(Hopley) vs. Liverpool Health Authority11,** were referred to for the proposition that contractual and commercial obligations are enforceable only by ordinary action and not by judicial review. It was stated thus :-

"50. We have also pointed out above that in Saka Venkata Rao 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 (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."

21. The nature of the prerogative remedy of a mandatory order as the normal means for enforcing performance of public duties by public authorities has been considered in **Administrative Law by H.W.R. Wade & C.F. Forsyth12,** and a distinction has been drawn between public duties enforceable by a mandatory order, which are usually statutory, and duties arising merely from contract. It has been stated thus :-

"A distinction which needs to be clarified is that between public duties enforceable by a mandatory order, which are usually statutory, and duties arising merely from contract. Contractual duties are enforceable as matters of private law by the ordinary contractual remedies, such as damages, injunction, specific performance and declaration. They are not enforceable by a mandatory order, which in the first place is confined to public duties and secondly is not granted where there are other adequate remedies."

22. We may also gainfully refer to the judgment in the case of **Joshi Technologies International Inc. vs. Union of India and**

others13 wherein the legal position in this regard has been taken note of and summarized in the following terms:-

"69. The position thus summarised in the aforesaid principles has to be understood in the context of discussion that preceded which we have pointed out above. As per this, no doubt, there is no absolute bar to the maintainability of the writ petition even in contractual matters or where there are disputed questions of fact or even when monetary claim is raised. At the same time, discretion lies with the High Court which under certain circumstances, it can refuse to exercise. It also follows that under the following circumstances, "normally", the Court would not exercise such a discretion:

69.1. The Court may not examine the issue unless the action has some public law character attached to it.

69.2. Whenever a particular mode of settlement of dispute is provided in the contract, the High Court would refuse to exercise its discretion under Article 226 of the Constitution and relegate the party to the said mode of settlement, particularly when settlement of disputes is to be resorted to through the means of arbitration.

69.3. If there are very serious disputed questions of fact which are of complex nature and require oral evidence for their determination.

69.4. Money claims per se particularly arising out of contractual obligations are normally not to be entertained except in exceptional circumstances.

70. Further, the legal position which emerges from various judgments of this Court dealing with different situations/aspects relating to contracts entered into by the State/public authority with private parties, can be summarised as under:

70.1. At the stage of entering into a contract, the State acts purely in its executive capacity and is bound by the obligations of fairness.

70.2. State in its executive capacity, even in the contractual field, is under obligation to act fairly and cannot practise some discriminations.

70.3. Even in cases where question is of choice or consideration of competing claims before entering into the field of contract, facts have to be investigated and found before the question of a violation of Article 14 of the Constitution could arise. If those facts are disputed and require assessment of evidence the correctness of which can only be tested satisfactorily by taking detailed evidence, involving examination and cross-examination of witnesses, the case could not be conveniently or satisfactorily decided in proceedings under Article 226 of the Constitution. In such cases the Court can direct the aggrieved party to resort to alternate remedy of civil suit, etc.

70.4. Writ jurisdiction of the High Court under Article 226 of the Constitution was not intended to facilitate avoidance of obligation voluntarily incurred.

70.5. Writ petition was not maintainable to avoid contractual obligation. Occurrence of commercial difficulty, inconvenience or hardship in performance of the conditions agreed to in the contract can provide no justification in not complying with the terms of contract which the parties had accepted with open eyes. It cannot ever be that a licensee can work out the licence if he finds it profitable to do so: and he can challenge the conditions under which he agreed to take the licence, if he finds it commercially inexpedient to conduct his business.

70.6. Ordinarily, where a breach of contract is complained of, the party complaining of such breach may sue for specific performance of the contract, if contract is capable of being specifically performed. Otherwise, the party may sue for damages.

70.7. Writ can be issued where there is executive action unsupported by law or even in respect of a corporation there is denial of equality before law or equal protection of law or if it can be shown that action of the public authorities was without giving any hearing and violation of principles of natural justice after holding that action could not have been taken without observing principles of natural justice.

70.8. If the contract between private party and the State/instrumentality and/or agency of the State is under the realm of a private law and there is no element of public law, the normal course for the aggrieved party, is to invoke the remedies provided under ordinary civil law rather than approaching the High Court under Article 226 of the Constitution of India and invoking its extraordinary jurisdiction.

70.9. The distinction between public law and private law element in the contract with the State is getting blurred. However, it has not been totally obliterated and where the matter falls purely in private field of contract, this Court has maintained the position that writ petition is not maintainable. The dichotomy between public law and private law rights and remedies would depend on the factual matrix of each case and the distinction between the public law remedies and private law field, cannot be demarcated with precision. In fact, each case has to be examined, on its facts whether the contractual relations between the parties bear insignia of public element. Once on the facts of a particular case it is found that nature of the activity or controversy involves public law element, then the matter can be examined by the High Court in writ petitions under Article 226 of the Constitution of India to see whether action of the State and/or instrumentality or agency of the State is fair, just and equitable or that relevant factors are taken into consideration and irrelevant factors have not gone into the decision-making process or that the decision is not arbitrary.

70.10. Mere reasonable or legitimate expectation of a citizen, in such a situation, may not by itself be a distinct enforceable right, but failure to consider and give due weight to it may render the decision arbitrary, and this is how the requirements of due consideration of a legitimate expectation forms part of the principle of non-arbitrariness.

70.11. The scope of judicial review in respect of disputes falling within the domain of contractual obligations may be more limited and in doubtful cases the parties may be relegated to adjudication of their rights by resort to remedies provided for adjudication of purely contractual disputes."

23. The question of maintainability of the writ petition under Article 226 for enforcement of a contractual right again came up in **Life Insurance Corporation of India and others vs. Asha Goel (Smt.) and another 14,** and it was held that pros and cons of fact-situation should be carefully weighed and the determination of the question as to when a claim can be enforced in writ jurisdiction would depend on consideration of several factors like, whether the writ petitioner is merely attempting to enforce his contractual rights or the case raises important questions of

law and constitutional issues, the nature of dispute raised; the nature of enquiry necessary for determination of the dispute etc. It was held that the matter would be required to be considered in the facts and circumstances of each case. The observations made in the judgement in this regard are as follows :-

"10. Article 226 of the Constitution confers extraordinary jurisdiction on the High Court to issue high prerogative writs for enforcement of the fundamental rights or for any other purpose. It is wide and expansive. The Constitution does not place any fetter on exercise of the extraordinary jurisdiction. It is left to the discretion of the High Court. Therefore, it cannot be laid down as a general proposition of law that in no case the High Court can entertain a writ petition under Article 226 of the Constitution to enforce a claim under a life insurance policy. It is neither possible nor proper to enumerate exhaustively the circumstances in which such a claim can or cannot be enforced by filing a writ petition. The determination of the question depends on consideration of several factors like, whether a writ petitioner is merely attempting to enforce his/her contractual rights or the case raises important questions of law and constitutional issues, the nature of the dispute raised; the nature of inquiry necessary for determination of the dispute etc. The matter is to be considered in the facts and circumstances of each case. While the jurisdiction of the High Court to entertain a writ petition under Article 226 of the Constitution cannot be denied altogether, courts must bear in mind the self-imposed restriction consistently followed by High Courts all these years after the constitutional power came into existence in not entertaining writ petitions filed for enforcement of purely contractual rights and obligations which involve disputed questions of facts. The courts have consistently taken the view that in a case where for determination of the dispute raised, it is necessary to inquire into facts for determination of which it may become necessary to record oral evidence a proceeding under Article 226 of the Constitution, is not the appropriate forum. The position is also well settled that if the contract entered between the parties provide an alternate forum for resolution of disputes arising from the contract, then the parties should approach the forum agreed by them and the High Court in writ jurisdiction should not permit them to bypass the agreed forum of dispute resolution. At the cost of repetition it may be stated that in the above discussions we have only indicated some of the circumstances in which the High Court have declined to entertain petitions filed under Article 226 of the Constitution for enforcement of contractual rights and obligation; the discussions are not intended to be exhaustive. This Court from time to time disapproved of a High Court entertaining a petition under Article 226 of the Constitution in matters of enforcement of contractual rights and obligation particularly where the claim by one party is contested by the other and adjudication of the dispute requires inquiry into facts. We may notice a few such cases: Mohd. Hanif v. State of Assam (1969) 2 SCC 782; Banchhanidhi Rath v. State of Orissa (1972) 4 SCC 781; Rukmanibai Gupta v. Collector, Jabalpur (1980) 4 SCC 556; Food Corpn. of India v. Jagannath Dutta 1993 Supp (3) SCC 635 and State of H.P. v. Raja Mahendra Pal (1999) 4 SCC 43."

24. Taking a similar view where a contractual right was sought to be enforced

by filing a writ petition, this Court in **M/s Lalloo Ji Rajiv Chandra And Sons vs. Meladhikari Prayagraj Mela Authority and others15**, reiterated the legal position that in a case of non-statutory contract, the remedy available to the contractor, if he is aggrieved by non-payment, would be either to file a civil suit or if there is an arbitration agreement between the parties, to invoke the terms of the agreement. The writ petition was dismissed with the following observations :-

"10. In the present case there is nothing to held that the contract is a statutory contract. The remedy of the contractor, if he is aggrieved by non-payment, would be to either file an ordinary civil suit or if there is an arbitration agreement between the parties, to invoke the terms of the agreement.

11. In our view, it will not either be appropriate or proper for the Court under Article 226 of the Constitution to entertain a petition of this nature. The grant of relief of this nature would virtually amount to a money decree. The petitioner is at liberty to take recourse to the remedies available by raising such a claim either invoking an arbitration clause (if it exists in the contract between the parties) or if there is no provision for arbitration, to move the competent civil court with a money claim."

25. The aforementioned legal position with regard to the question of maintainability of a writ petition seeking enforcement of contractual and commercial obligations has been considered in detail in recent judgements of this Court in **M/s Ipjacket Technology India Private Limited vs. M.D. Uttar Pradesh Rajkiya Nirman Nigam Limited16 and M/S Bio Tech System vs. State of U.P. and 4 others17.**

26. From the foregoing discussion, as a matter of general principle, it may be held that in a case where the contract entered into between the State and the person aggrieved is of a non-statutory character and the relationship is governed purely in terms of a contract between the parties, in such situations the contractual obligations are matters of private law and a writ would not lie to enforce a civil liability arising purely out of a contract. The proper remedy in such cases would be to file a civil suit for claiming damages, injunctions or specific performance or such appropriate reliefs in a civil court. Pure contractual obligation in the absence of any statutory complexion would not be enforceable through a writ.

27. The remedy under Article 226 of the Constitution being an extraordinary remedy, it is not intended to be used for the purpose of declaring private rights of the parties. In the case of enforcement of contractual rights and liabilities the normal remedy of filing a civil suit being available to the aggrieved party, this Court would not exercise its prerogative writ jurisdiction to enforce such contractual obligations. The only exception may be a case where the amount is admitted and there is no disputed question of fact requiring adjudication of detailed evidence and interpretation of the terms of the contract.

28. In the case at hand, the reliefs sought, as per the case set up by the petitioner, would require adjudication of serious factual disputes relating to the terms of the contract in respect of the prescribed standards of work and the time schedule for its completion. There is also serious dispute with regard to the extent of the work completed and the payments which are due. The pleadings and the

material which are on record do not in any manner indicate that it is a public law remedy which the petitioner is seeking to invoke so as to pursuade us to exercise our discretionary jurisdiction.

29. Having regard to aforesaid facts and circumstances, we are not inclined to exercise our extra-ordinary jurisdiction under Article 226 of the Constitution.

30. The writ petition stands accordingly dismissed.

(2021)02ILR A281
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.11.2020

BEFORE

THE HON'BLE SURYA PRAKASH KESARWANI, J.
THE HON'BLE DR. YOGENDRA KUMAR SRIVASTAVA, J.

Writ C No. 17093 of 2020

Ajay Kumar & Anr. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Shri Krishna Mishra

Counsel for the Respondents:
C.S.C., Sri Vivek Mishra

Constitution of India, Art.226 - Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act (54 of 2002) , S.14, S.17(1) - Writ petition - Petitioner defaulted in payment of instalments of housing loan - sought quashing of the order u/s 14 passed by D.M. & for direction to the respondents not to interfere in peaceful possession of the petitioners over his house during pendency of the SARFAESI Application pending before the Debt Recovery Tribunal - Held - Petitioner already availed an efficacious statutory remedy provided under S.17(1), no good reason to entertain writ petition- Writ petition, dismissed. (Para 16)

Writ Petition dismissed. (E-4)

List of Cases cited: -

1. United Bank of India Vs Satyawati Tondon & ors. (2010) 8 SCC 110

2. Kanaiyalal Lalchand Sachdev & ors. Vs St. of Mah. & ors. (2011) 2 SCC 782

3. Standard Chartered Bank Vs Noble Kumar & ors. (2013) 9 SCC 620

4. GM, Sri Siddeshwara Co-operative Bank Limited & anr. Vs Sri Ikbal & ors. (2013) 10 SCC 83

5. Authorized Officer, State Bank of Travancore & anr. Vs Mathew K.C. (2018) 3 SCC 85

6. ICICI Bank Ltd. Vs Umakanta Mohapatra (2019) 13 SCC 497

(Delivered by Hon'ble Surya Prakash Kesarwani, J.
&
Hon'ble Dr. Yogendra Kumar Srivastava, J.)

1. Heard Sri S.K. Mishra, learned counsel for the petitioners, the learned standing counsel for the State-respondents and Sri Vivek Mishra, learned counsel for the respondent No.6.

2. Petitioners have filed the present writ petition praying to quash the order dated 02.09.2019 under Section 14 of The Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002 (the SARFAESI Act) passed by the District Magistrate, Prayagraj and the consequential

letter dated 13.10.2020 issued by the Additional District Magistrate (II), Prayagraj. The petitioners have also prayed for a writ, order or direction in the nature of mandamus to direct the respondents not to interfere in peaceful possession of the petitioners over House No.114/B/3, Umarpur Niwa, Sulemsarai, Allahabad during pendency of the SARFAESI Application No.29 of 2020 (Ajay Kumar vs. State Bank of India), pending before the Debt Recovery Tribunal at Allahabad.

3. Briefly stated, facts of the present case are that the petitioners are borrowers who took a housing loan of Rs.3,50,000/- on 30.07.2004 from the respondent No.6 - Bank. The petitioners defaulted in payment of instalments. Consequently, notice under Section 13(2) of the SARFAESI Act was issued and thereafter proceedings under Section 13(4) were initiated and an order under Section 14 of the Act was passed by the District Magistrate on 02.09.2019. Consequently, sale notice dated 03.10.2020 was issued and the auction was conducted on 05.11.2019. Aggrieved with the sale notice and the auction, the petitioners filed the SARFAESI Application No.29 of 2020 under Section 17(1) of the Act, before the Debt Recovery Tribunal, Allahabad (the DRT Allahabad) in which the DRT Allahabad passed an order on 15.01.2020, as under:

"This S.A. Has been filed by the Applicant on 07.01.2020 U/s 17(1) of the S.A.R.F.A.E.S.I. Act, 2002 challenging the action of the Respondent Bank initiated against the secured asset which Include Sale Notice dated 03.10.2019 as well as auction dated 05.11.2019 and consequential /subsequent proceedings thereof for recovery of Rs.6,73,697.88ps. alongwith interest together with expenses/charges etc.

I have heard the Ld. Counsel for the Applicant and perused the S.A. as well as the documents annexed alongwith it.

Let notice be Issued to Respondent Bank for inviting reply, if any. The Applicant is directed to take steps for service of summon alongwith complete paper-book upon Respondent Bank through Registered A.D. Cover /Speed Post A.D. Cover as well as Dasti mode against acknowledgement. The Applicant is further directed to file proof of service of both mode including Tracking Report of Postal Authority & personal acknowledgment along-with affidavit before the next date fixed.

Respondent Bank is directed to file detail reply to the S.A. & I.A, along-with affidavit with relevant documents in support, if any, within 15 days from the date of service of summon with an advance copy to the opposite counsel. Thereafter, the Applicant may also file Rejoinder, if any, before the next date of hearing with an advance copy to the opposite counsel.

Be listed on 06.02.2020 s at 10.30 A.M. for arguments."

4. Now during pendency of the aforesaid application under Section 17(1) of the Act before the DRT Allahabad, the petitioners have filed the present writ petition making prayers as briefly noted above.

5. Learned counsel for the petitioners submits that the impugned order dated 02.09.2019 has been passed by the District Magistrate, Prayagraj without affording opportunity of hearing, which is in the teeth of the judgment of this court dated 11.12.2018 in Writ-C No.38578 of 2018

(Kumkum Tentiwal vs. State Of U.P. And 3 Others).

6. Learned counsel for the respondent No.6 submits that the application of the petitioner under Section 17(1) of the Act is pending before the DRT Allahabad against the sale notice and the auction and, therefore, the writ petition itself is not maintainable.

7. We have carefully considered the submissions of the learned counsels for the parties.

8. It is admitted on record by the petitioners that against the sale notice dated 03.10.2019 and the auction dated 05.11.2019, the petitioners have filed a SARFAESI Application No.29 of 2020 in which the aforequoted order dated 15.01.2020 was passed by the DRT Allahabad. Under the circumstances, the present writ petition filed by the petitioners is not maintainable inasmuch as the petitioners have already filed the statutory remedy provided under the Act.

9. The judgment in the case of Kumkum Tentiwal (supra) relied by the learned counsel for the petitioners is not applicable on the facts of the present case. In the present set of facts, the petitioners have already availed the statutory remedy under Section 17(1) of the Act by filing S.A. No.29 of 2020, which is pending before the DRT, Allahabad.

10. That apart, in the case of **United Bank of India v. Satyawati Tondon and others, (2010) 8 SCC 110**, the Hon'ble Supreme Court has held as under:

"42. There is another reason why the impugned order should be set aside. If respondent No.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 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 & 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 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, ***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.

XXXX XXXXX XXXX

55. ***It is a matter of serious concern that despite repeated pronouncement of this Court, the High Courts continue to ignore the availability of statutory remedies under the DRT Act and the SARFAESI Act and exercise jurisdiction under Article 226 for passing orders which have serious adverse impact on the right of banks and other financial institutions to recover their dues. We hope and trust that in future the High Courts will exercise their discretion in such matters with greater caution, care and circumspection.***

56. Insofar as this case is concerned, we are convinced that the High Court was not at all justified in injuncting the appellant from taking action in furtherance of notice issued under Section 13(4) of the Act. In the result, the appeal is allowed and the impugned order is set aside. Since the respondent has not appeared to contest the appeal, the costs are made easy."

11. In the case of **Kanaiyalal Lalchand Sachdev and others Vs. State of Maharashtra and others, (2011) 2 SCC 782,** the Hon'ble Supreme Court held as under:

"24. In City and Industrial Development Corporation Vs. Dosu Aardeshir Bhiwandiwala & Ors. (2009) 1 SCC 168, this Court had observed that:

"30. The Court while exercising its jurisdiction under Article 226 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."

25. In the instant case, apart from the fact that admittedly certain disputed questions of fact viz. non-receipt of notice under Section 13(2) of the Act, non-

communication of the order of the Chief Judicial Magistrate, etc. are involved, ***an efficacious statutory remedy of appeal under Section 17 of the Act was available to the appellants, who ultimately availed of the same.*** *Therefore, having regard to the facts obtaining in the case, the High Court was fully justified in declining to exercise its jurisdiction under Articles 226 and 227 of the Constitution."*

12. In the case of **Standard Chartered Bank Vs. Noble Kumar & Ors., reported in (2013) 9 SCC 620,** the Hon'ble Supreme Court held as under:

"27. The "appeal" under Section 17 is available to the borrower against any measure taken under Section 13(4). Taking possession of the secured asset is only one of the measures that can be taken by the secured creditor. Depending upon the nature of the secured asset and the terms and conditions of the security agreement, measures other than taking the possession of the secured asset are possible under Section 13(4). Alienating the asset either by lease or sale, etc. and appointing a person to manage the secured asset are some of those possible measures. On the other hand, Section 14 authorises the Magistrate only to take possession of the property and forward the asset along with the connected documents to the borrower (sic the secured creditor). Therefore, the borrower is always entitled to prefer an "appeal" under Section 17 after the possession of the secured asset is handed over to the secured creditor. Section 13(4)(a) declares that the secured creditor may take possession of the secured assets. It does not specify whether such a possession is to be obtained directly by the secured creditor or by resorting to the procedure under Section 14. We are of the opinion that by whatever manner the secured creditor obtains possession either through the process contemplated under Section 14 or without resorting to such a process obtaining of the possession of a secured asset is always a measure against which a remedy under Section 17 is available."

13. In the case of **GM, Sri Siddeshwara Co-operative Bank Limited and another Vs Sri Ikbal and others, (2013) 10 SCC 83,** the Hon'ble Supreme Court observed that although alternative remedy is not an absolute bar to the exercise of extraordinary jurisdiction under Article 226 of the Constitution of India, yet, it is well settled that where a statute provides efficacious and adequate remedy, the High Court will do well in not entertaining a petition under Article 226.

14. In the case of **Authorized Officer, State Bank of Travancore & Anr. Vs. Mathew K.C., (2018) 3 SCC 85,** the Hon'ble Supreme Court while considering the question of invoking the writ jurisdiction in matters of realisation of loan by financial institutions, considered earlier judicial pronouncements and held as under:

"16. It is the solemn duty of the Court to apply the correct law without waiting for an objection to be raised by a party, especially when the law stands well settled. Any departure, if permissible, has to be for reasons discussed, of the case falling under a defined exception, duly discussed after noticing the relevant law. In financial matters grant of ex-parte interim orders can have a deleterious effect and it is not sufficient to say that the aggrieved has the remedy to move for vacating the interim order. Loans by financial institutions are granted from public money generated at the tax payers expense. Such

loan does not become the property of the person taking the loan, but retains its character of public money given in a fiduciary capacity as entrustment by the public. Timely repayment also ensures liquidity to facilitate loan to another in need, by circulation of the money and cannot be permitted to be blocked by frivolous litigation by those who can afford the luxury of the same. The caution required, as expressed in Satyawati Tandon (supra), has also not been kept in mind before passing the impugned interim order:-

"46. It must be remembered that stay of an action initiated by the State and/or its agencies/ instrumentalities for recovery of taxes, cess, fees, etc. seriously impedes execution of projects of public importance and disables them from discharging their constitutional and legal obligations towards the citizens. In cases relating to recovery of the dues of banks, financial institutions and secured creditors, stay granted by the High Court would have serious adverse impact on the financial health of such bodies/institutions, which (sic will) ultimately prove detrimental to the economy of the nation. Therefore, the High Court should be extremely careful and circumspect in exercising its discretion to grant stay in such matters. Of course, if the petitioner is able to show that its case falls within any of the exceptions carved out in Baburam Prakash Chandra Maheshwari Vs Antarim Zila Parishad, AIR 1969 SC 556; Whirlpool Corporation VS Registrar of Trade Marks, (1998) 8 SCC 1; and Harbanslal Sahnia Vs Indian Oil Corporation Ltd., (2003) 2 SCC 107 and some other judgments, then the High Court may, after considering all the relevant parameters and public interest, pass an appropriate interim order."

17. ***The writ petition ought not to have been entertained and the interim order granted for the mere asking without assigning special reasons, and that too without even granting opportunity to the Appellant to contest the maintainability of the writ petition*** *and failure to notice the subsequent developments in the interregnum. The opinion of the Division Bench that the counter affidavit having subsequently been filed, stay/modification could be sought of the interim order cannot be considered sufficient justification to have declined interference.*

18. We cannot help but disapprove the approach of the High Court for reasons already noticed in Dwarikesh Sugar Industries Ltd Vs Prem Heavy Engineering Works (P) Ltd and another, 1997 (6) SCC 450, observing:

"32. When a position, in law, is well settled as a result of judicial pronouncement of this Court, it would amount to judicial impropriety to say the least, for the subordinate courts including the High Courts to ignore the settled decisions and then to pass a judicial order which is clearly contrary to the settled legal position. Such judicial adventurism cannot be permitted and we strongly deprecate the tendency of the subordinate courts in not applying the settled principles and in passing whimsical orders which necessarily has the effect of granting wrongful and unwarranted relief to one of the parties. It is time that this tendency stops."

19. The impugned orders are therefore contrary to the law laid down by this Court under Article 141 of the Constitution and unsustainable. They are

therefore set aside and the appeal is allowed.

20. All questions of law and fact remain open for consideration in any application by the aggrieved before the statutory forum under the SARFAESI Act."

15. In a recent judgment in the case of I**CICI Bank Ltd Vs Umakanta Mohapatra, (2019) 13 SCC 497,** the Hon'ble Supreme Court has disapproved the practice of granting interim orders in reference to the matters arising out of the SARFAESI Act, and held as under:-

"2. Despite several judgments of this Court, including a judgment by Hon'ble Mr.Justice Navin Sinha, as recently as on 30.01.2018, in Authorized Officer, ***State Bank of Travancore and Another VS Mathew KC., (2018) 3 SCC 85, the High Courts continue to entertain matters which arise under Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI), and keep granting interim orders in favour of persons who are Non-Performing Assets (NPAs).***

3. The writ petition itself was not maintainable, as a result of which, in view of our recent judgment, which has followed earlier judgments of this Court, held as follows:-

"17. We cannot help but disapprove the approach of the High Court for reasons already noticed in Dwarikesh Sugar Industries Ltd. Vs Prem Heavy Engineering Works (P) Ltd and another, (1997) 6 SCC 450, observing:-

"32. When a position, in law, is well settled as a result of judicial pronouncement of this Court, it would amount to judicial impropriety to say the least, for the subordinate courts including the High Courts to ignore the settled decisions and then to pass a judicial order which is clearly contrary to the settled legal position. *Such judicial adventurism cannot be permitted and we strongly deprecate the tendency of the subordinate courts in not applying the settled principles and in passing whimsical orders which necessarily has the effect of granting wrongful and unwarranted relief to one of the parties. It is time that this tendency stops."*

4. The writ petition, in this case, being not maintainable, obviously, all orders passed must perish, including the impugned order, which is set aside."

16. Considering the facts of the present case particularly that the petitioners have already availed the remedy under Section 17(1) of the Act, we do not find any good reason to entertain this writ petition.

17. Consequently, **the writ petition is dismissed.**

(2021)02ILR A287
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 07.12.2020

BEFORE

THE HON'BLE ANJANI KUMAR MISHRA, J.
THE HON'BLE PRAKASH PADIA, J.

Writ C No. 17754 of 2020

Amir Kumar Mishra ...Petitioner
Versus
Union of India & Ors. ...Respondents

Counsel for the Petitioner:
Sri Rahul Jain, Sri Tushar Kant

Counsel for the Respondents:

A.S.G.I., Annapurna Singh, Sri Vikas Budhwar

Constitution of India, Art.226- Writ of Mandamus - Aggrieved person - Legal wrong - Establishment of competing business which may have adverse impact on petitioner's profitability cannot give rise to legal wrong - law does not recognize any remedy unless it is established that the person had suffered a legal wrong or a wrong which is recognised or is recognizable in law. (Para 7)

Petitioner sought direction to authorities not to issue final allotment letter for retail outlet dealership in favour of respondent -*Held* - Petitioner is mere rival in trade - petitioner has no locus standi to challenge the advertisement being rival businessman- Business disputes between parties can be adjudicated by Civil Court provided any appropriate suit for injunction is filed - Court cannot interfere when question of supplying essential commodities involved. (Para 8, 9,10)

Writ Petition dismissed. (E-4)

List of Cases cited : -

1. Jasbhai Motibhai Desai Vs Roshan Kumar & ors. (1976) 1 SCC 671, AIR 1976 SC 578

2. The Nagar Rice & Flour Mills & ors. Vs N. Teekappa Gowda & Bros. & ors. AIR 1971 SC 246

3. M.L. Krishnamurthy Vs The District Revenue Officer, Vellore & ors. AIR 1990 Madras 87 (FB)

4. Ganesh Chandra Hazarika Vs State of Assam & ors. AIR 1981 Gauhati 36

5. M/s. Kisan Seva Kendra Vs St. of U.P. & ors. C.M.W.P. No. 39125 of 2007 dt 22.08

6. Manoj Kumar Vs Union of India & ors. C.M.W.P. No. 15351 of 2011 and 14th March, 2011

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

&

Hon'ble Prakash Padia, J.)

1. The petitioner has preferred the present writ petition inter-alia with the prayer to issue a mandamus directing the respondents to decide the pending representation. A further prayer has also been made in the writ petition to direct the respondents not to issue final allotment letter for retail outlet dealership for village Pasna, Tehsil Koraon on Meja to Koran M.D.R. Road, Prayagraj in favour of the respondent No.4.

2. Facts in brief as contained in the writ petition are that Hindustan Petroleum Corporation Ltd./respondent No.2 issued an advertisement on 14.10.2014 inviting online applications for allotment of regular and rural retail outlet dealership through draw of lots for various Districts in the State of U.P. The petitioner has also submitted his online application form for allotment of retail outlet dealership and he was allotted a retail outlet dealership in the location namely village Pasna, Tehsil Koraon, District Prayagraj. In this regard, a letter of intent was also issued in his favour by respondent-corporation on 25.08.2018. It is stated that retail outlet dealership of the petitioner is situated at M.D.R. 121, Sirsa-Koraon Road between milestone 24 kms.to 26 kms. The petitioner stated his retail outlet dealership in the name and style J.K.Automobiles, at Village Pasna, Tehsil Koraon, Meja Road, Prayagraj. It is further stated that the retail outlet dealership of the petitioner is situated in a rural area where the sale of petroleum product is not very good. It is stated that respondent No.4 namely Sri Vivek Shukla, started the construction of boundary wall of his petrol pump in village Pasna and during the course of inquiry, the petitioner came to

know that Sri Vivek Shukla has also allotted retail outlet dealership in his favour by respondent Hindustan Petroleum Corporation Ltd. In this regard, the petitioner further came to know that an advertisement was also issued by the respondent-Hindustan Petroleum Corporation Ltd. on 24.12.2018 in which details of petrol pump, which was allotted in favour of respondent No.4, was mentioned at Serial No.2052. It is further stated that in spite of best efforts, the petitioner could not get the copy of the letter of intent issued in favour of respondent No.4 and when the respondent No.4 started construction of boundary wall of the retail outlet dealership, he came to know regarding his selection for location in question.

3. After the petitioner came to know about the aforesaid facts, he made a representation dated 22.08.2020 addressed to the Chief Regional Manager, Hindustan Petroleum Corporation Ltd./respondent No.3 vide registered post on 24.08.2020. Since no action was taken as such, a letter in the shape of reminder was also made by the petitioner before respondent No.3 on 12.09.2020 and when no action was taken on the same, the petitioner has preferred the present writ petition.

4. It is argued by learned counsel for the petitioner that a retail outlet dealership has been allotted in favour of the petitioner by Hindustan Petroleum Corporation Ltd. itself in the rural area where sale is not good and if, a new retail outlet dealership, which is allotted in favour of respondent No.4, will affect the business of the petitioner. It is further argued that the petitioner has invested huge amount in his petrol pump before starting business. It is further argued that the retail outlet dealership was allotted in favour of the respondent No.4 only due to his political connection with ruling party.

5. On the other hand, it is argued that allotment of retail outlet dealership in favour of respondent No.4 is absolutely perfect and valid and after completing all the formalities as required in law. It is further argued that the law laid down by this Court as well as by the Apex Court, the petitioner does not fall within the definition of "Aggrieved Person" and it is kind of business rivalry, the present writ petition filed by the petitioner under Article 226 of the Constitution of India is liable to be dismissed.

6. Heard learned counsel for the parties.

7. Undisputedly, the petitioner is a mere rival in trade. The establishment of a competing business which may have an adverse impact on his profitability cannot give rise to a legal wrong. Such actions are clearly barred on the principle of *damnum sine injuria* which essentially holds that the law does not recognize any remedy unless it is established that the person had suffered a legal wrong or to put it differently a wrong which is recognised or is recognizable in law. In the case of ***Jasbhai Motibhai Desai Vs. Roshan Kumar and others [(1976) 1 SCC 671],*** the Hon'ble Supreme Court in paragraphs 47 & 48 held following principles:-

"47. Thus, in substance, the appellant's stand is that the setting up of a rival cinema house in the town will adversely affect his, monopolistic commercial interest, causing pecuniary harm and loss of business from competition. Such harm or loss is not

wrongful in the eye of law, because it does not result in injury to a legal right or a legally protected, interest, the business competition causing it being a lawful activity. Juridical, harm of this description is called damnum sine injuries, the term injuria being here used in its true sense of an act contrary to law. The reason why the law suffers a person knowingly to inflict harm of this description on another, without holding him accountable for it, is that such harm done to an individual is a gain to society at large.

48. In the light of the above discussion, it is demonstrably clear that the appellant has not been denied or deprived of a legal right. He has not sustained injury to any legally protected interest. In fact, the impugned order does not operate as a decision against him, much less does it wrongfully affect his title to something. He has not been subjected to a legal wrong. He has suffered no legal grievance. He has no legal peg for a justiciable claim to hang on. Therefore he is not a 'person aggrieved' and has no locus standi to challenge the grant of the no-objection Certificate."

8. Apart from the same, law in this connection is well settled that the petitioner has no locus standi to challenge the advertisement being rival businessman. This controversy has already been decided in large number of cases not only by Apex Court but also different High Courts. Reference of some cases are ***AIR 1971 SC 246 (The Nagar Rice and Flour Mills and others Vs. N. Teekappa Gowda & Bros. and others),AIR 1976 SC 578 (Jasbhai Motibhai Desai Vs. Roshan Kumar, Haji Bashir Ahmed and others), AIR 1990 Madras 87 (FB) (M.L. Krishnamurthy and etc. Vs. The District Revenue Officer, Vellore and another), AIR 1981 Gauhati 36 (Ganesh Chandra Hazarika Vs. State of Assam and others).***

9. The Division Bench of this Court in the cases of ***Civil Misc. Writ Petition No. 39125 of 2007 (M/s. Kisan Seva Kendra Vs. State of U.P. & ors.) and Civil Misc. Writ Petition No. 15351 of 2011 (Manoj Kumar Vs. Union of India and others)*** delivered on 22nd August, 2007 and 14th March, 2011 respectively held that when the petitioner wants that a competitor should not carry on any similar business near his business place, such type of disputes between the parties can be adjudicated by the civil Court provided any appropriate suit for injunction is filed. This Court can not interfere with the same particularly when the question of supplying essential commodities is involved.

10. In view of the facts as narrated above and the law laid down by the Supreme Court as well as this Court, we do not find any reason to pass any affirmative order in favour of the petitioner in the writ petition. Hence, the present writ petition is dismissed, however, no order is passed as to costs.

(2021)02ILR A290
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.11.2020

BEFORE

THE HON'BLE SURYA PRAKASH KESARWANI, J.
THE HON'BLE DR. YOGENDRA KUMAR SRIVASTAVA, J.

Writ C No. 17830 of 2020

Ravishankar ...Petitioner

Versus

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

Counsel for the Petitioner:
Sri Atul Kumar

Counsel for the Respondents:
C.S.C.

A. Maxim- "Audi alteram partem - Natural Justice - Show cause notice - Natural justice requires the decision maker to give prior notice of the proposed decision to the person who is to be affected and to provide an opportunity to make representation -The right to be given a notice containing the charges & the proposed action is a basic right - its violation amounts to denial of fair opportunity to the person concerned. (Para 6)

B. Cancellation of the stamp vendor licence - impugned show cause notice did not require the petitioner to show cause with regard to cancellation of his licence - Held – show cause notice neither mentioned the grounds necessitating action nor specified what actions were proposed to be taken - Order cancelling the licence passed without putting petitioner to notice, in breach of principles of justice - Same not legally permissible. (Para 4,5,6 & 7)

Writ Petition allowed. (E-4)

List of Cases cited: -

1. Mahipal Singh Tomar Vs St. of U.P. & ors. (2013) 16SCC 771

2. Keshav Mills Company Ltd. Vs U.O.I. & ors. AIR 1973 SC 389

(Delivered by Hon'ble Surya Prakash Kesarwani, J.
&
Hon'ble Dr. Yogendra Kumar Srivastava, J.)

1. Heard learned counsel for the petitioner and learned Standing Counsel for the State respondents.

2. According to the petitioner, he is a stamp vendor having licence under the Uttar Pradesh Stamp Rules, 19421. By the impugned order dated 20.03.2020, the licence of the petitioner being licence no. 176 has been cancelled by the Additional District Magistrate (Finance and Revenue), Muzaffar Nagar on the ground that a complaint has been made by Tehsil Bar Association against the petitioner for misbehaviour.

3. The petitioner duly holds a stamp vendor licence granted under the Rules, 1942, which, as per his claim, has been renewed from time to time. Contention of the learned counsel for the petitioner is that the order cancelling the petitioner's licence has been passed only on the basis of a complaint without any proper enquiry and an opportunity to the petitioner to submit his version. It has been submitted that the explanation submitted by the petitioner to the show cause notice has not been considered by the licensing authority while passing the impugned order.

4. We find that the show cause notice dated 13.03.2020 issued by the Additional District Magistrate (Finance and Revenue),Muzaffar Nagar did not require the petitioner to show cause with regard to cancellation of his licence. Thus the impugned order cancelling the licence has been passed without putting the petitioner to notice. The impugned order has been passed in breach of principles of natural justice.

5. The show cause notice having neither mentioned the grounds necessitating action nor specified what actions were proposed to be taken, the same cannot be said to be adequate.

6. The principle of *audi alteram partem* is a fundamental principle of the rules of natural justice and it requires the decision maker to give prior notice of the proposed decision to the person who is to be affected and to provide an opportunity to make representation. The right to be given a notice containing the charges and the proposed action is a basic right and its violation amounts to denial of fair opportunity to the person concerned.

7. The order impugned cancelling the petitioner's licence, having thus travelled beyond the bounds of notice, is clearly impermissible to that extent, and cannot be legally sustained.

8. In taking this view we are fortified by the decisions in **Mahipal Singh Tomar Vs. State of U.P. and others2 and Keshav Mills Company Ltd. Vs. Union of India and others3.**

9. That apart, in the impugned order, no finding has been recorded by the respondent no. 6 that any provision of the relevant rules governing the terms of licence have been violated by the petitioner, which may result in cancellation of his licence.

10. Under the circumstances, the impugned order dated 20.03.2020 passed by the respondent no. 6 cannot be sustained and is hereby quashed.

11. The writ petition is allowed.

(2021)02ILR A292

ORIGINAL JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 11.04.2017

BEFORE

THE HON'BLE ARUN TANDON, J.
THE HON'BLE MRS. REKHA DIKSHIT, J.

Writ C No. 18738 of 2010

Fiza Parveen ...Petitioner

Versus

Indian Oil Corporation Ltd. Head Office Bandra (East), Mumbai & Ors.

...Respondents

Counsel for the Petitioner:
Sri K. Ajit

Counsel for the Respondents:
Sri P. Padia, S.C.

Lease - U.P.Z.A. & L.R. Act - S.165 - Lease in contravention of S. 157 - Where the total area of the land holding of the lessee along with his family members is less than 12.5 acres, then lessee becomes bhumidhar with non-transferable right- U/s 142 - bhumidhar with non-transferable rights can use the land only for the purposes connected with Agriculture, Horticulture, Animal Husbandry, Pisciculture, Poultry Farming, Social Forestry - *Held* - such land cannot be offered for the purposes of setting up of a retail outlet.

Writ Petition dismissed. (E-4)

(Delivered by Hon'ble Arun Tandon, J.
&
Hon'ble Mrs. Rekha Dikshit, J.)

1. Heard learned counsel for the parties.

2. This writ petition is directed against the order of the Indian Oil Corporation dated 17.3.2010.

3. On a complaint being received with regards to the correctness or otherwise of the land documents submitted by the writ petitioner for setting up the Kisan Seva

Kendra as per the advertisement published by Indian Oil Corporation, the matter was examined and it has been found that the lease deed said to have been executed by the recorded tenure holder in favour of the writ petitioner was hit by provision 156/157 of the U.P.Z.A. & L.R. Act, 1950. Therefore, it has been held that in light of Section 165 the petitioner had no right to construct for over such land. It has also been noticed that the petitioner subsequent by purchased the land and on the the date of interview i.e. 8.2.2008. Under the subsequent deed earlier lease deed had been cancelled.

4. The Corporation has found that such change of right over the land of offered subsequent to the last date of application does not material effect the marks awarded under the various heads including the facility of infrastructure/land which had to be computed with reference to the averments made in the application form. Accordingly, the Corporation has held that the petitioner was not entitled for restoration of letter of intent. This order has been passed in compliance with the direction issued by the Writ Court in Writ Petition No.23187 of 2009 decided on 5.5.2009 filed by the present petitioner herself.

5. On behalf of the petitioner, it is contended that a similar issue has been examined by a Division Bench of this Court in the Case of Padam Singh Vs. Indian Oil Corporation Ltd. and others and it has been held that the provisions of Section 157 read with Section 165 of the U.P.Z.A. & L.R. Act, do not in any way affect the Clauses of brochure providing for the valuation of the land offered by the respective candidate.

6. Sri K. Ajit, counsel for the petitioner vehemently contended before us that in view of the said judgment, the order passed by the Corporation needs to be quashed.

7. We have heard learned counsel for the parties and examined the records of the present writ petition. We may record that under Section 165 of U.P.Z.A. & L.R. Act, any lease executed in violation of Section 157 of the U.P.Z.A. & L.R. Act, 1950 result in two consequences;-

(a) Where the total area of the land holding of the lessee along with his family members is found to be less than 12.5 acres, in that circumstance he becomes bhumidhar with non transferable right

(b) While under Clause (b) of the same Section, if the total area of the lessee along with his family members exceeds 12.5 acres then the consequences as contained in Section 154 and 163 shall mutatis mutandis apply.

8. Counsel for the petitioner would contend that the petitioner would get a better title because of the lease having been executed in violation of Section 157 of U.P.Z.A. & L.R. Act, 1950.

9. If the petitioner claims benefit of Clause (1) of Section 154 he is further required to demonstrate that the total area of land holding in his name as well as name of other family members including the area of transfer land does not exceed 12.5 acres, we may record that there is no such pleading in the entire writ petition, if Clause (b) is attracted and the total area exceeds 12.5 acres then the provisions of Section 154 would mutatis mutandis applied meaning thereby that there cannot transfer sell of the land in excess of 12.5 acres without a written permission of the State Government reference Section 154 Sub Clause (3). Since admittedly, no

permission has been taken from the Government has been obtained the transfer would be bad in violation of law

10. We are, further, of the opinion that the Corporation has committed no wrong is not relying upon the document of transfer of rights in respect of immovable property, which has been made in violation of law.

11. Another aspect of the matter, which does need consideration is with regards to the provision of Section 142 of the U.P.Z.A. & L.R. Act, 1950. The said Section is in two parts which provides as under:-

12. Sub-section (1) discloses that bhumidhar with transferable rights will have the right to exclusive possession over the land and to use it for any purpose whatsoever.

13. Sub-section (2) defines the rights of bhumidhar with non transferable rights. It is clarified that while he will have right to exclusive possession of all land of which he bhumidhar but the land can be put to use it for the purposes connected with Agriculture, Horticulture and Animal Husbandry which included the Pisciculture, Poultry Farming and Social Forestry.

14. It is therefore, the consequences under Section 165 because of the lease being in violation of Section 157 of the U.P.Z.A & L.R. Act, 1950 would be that the petitioner would have acquired the right of bhumidhar with non transferable rights therein, in that circumstances the provision of Section 142 would come into play and the land cannot be used except for the purpose of Agriculture Horticulture and Animal Husbandry including with Pisciculture, Poultry Farming and Social Forestry.

15. The Indian Oil Corporation appears to be more than correct in contending that such land cannot be offered for the purposes of setting up of a retail outlet.

16. In the totality of the circumstances on record, we see no reason to interfere with the order of Indian Oil Corporation, however, we leave it open to the petitioner to demonstrate before the Corporation that because of the sale deed having been executed in his favour his right over the land, which was offered along with the application have become better and it was for the Corporation to examine and take appropriate action in accordance with law.

17. The writ petition is dismissed subject to the observations made above.

(2021)02ILR A294
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.12.2020

BEFORE

THE HON'BLE SURYA PRAKASH KESARWANI, J.
THE HON'BLE DR. YOGENDRA KUMAR SRIVASTAVA, J.

Writ C No. 20203 of 2020

Matsya Jivi Sahkari Samiti Ltd. Karauta, Gorakhpur ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Vijay Kumar

Counsel for the Respondents:
C.S.C., Sri Sunil Kumar Singh

U.P. Co-operative Societies Act, 1965, S. 70 - U.P. Co-operative Societies Rules, 1968, Rule 444-C (2) - Election dispute - Reference of the election dispute to the Registrar - on the grounds specified under clause (a) & clause (b) under sub-rule (1) of Rule 444-C - by the aggrieved party within forty-five days of the declaration of the result - *No court have jurisdiction to entertain any suit or other proceeding in respect of election dispute* - *Held* - Court declined to exercise extraordinary jurisdiction under Article 226 of the Constitution - in view of complete mechanism having been provided with regard to settlement of disputes relating to election in a co-operative society, in terms of the statutory provisions under the Act, 1965 and the Rules made thereunder.

Writ Petition dismissed. (E-4)

(Delivered by Hon'ble Surya Prakash Kesarwani, J.
&
Hon'ble Dr. Yogendra Kumar Srivastava, J.)

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

2. The present writ petition has been filed seeking a direction to decide the claim of the petitioner with regard to election proceedings of a co-operative society namely, *Matsya Jivi Sahkari Samiti Ltd.*, Village Karauta, Block Brahampur, District Gorakhpur.

3. As per the averments made in the writ petition, in particular, in paragraphs 9 and 10, the elections have been held and declared on 22.11.2019 and the elected office bearers have also taken charge but the grievance of the petitioner with regard to the elections, raised in his complaints, has not been redressed.

4. Learned Standing Counsel appearing for the State respondents has drawn attention of this Court to the provisions under Section 70 of the Uttar Pradesh Co-operative Societies Act, 1965, and the proviso to sub-section (1) thereof and also to Rule 444-C (2) of the Uttar Pradesh Co-operative Societies Rules, 1968, to contend that once an election of a co-operative society has been held, the remedy available to the aggrieved party is by seeking a reference of the dispute to the Registrar.

5. To appreciate the aforesaid contentions, the relevant statutory provisions may be adverted to.

6. Section 70 under Chapter IX of The U.P. Co-operative Societies Act, 1965 reads as under :-

"70. Disputes which may be referred to arbitration. - (1) Notwithstanding anything contained in any law for the time being in force, if any dispute relating to the constitution, management of the business of a co-operative society other than a dispute regarding disciplinary action taken against a paid servant of a society arises-

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

(b) between a member, past member or any person claiming through, a member, past member or deceased member, and the society, its Committee of Management or any officer, agent or employee of the society, including any past officer, agent or employee; or

(c) between the society or its committee and any past committee, any officer, agent or employee or any past officer, past agent or past employee or the nominee, heir or legal representative of any deceased officer, deceased agent, or deceased employee of the society; or

(d) between a co-operative society and any other co-operative society or societies:

such dispute shall be referred to the Registrar for action in accordance with the provisions of this Act and the rules and no court shall have jurisdiction to entertain any suit or other proceeding in respect of any such dispute:

Provided that a dispute relating to an election under the provisions of this Act or rules made thereunder shall not be referred to the Registrar until after the declaration of the result of such election.

(2) For the purpose of sub-section (1), the following shall be deemed to be included in dispute relating to the constitution, management or the business of a co-operative society, namely -

(a) claims for amounts due when a demand for payment is made and is either refused or not complied with whether such claims are admitted or not by the opposite party;

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

(c) a claim by a society for any loss caused to it by a member, officer, agent, or employee including past or deceased member, officer, agent, or employee, whether individually or collectively and whether such loss be admitted or not; and

(d) all matters relating to the objects of the society mentioned in the bye-laws as also those relating to the election of office-bearers.

(3) If any question arises whether a dispute referred to the Registrar under this section is a dispute relating to the constitution, management or the business of co-operative society the decision thereon of the Registrar shall be final and shall not be called in question in any Court."

7. Rule 444-C of the Uttar Pradesh Co-operative Societies Rules, 1968 is being reproduced hereinbelow :-

"**444-C**. (1) The election in a co-operative society shall not be called in question either by arbitration or otherwise except on the ground that--

(a) the election has not been a fair election by reasons that corrupt practice, bribery or undue influence has extensively prevailed at the election, or

(b) the result of the election has been materially affected--

(i) by improper acceptance or rejection of any nomination, or

(ii) by improper reception, refusal or rejection of voters, or

(iii) by gross failure to comply with the provisions of the Act, the rules or the bye-laws of the society.

Explanation.--For the purpose of this rule corruption, bribery or undue influence shall have the meaning assigned to each under Section 123 of the Representation of the People Act, 1951.

(2) A dispute relating to election shall be referred by the aggrieved party within forty-five days of the declaration of the result."

8. The aforequoted provisions indicate that the manner of settlement of disputes is provided for under Chapter IX of the Act, 1965.

9. Section 70 is in respect of disputes which may be referred to arbitration and in terms thereof, the disputes specified under sub-section (1) are to be referred to the Registrar for action in accordance with the provisions of the Act and the rules and no Court shall have jurisdiction to entertain any suit or other proceedings in respect of any such dispute.

10. In terms of the proviso to sub-section (1) of Section 70, a dispute relating to an election under the provisions of the Act or the rules made thereunder, shall not be referred to the Registrar until after the declaration of the result of such election.

11. Sub-rule (1) of Rule 444-C provides that the election in a co-operative society shall not be called in question either by arbitration or otherwise except on the grounds specified under clause (a) and clause (b) under sub-rule (1).

12. In terms of sub-rule (2) a dispute relating to an election shall be referred by the aggrieved party within forty-five days of the declaration of the result.

13. In the case at hand, as per the case set up by the petitioner, the elections of the co-operative society in question, have already been held and the results thereof have also been declared. In view of the aforesaid facts and situation, any complaint, grievance or dispute which is being sought to be raised with regard to the elections, is to be referred to the Registrar on an appropriate application by the aggrieved party.

14. A conjoint reading of the provisions contained under Section 70 of the Act, 1965 and Rule 444-C of the Rules, 1968 leave no manner of doubt that a complete procedure for settlement of disputes and the manner of reference of such disputes, including a dispute relating to an election under the provisions of the Act or the Rules made thereunder, is provided for. Any grievance, complaint or dispute relating to the election proceedings of a co-operative society can be called in question on the grounds specified under sub-rule (1) of Rule 444-C by applying for a reference by making an appropriate application under Section 70 of the Act, 1965.

15. A complete mechanism with regard to settlement of disputes relating to election in a co-operative society having been provided for in the manner as aforestated, we are not inclined to exercise our extraordinary jurisdiction under Article 226 of the Constitution, in the facts of the present case.

16. It would be open to the petitioner to invoke the appropriate remedy, provided in terms of the statutory provisions under the Act, 1965 and the Rules made thereunder.

17. Subject to the aforesaid observation, this writ petition stands dismissed.

(2021)02ILR A298
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 03.12.2020

BEFORE

THE HON'BLE SURYA PRAKASH KESARWANI, J.
THE HON'BLE DR. YOGENDRA KUMAR SRIVASTAVA, J.

Writ C No. 20423 of 2020

M/s S.K. Industries ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Ramendra Asthana, Sri Vijay Kumar Ojha

Counsel for the Respondents:
C.S.C.

Arbitration and Conciliation Act 1996, S. 30 - Settlement - arbitral tribunal to encourage settlement of the dispute - arbitral tribunal may use - mediation, conciliation or other procedures, at any time *during the arbitral proceedings* -to encourage settlement – Section 30 of the Act, 1996, is to be availed d*uring the pendency of the arbitral proceedings.* (Para 12, 13)

Agreement entered into between petitioner & State for milling paddy-Recovery certificate issued against petitioner-Clause 12 of the agreement contains arbitration clause-*Held*- In the present case, the dispute having not yet been referred for arbitration & no arbitral proceedings being pending - therefore question of settlement of the dispute U/s 30 of the Act, 1996, would not arise - Liberty granted to petitioner to make application to refer the dispute for arbitration as per terms of the agreement (Para 8, 14, 16)

Writ Petition disposed off. (E-4)

(Delivered by Hon'ble Surya Praksh Kesarwani, J.
&
Hon'ble Dr. Yogendra Kumar Srivastava, J.)

1. The present writ petition has been filed praying for the following reliefs :-

"(a) Issue a writ, order or direction in the nature of mandamus commanding the respondent nos. 1/2 to decide arbitration claim (contained in annexure No. 7 to the writ petition) within a period of three months or within as short a period as may be deemed to be necessary under facts and circumstances of the case.

(b) Issue a writ, order or direction in the nature of mandamus commanding the respondents and their subordinates etc. not to take any coercive measure on the basis of recovery certificate dated 19.09.2018 forming subject matter of aforesaid arbitration proceedings (copy of arbitration claim petition annexure no. 7 to the writ petition)."

2. The principal grievance sought to be raised is against a recovery certificate dated 19.9.2018 for amount of Rs. 48,60,102/- issued against the petitioner in accordance with Clause 19 of the Paddy Purchase Policy 2017-18 dated 31st August, 2017.

3. The petitioner claims to have filed an application seeking settlement of dispute under Section 30 of the Arbitration and Conciliation Act 19961 as per clause 12 of the CMR agreement. The petitioner also claims to have filed an application for staying the recovery proceedings during the pendency of the settlement proceedings.

4. Contention of learned counsel for the petitioner is that the aforesaid application for settlement under Section 30

of the Act, 1996 is pending before the authorities with no decision thereon, and accordingly no recovery can be made against the petitioner in the meantime.

5. As per the case set up in the writ petition, the petitioner is a rice mill which had entered into an agreement with the State authorities for milling of paddy procured by the State Government under the Paddy Purchase Policy 2017-18. The recovery proceedings initiated against the petitioner are in respect of certain defaults, which the petitioner has disputed, and accordingly it is submitted that in view of the arbitration clause under the CMR agreement, the dispute is to be referred for arbitration. Further it is submitted that an application under Section 30 of the Act, 1996 having been submitted by the petitioner for settlement of dispute along with an application for stay, the recovery proceedings during the intervening period cannot be initiated.

6. The law relating to arbitration is governed in terms of the Arbitration and Conciliation Act, 1996, and the procedure for appointment of arbitrators is provided under Section 11 of the said Act.

7. For ease of reference the relevant statutory provisions contained under Section 11 and Section 30 of the Act, 1996, are being extracted below:-

"11. Appointment of arbitrators--(1) A person of any nationality may be an arbitrator, unless otherwise agreed by the parties.

(2) Subject to sub-section (6), the parties are free to agree on a procedure for appointing the arbitrator or arbitrators.

(3) Failing any agreement referred to in sub-section (2), in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two appointed arbitrators shall appoint the third arbitrator who shall act as the presiding arbitrator.

(3A) The Supreme Court and the High Court shall have the power to designate, arbitral institutions, from time to time, which have been graded by the Council under section 43-I, for the purposes of this Act:

Provided that in respect of those High Court jurisdictions, where no graded arbitral institution are available, then, the Chief Justice of the concerned High Court may maintain a panel of arbitrators for discharging the functions and duties of arbitral institution and any reference to the arbitrator shall be deemed to be an arbitral institution for the purposes of this section and the arbitrator appointed by a party shall be entitled to such fee at the rate as specified in the Fourth Schedule.

Provided further that the Chief Justice of the concerned High Court may, from time to time, review the panel of arbitrators.

(4) If the appointment procedure in sub-section (3) applies and--

(a) a party fails to appoint an arbitrator within thirty days from the receipt of a request to do so from the other party; or

(b) the two appointed arbitrators fail to agree on the third arbitrator within thirty days from the date of their appointment,

the appointment shall be made, on an application of the party, by the arbitral institution designated by the Supreme Court, in case of international commercial arbitration, or by the High Court, in case of arbitrations other than international commercial arbitration, as the case may be.

(5) Failing any agreement referred to in sub-section (2), in an arbitration with a sole arbitrator, if the parties fail to agree on the arbitrator within thirty days from receipt of a request by one party from the other party to so agree (the appointment shall be made on an application of the party in accordance with the provisions contained in sub-section (4).

(6) Where, under an appointment procedure agreed upon by the parties,--

(a) a party fails to act as required under that procedure; or

(b) the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or

(c) a person, including an institution, fails to perform any function entrusted to him or it under that procedure,

the appointment shall be made, on an application of the party, by the arbitral institution designated by the Supreme Court, in case of international commercial arbitration, or by the High Court, in case of arbitrations other than international commercial arbitration, as the case may be] to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

(6A) xxx

(6B) The designation of any person or institution by the Supreme Court or, as the case may be, the High Court, for the purposes of this section shall not be regarded as a delegation of judicial power by the Supreme Court or the High Court.

(7) xxx

(8) The arbitral institution referred to in sub-sections (4) (5) and (6) before appointing an arbitrator, shall seek a disclosure in writing from the prospective arbitrator in terms of sub-section (1) of section 12, and have due regard to--

(a) any qualifications required for the arbitrator by the agreement of the parties; and

(b) the contents of the disclosure and other considerations as are likely to secure the appointment of an independent and impartial arbitrator.

(9) In the case of appointment of sole or third arbitrator in an international commercial arbitration, the arbitral institution designated by the Supreme Court may appoint an arbitrator of a nationality other than the nationalities of the parties where the parties belong to different nationalities.

(10) xxx

(11) Where more than one request has been made under sub-section (4) or sub-section (5) or sub-section (6) to different arbitral institutions, the arbitral institution to which the request has been first made under the relevant sub-section shall be competent to appoint.

(12) Where the matters referred to in sub-sections (4), (5), (6),and (8) arise in an international commercial arbitration, or any other arbitration, the reference to the arbitral institution in those sub-sections shall be construed as a reference to the arbitral institution designated under sub-section (3A).

(13) An application made under this section for appointment of an arbitrator or arbitrators shall be disposed of by the arbitral institution within a period of thirty days from the date of service of notice on the opposite party.

(14) The arbitral institution shall determine the fees of the arbitral tribunal and the manner of its payment to the arbitral tribunal subject to the rates specified in the Fourth Schedule.

Explanation--For the removal of doubts, it is hereby clarified that this sub-section shall not apply to international

commercial arbitration and in arbitrations (other than international commercial arbitration) where parties have agreed for determination of fees as per the rules of an arbitral institution.

30. Settlement.--(1) It is not incompatible with an arbitration agreement for an arbitral tribunal to encourage settlement of the dispute and, with the agreement of the parties, the arbitral tribunal may use mediation, conciliation or other procedures at any time during the arbitral proceedings to encourage settlement.

(2) If, during arbitral proceedings, the parties settle the dispute, the arbitral tribunal shall terminate the proceedings and, if requested by the parties and not objected to by the arbitral tribunal, record the settlement in the form of an arbitral award on agreed terms.

(3) An arbitral award on agreed terms shall be made in accordance with section 31 and shall state that it is an arbitral award.

(4) An arbitral award on agreed terms shall have the same status and effect as any other arbitral award on the substance of the dispute."

8. In the instant case, although the agreement entered into between the petitioner and the State authorities for milling of the paddy procured under the Paddy Purchase Policy of the State Government, has not been placed on record, the petitioner claims that Clause 12 of the aforesaid agreement contains an arbitration clause whereunder every dispute, difference of question pertaining to the agreement or the subject matter thereof shall be referred to the arbitration of certain designated authorities.

9. In the aforesaid circumstances, where an appointment procedure has been agreed upon by the parties, the appointment of arbitrators is to be made as provided under sub-section (6) of Section 11 of the Act, 1996.

10. Sub-section (6) of Section 11 of the Act, 1996 provides that where, under an appointment procedure agreed upon by the parties, (i) a party fails to act as required under that procedure; or (ii) the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or (iii) a person, including an institution, fails to perform any function entrusted to him or it under that procedure, the appointment of arbitrator (s) is to be made upon an application made by the party concerned.

11. In the facts of the present case, in the event the CMR agreement, contains an arbitration clause, as is sought to be contended by the petitioner, it is open to the petitioner to invoke the arbitration clause.

12. As regards the claim petition stated to have been filed under Section 30 of the Act, 1996 for settlement of the dispute, along with an application for stay, we may take note of the fact that the provision with regard to settlement of the dispute, under Section 30 of the Act, 1996, is to be availed during the pendency of the arbitral proceedings whereunder it is provided that if during arbitral proceedings the parties settle the dispute, the arbitral tribunal shall terminate the proceedings, and record the settlement in the form of an arbitral award on agreed terms.

13. The object and purpose of Section 30 of the Act, 1996, is to encourage settlement of the dispute by the arbitral tribunal with use of mediation, conciliation or other procedures, during the pendency of the arbitral proceedings before the arbitral tribunal.

14. In the present case, the dispute having not yet been referred for arbitration to the arbitral tribunal and no arbitral proceedings being pending the question of settlement of the dispute under Section 30 of the Act, 1996, and making an arbitral award in terms thereof would not arise at the present stage.

15. Learned counsel for the petitioner at this stage makes a prayer that he may be permitted to invoke the arbitration clause as contained in the CMR agreement for appointment of an arbitrator, by moving an appropriate application before the authority concerned, and in the event of failure to act as required as per the procedure provided under the arbitration clause he may invoke the provisions under sub-section (6) of Section 11 of the Act, 1996.

16. In this regard, we may observe that in the event, the agreement entered into by the petitioner with the State authorities for milling of the paddy procured by the State agencies, contains an arbitration clause, as asserted by the petitioner, it would be open to the petitioner to make an appropriate application to the authority concerned for referring the dispute for arbitration as per terms of the agreement.

17. With the aforesaid observations, the writ petition stands disposed of.

18. It is made clear that we have not expressed any opinion on the merits of the claim sought to be set up by the petitioner.

(2021)02ILR A302

ORIGINAL JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 20.01.2021

BEFORE

THE HON'BLE PANKAJ NAQVI, J.

THE HON'BLE PIYUSH AGRAWAL, J.

Writ C No. 21540 of 2020

Shri Sushil Kumar Nagrath ...Petitioner
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Petitioner:
Sri Rohan Gupta

Counsel for the Respondents:
C.S.C., Sri M.C. Chaturvedi, Sri Shivam Yadav, Sri Kaushalendra Nath Singh

A. U.P. Industrial Area Development Act (6 of 1976), S.3, S.6, S.6A, S.7 - Lease deed - Levy of transfer charges - Issue - whether NOIDA is empowered to levy transfer charges on conveyance executed by its lessees / sub-lessees? - Petitioner challenged the levy on the ground that it has no statutory sanction / flavour - *Held* - Levy of transfer charge is not tax but fee which authority is empowered to collect under terms of lease deed - Transfer charge may not be having statutory flavour in its traditional sense as urged by petitioner but once NOIDA instrumentality of State in exercise of its supervisory power under S. 7, stipulates condition of payment of transfer charges to be paid to NOIDA, lessor on every subsequent transactions and makes said stipulation binding on subsequent sub-lessees, it becomes contractual liability for all sub-lessees to comply with same - No interference warranted. (Para 19)

B. Tax & Fee - Difference - tax and fee are compulsory mode of exaction - but in case of tax there may not be any liability to render any service / amenity while fee presupposes delivery of service / amenity, thus there is an element of quid pro quo (Para 10)

Lease deed executed by NOIDA (lessor) in favour of Army Welfare Housing Organization (lessee) - Petitioner, sub-lessee intended to transfer property in favour of third person - applied before NOIDA seeking permission -

authority granted permission but subject to payment of 5 % of the circle rate as transfer charge – No illegality.

Writ Petition dismissed. (E-4)

List of Cases cited: -

1. Ultratech Cement Ltd. Vs St. of Mah. & anr. (2011) 13 SCC 497

2. Tata Iron & Steel Co. Ltd. & anr. Vs St. of Bih. & anr. (2018) 12 SCC 107

3. NOIDA Vs Army Welfare Housing Org. & ors. (2010) 9 SCC 354

(Delivered by Hon'ble Pankaj Naqvi, J.
&
Hon'ble Piyush Agrawal, J.)

Heard Sri Rohan Gupta, learned counsel for the petitioner, Sri M.C. Chaturvedi, the learned Senior Counsel assisted by Sri Shivam Yadav for respondent no.2 and the learned standing counsel for the State.

The moot issue involved in this petition is as to whether NOIDA is empowered to levy transfer charges on conveyance executed by its lessees / sub-lessees.

1. Learned counsel for the petitioner has challenged the levy principally on the ground that it has no statutory flavour as also the lease deed dated 29.1.1990 contains no such power or authority to levy transfer charges in respect of subsequent conveyances. He places reliance on the decisions of the Apex Court in **Ultratech Cement Ltd. v. State of Maharashtra and Another, (2011) 13 SCC 497** and **Tata Iron and Steel Company Limited and another vs. State of Bihar and another, (2018) 12 SCC 107.**

2. The learned Senior Counsel for the respondent - authority opposed the submission on the ground that levy of transfer charge is not a tax but a fee which the authority is empowered to collect under the terms of the lease deed dated 29.1.1990.

3. A lease deed dated 29.1.1990 was executed by NOIDA (lessor), an authority constituted under Section 3 of the U.P. Industrial Area Development Act, 1976 in favour of the Army Welfare Housing Organization (AWHO- the lessee), in respect of the plot of land.

4. The petitioner, a sub-lessee intended to transfer the property in favour of one Rajiv Kumar Singh under an agreement to sell dated 4.9.2013 applied before NOIDA seeking permission, the authority under orders dated 21.10.2019 and 9.1.2020 granted requisite permission but subject to payment of 5 % of the circle rate as transfer charge.

5. We by our order dated 11.1.2021 called upon learned counsel for the authority to place on record a copy of the lease executed by the NOIDA in favour of AWHO (original lessee) and in compliance thereto a xerox of the same (lease deed dated 29.1.1990) is placed on record, after showing / serving a copy thereof to learned counsel for the petitioner who did not challenge the correctness thereof.

6. The relevant clause which binds the lessee (AWHO) and its sub-lessees under the above deed are sub-clause (c)

and (d) of Clause (I) which are extracted hereunder:

(c) That the lessee shall in no case assign relinquish (except in favour of the lessor), let, transfer, or part with possession of the demised premises to any one except, by way of conveyance deed as provided in this lease, to the cooperative society of the registrants or directly to the individual registrants of the lessee. Any subsequent transfer by the allottees with prior permission in writing of the AWHO or cooperative society (as the case may be) and NOIDA, and will be subject to condition of payment of transfer charges to the lessor as levied from time to time but subject to a maximum of 25 % of the unearned increase in the value of the property and these will not be more than the transfer charges being recovered by the lessor (NOIDA) from its direct allottes.

(d) This lease deed will form a part of sub-lease executed between the AWHO and cooperative society or the individual allottees (as the case may be) all conditions contained herein are binding on the sub-lessor / registrant allottee also.

7. Similarly, the lessee (AWHO) under sub-clause (b) of Clause -3 agreed to the following covenants:

(b) The sub-lessee shall be liable to pay all rates, local taxes, charges and assessment by whatever name called for every description in respect of plot of land or building constructed thereon assessed or imposed from time to time by the lessor and / or any authority / Government.

8. A perusal of sub-clause (c) of Clause 1 as aforesaid would manifest that an allottee of AWHO i.e. a sub-lessee had to obtain prior permission in writing of the lessee or a cooperative society as the case may be, and that of NOIDA, the lessor before any transfer is effected by the allottee/sub-lessee. This transfer is subject to a condition of payment of transfer charges to the lessor i.e. the NOIDA as levied from time to time but subject to a ceiling of 25 % of the unearned increase in the value of the property which will not be more than the transfer charges to be recovered by the NOIDA from its direct allottees. Sub-clause (d) of Clause-1 provides that the lease deed dated 29.1.1990 will form a part of subsequent sub-lessee and all conditions contained in the lease deed dated 29.1.1990 shall be binding on the sub-lessee and the registrant allottee.

9. Sub-clause (b) of clause -3 further binds the sub-lessee with a liability to pay all rates, local taxes, charges and assessments by whatever nomenclature in respect of the property assessed or imposed from time to time.

10. It is well settled that tax and fee are compulsory mode of exaction and to that extent there is no generic difference between the two but in the case of former, there may not be any liability to render any service / amenity while latter presupposes delivery of service / amenity, thus there is an element of quid pro quo.

11. The U.P. Industrial Area Development Act, 1976 has been enacted to provide for the constitution of authority for the development of certain areas in the State of Uttar Pradesh into industrial and urban township and for matters connected therewith. Once an authority is established, it is expected to provide amenities such as road, water supply, street lighting, power supply, sewerage, drainage connection,

disposal of industrial waste, town refuse and other community services.

11. Section - 6 of the Act provides functions of the authority which essentially is a planned development of industrial development area. To achieve the above purpose, the authority is empowered to acquire land, prepare plan for development, provide amenities and in particular to allocate and transfer by way of sale and lease or otherwise plots of land for industrial / residential purposes.

12. Section - 7 of the Act in so far is relevant for the present case is extracted hereunder:-

7. Power to the Authority in respect of transfer of land. - The Authority may sell, lease of otherwise transfer whether by auction, allotment or otherwise any land or building belonging to the Authority in the industrial development area, on such terms and conditions as it may, subject to any rules that may be made under this Act, think fit to impose.

13. A perusal of the aforesaid manifests that the authority while executing a conveyance can put the lessee to such terms and condition as it may, subject to any rules, that may be made under this Act, think fit to impose.

14. We, after carefully perusing Section -7 of the Act, are of the considered view that once terms and conditions, have been incorporated in the conveyance, the said incorporation cannot be faulted on the ground that no rules have been framed under the Act.

15. Learned counsel for the petitioner has not challenged the levy on the premise that no amenity / service is being rendered by the authority, rather the challenge is only on the ground that the levy has no statutory sanction.

16. To answer the challenge, we will have to revert to the original lease dated 29.1.1990 which contained an express covenant that on every subsequent transfer, transfer charges would be made at a certain rate with a ceiling limit of 25 % of the market value vide sub-clause (c) of Clause-I. There is an additional covenant in sub-clause (d) of Clause-I that all conditions which of course would include transfer charges shall be deemed to have been contained in the subsequent conveyances so that NOIDA gets an unfettered right to collect the said amount on every subsequent transfer from new sub-lessees to discharge its obligation for rendering services and providing amenities in the area. A covenant attached to the land runs with the land. The petitioner fully cognizant of the aforesaid covenant voluntarily obtained sub-lease cannot now take a somersault. Levy is under a contract executed by an instrumentality of State.

17. Learned counsel for the petitioner on the strength of the authorities cited above, submitted that no fee could be collected without authority of law. We do not dispute the said proposition but the same would have no application in the present case as the said levy is under a deed executed by NOIDA i.e. a state instrumentality with an express covenant which is to run with the land which is also fortified by the decision of the Apex Court in **NOIDA vs. Army Welfare Housing Organization and others, (2010) 9 SCC 354** wherein it held as under:

29. We are, therefore, of the opinion that in this background the impugned notices postulating the execution of tripartite deeds flows not only from the clauses of the lease deed executed between the NOIDA and AWHO but also from the supervisory authority which is placed on NOIDA by virtue of the provisions of Section 7 of the 1976 Act. The observation of the High Court that the structures built on funds provided by the sub-lessees is to our mind of no consequence. Even assuming that such was the position, this was an arrangement inter-se AWHO and its members and would not detract from the obligations placed on AWHO and the sub- lessees to execute tripartite deeds.

18. A perusal of the aforesaid judgment would indicate that the Apex Court held that conditions contained in the original deed will be binding on the sub-lessee.

19. We are, thus, of the considered view that even though transfer charge may not be having a statutory flavour in its traditional sense as urged by learned counsel for the petitioner but once NOIDA an instrumentality of State in exercise of its supervisory power under Section 7 of the Act, stipulates a condition of payment of transfer charges to be paid to NOIDA, lessor on every subsequent transactions and makes the said stipulation binding on subsequent sub-lessees, it becomes a contractual liability for all sub-lessees to comply with the same.

No other plea is urged.

The writ petition lacks merit and is dismissed.

(2021)02ILR A306
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 20.01.2021

BEFORE

THE HON'BLE PANKAJ NAQVI, J.
THE HON'BLE PIYUSH AGRAWAL, J.

Writ C No. 22342 of 2020

M/s Mahalakshmi Industries ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Kaushalendra Nath Singh

Counsel for the Respondents:
C.S.C., Sri Ashish Agrawal, Sri Sunil Kumar Misra, Sri Ashok Singh

A. Central Excise Act (1 of 1944) - Excise dues - Liability of auction purchaser of unit to pay excise dues of the erstwhile owner - *Held* - dues of central excise are not a charge on the plant & machinery or land & building - dues of central excise become payable on the manufacturing of excisable items - these statutory dues are in respect of those products and not the plant & machinery which were used for manufacturing - same cannot be recovered from the auction purchaser. (Para 9)

Bank invited bids for auction of Industrial Plot - petitioner a successful bidder deposited the earnest & the remaining amount - Bank issued sale certificate & the deed clearly stated that the industrial plot free from all encumbrances - petitioner applied for transfer of the plot - however CGST requested UPSID not to transfer plot as some outstanding dues were pending against the erstwhile owner which were liable to be recovered from the plot - Held - Court directed the UPSIDC to execute the transfer deed of the industrial plot in favour of the petitioner (Para 3,5,11)

B. Constitution of India , Art.265 - Tax - Taxes not to be imposed save by authority of law - a tax can only be levied by statutory provision - whenever there is compulsory exaction of money, whether as a tax or a fee, there should be a specific statutory provision for the same - no amount can be withheld without any authority of law - a charge cannot be imposed without legislative sanction - Held - UPSIDC directed to refund the amount deposited by the petitioner under protest within a month. (Para 14)

Writ Petition allowed. (E-4)

List of Cases cited: -

1. Rana Girders Limited Vs U.O.I. & ors. AIR (2013) 10 SCC 746)

2. Firm Gulam Husain Hazi Yakub & Sons Vs St. of Raj. 1963 (2) SCR 255

3. Cooperative Sugars (Chittur) Ltd. Vs St. of T.N. [1993 (Supp.) 4 SCC 42

4. District Mining Officer Vs T.I.S.C.O. (2001) 7 SCC 358

5. Ahmedabad Urban Dev. Auth. Vs Sharadkumar Jayantikumar JT 1992 (3) SC 417

(Delivered by Hon'ble Pankaj Naqvi, J.
&
Hon'ble Piyush Agrawal, J.)

1. Heard Shri Kaushalendra Nath Singh for the petitioner, Shri Ashish Agrawal for respondent nos. 2 & 3, learned Standing Counsel for respondent no. 1 and Shri Ashok Singh, learned counsel for respondent no. 4.

2. This writ petition has been filed for the following, amongst other, reliefs:-

"I. Issue a writ of mandamus directing the Respondents to execute the Transfer Deed/Transfer Memorandum of Industrial Plot No. 13A/17 U.P.S.I.D.C, Loni Road, Site - II, Mohan Nagar, Sahibabad, Ghaziabad, U.P., in favour of the petitioner.

II. Issue a writ of mandamus directing the respondents to refund the amount paid by the petitioner to the Assistant Commissioner, C.G.S.T. Division - IV, Ghaziabad."

3. Learned counsel for the petitioner submits that pursuant to an advertisement, Central Bank of India invited bids for auction of Industrial Plot No. 13A/17 U.P.S.I.D.C, Loni Road, Site - II, Mohan Nagar, Sahibabad, Ghaziabad. The petitioner a successful bidder deposited the earnest and the remaining amount within the specified time. Pursuant thereto, the Bank issued sale certificate and the deed clearly stated that the said industrial plot is free from all encumbrances. On 07.09.2018, the Bank handed over the original lease deed in favour of the erstwhile owner, letter of the UPSIDC and the keys of the auctioned plot in favour of the petitioner. Thereafter, the petitioner applied for transfer of the plot in question on 11.10.2018 with all the requisite documents before respondent no. 3, but in spite of completion of all the formalities, respondent nos. 2 & 3, without any rhyme or reason, are not transferring the plot in question in favour of the petitioner. Meanwhile, the respondent - UPSIDC wrote a letter to the Assistant Commissioner, Central GST, Ghaziabad on 14.10.2019 to inquire as to whether any government dues/outstanding are pending from the erstwhile owner of the plot in question, i.e., M/s Sarthak Aqua Private Limited.

4. Learned counsel for the petitioner submits that to buy peace and to get the matter of transfer expedited, it has

deposited a sum of Rs. 33,59,276/-, under protest, though the same was not liable to be paid by it, yet the transfer deed is not being executed. Hence, the action of respondent no. 2 in not transferring the plot in question in favour of the petitioner since October, 2018 is arbitrary and unsustainable.

5. Shri Ashok Singh, learned counsel for CGST has brought on record the instructions dated 06.01.2021, which are taken on record. On the strength of the instructions, Shri Singh submits that some outstanding dues are pending against the erstwhile owner, i.e., M/s Sarthak Aqua Private Limited, which are liable to be recovered from the plot in question and therefore, the letter was sent requesting respondent no. 3 not to transfer the plot in question in favour of the petitioner.

6. Shri Ashish Agrawal, learned counsel for respondent - UPSIDC submits that the Corporation has not transferred the plot in question only on the request of respondent no. 4; otherwise, petitioner has completed all the formalities.

7. The Court has perused the materials available on record.

8. It is admitted case of the parties that the petitioner has purchased the plot in question from the Bank in auction proceedings and the petitioner deposited the earnest and the remaining amount within the specified time after being declared as a successful bidder. It is also admitted between the parties that the Bank had issued sale certificate and sale deed has also been executed clearly stating therein that the said industrial plot is free from all encumbrances. On perusal of the instructions of respondent no. 4, it also reveals that the plot in question was never tendered/attached/seized with regard to any outstanding dues as claimed by respondent no. 4.

9. The Hon'ble Supreme Court in the case of ***Rana Girders Limited Vs. Union of India & Others*** (reported in (2013) 10 SCC 746) has decided a similar issue holding that the dues of central excise are not a charge on the plant & machinery or land & building. The dues of central excise become payable on the manufacturing of excisable items by the erstwhile owner and therefore, these statutory dues are in respect of those products and not the plant & machinery which were used for manufacturing and the same cannot be recovered from the auction purchaser. The relevant paragraphs of the said judgement are quoted below:-

"6. The appellant turned out to be the successful bidder whose bid in the sum of Rs.43 Lakh for land and building being highest was accepted by the UPFC. Sale Deed dated 8th March 2002 was executed. In this Sale Deed it was specifically mentioned that the property is free from all encumbrances by stating that "the vendor herein confirms that the property purchased through the sale deed in favour of vendee is free from all charges and encumbrances....." The appellant had paid a sum of Rs.21.50 Lakh at the time of registration of the Sale Deed and balance amount of Rs.21.50 lakh was to be paid by the appellant to the UPFC which was payable together with interest at the rate of 16% P.A. in instalments as specified in the Schedule to the said Sale Deed. There is no dispute that this balance consideration has been paid by the appellant to the UPFC. Another condition in the Sale Deed, which was also mentioned in the public notice was that:

"All the statutory liabilities arising out of said properties shall be borne by the vendee and vendor shall not be held responsible."

7. The appellant also purchased plant and machinery in the said auction for a total consideration of Rs.1 Crore 93 Lakh for which Agreement dated 15th March 2002 was executed by the parties. This Agreement also contained both the clauses, similar to the clauses in the Sale Deed, namely, the said plant and machinery was free from all encumbrances and that all the statutory liabilities arising out of the plant and machinery of the industrial unit were to be borne by the purchaser i.e. the appellant.

10. Since the appellant had purchased the land and building as well as plant and machinery of the borrower in the auction conducted by the UPFC, the respondent No.2 issued notice dated 25.8.2004 to the appellant stating that the amount in question had now become the liability of the appellant and demanded the aforesaid payment. It was mentioned in the notice that this amount was payable by the appellant in view of the law laid down by this Court in the case of M/s. Macson Marbles Pvt. Ltd. Vs. Union of India2003 (158) ELT 424 SC.

14. Before us, it was strenuously argued by the learned counsel for the Revenue that since the excise duty is a statutory liability such a duty has to be paid by the person who purchased the property of borrower in default even when sold in auction under section 29 of the State Financial Corporation Act. He further argued that in any case the High Court was right in holding that by virtue of the stipulations in the Sale Deed as well as in the Agreement of Sale, so far as the appellant is concerned, it was liable to discharge the excise liability. In the circumstances, two questions arise for consideration namely (1) on the interpretation of stipulation contained in the Sale Deed of the land and building and Agreement of Sale of plant and machinery, whether the appellant had agreed to discharge the dues payable to the excise department by the borrower. (2) Whether such a liability arises in law (de-hors the stipulation in Sale Deed /Agreement of Sale) having regard to the legal provisions contained in the Excise Act and State Financial Corporation Act?

20. Coming to the liability of the successor in interest, the Court clarified the legal position enunciated in M/s. Macson by observing that such a liability can be fastened on that person who had purchased the entire unit as an ongoing concern and not a person who had purchased land and building or the machinery of the erstwhile concern. This distinction is brought out and explained in paragraph 24 and 25 and it would be useful for us to reproduce herein below:

"Reliance has also been placed by Ms.Rao on Macson Marbles Pvt.Ltd. (supra) wherein the dues under Central Excise Act was held to be recoverable from an auction purchaser, stating:

We are not impressed with the argument that the State Act is a special enactment and the same would prevail over the Central Excise Act. Each of them is a special enactment and unless in the operation of the same any conflict arises this aspect need not be examined. In this case, no such conflict arises between the corporation and the Excise Department. Hence it is unnecessary to examine this aspect of the matter.

The Department having initiated the proceedings under Section 11A of this Act adjudicated liability of respondent No.4 and held that respondent No.4 is also liable

to pay penalty in a sum of Rs.3 lakhs while the Excise dues liable would be in the order of a lakh or so. It is difficult to conceive that the appellant had any opportunity to participate in the adjudication proceedings and contend against the levy of the penalty. Therefore, in the facts and circumstances of this case, we think it appropriate to direct that the said amount, if already paid, shall be refunded within a period of three months. In other respects, the order made by the High Court shall remain undisputed. The appeal is disposed of accordingly." The decision, therefore, was rendered in the facts of that case. The issue with which we are directly concerned did not arise for consideration therein. The Court also did not notice the binding precedent of Dena Bank as also other decisions referred to hereinbefore."

21. A harmonious reading of the judgments in Macson and SICOM would tend us to conclude that it is only in those cases where the buyer had purchased the entire unit i.e. the entire business itself, that he would be responsible to discharge the liability of Central Excise as well. Otherwise, the subsequent purchaser cannot be fastened with the liability relating to the dues of the Government unless there is a specific provision in the Statute, claiming "first charge for the purchaser". As far as Central Excise Act is concerned, there was no such specific provision as noticed in SICOM as well. Proviso to Section 11 is now added by way of amendment in the Act only w.e.f. 10.9.2004. Therefore, we are eschewing our discussion regarding this proviso as that is not applicable in so far as present case is concerned. Accordingly, we thus, hold that in so far as legal position is concerned, UPFC being a secured creditor had priority over the excise dues. We further hold that since the appellant had not purchased the entire unit as a business, as per the statutory framework he was not liable for discharging the dues of the Excise Department.

22. With this, we now revert to the first issue, namely interpretation of the clause in the Sale Deed for land and building and similar clause in Agreement of Sale for machinery on the basis of which appellant is held to be liable to pay the dues. These clauses have already been incorporated in the earlier portion of our judgment.

23. We may notice that in the first instance it was mentioned not only in the public notice but there is a specific clause inserted in the Sale Deed/Agreement as well, to the effect that the properties in question are being sold free from all encumbrances. At the same time, there is also a stipulation that "all these statutory liabilities arising out of the land shall be borne by purchaser in the sale deed" and "all these statutory liabilities arising out of the said properties shall be borne by the vendee and vendor shall not be held responsible in the Agreement of Sale." As per the High Court, these statutory liabilities would include excise dues. We find that the High Court has missed the true intent and purport of this clause. The expressions in the Sale Deed as well as in the Agreement for purchase of plant and machinery talks of statutory liabilities "arising out of the land" or statutory liabilities "arising out of the said properties" (i.e. the machinery). Thus, it is only that statutory liability which arises out of the land and building or out of plant and machinery which is to be discharged by the purchaser. Excise dues are not the statutory liabilities which arise out of the land and building or the plant and machinery. Statutory liabilities arising out of the land and building could be in the form of the

property tax or other types of cess relating to property etc. Likewise, statutory liability arising out of the plant and machinery could be the sales tax etc. payable on the said machinery. As far as dues of the Central Excise are concerned, they were not related to the said plant and machinery or the land and building and thus did not arise out of those properties. Dues of the Excise Department became payable on the manufacturing of excisable items by the erstwhile owner, therefore, these statutory dues are in respect of those items produced and not the plant and machinery which was used for the purposes of manufacture. This fine distinction is not taken note at all by the High Court."

10. In view of the judgement of the Hon'ble Supreme Court in the case of ***Rana Girders Limited*** (supra), the present issue is concluded in favour of the petitioner.

11. The respondent - UPSIDC is directed to execute the transfer deed/transfer memo of the industrial plot in question in favour of the petitioner within a month from the date of production of a copy of this order.

12. Further, with regard to refund of the amount deposited by the petitioner under protest, the learned counsel for the petitioner submits that the amount was deposited under protest in order to get the matter expedited and there was no liability of the petitioner to pay the same. Learned counsel for the petitioner further submits that under Article 265 of the Constitution of India, any amount cannot be charged/withheld without any authority of law.

13. Shri Ashok Singh, learned counsel for respondent no. 4 could not justify retaining the amount deposited by the petitioner under protest to the tune of Rs. 33,59,276/-.

14. The Hon'ble Supreme Court, on various occasions, has held that no amount can be withheld without any authority of law. In ***Firm Gulam Husain Hazi Yakub & Sons Vs. State of Rajasthan*** [1963 (2) SCR 255], it was held that a charge cannot be imposed without legislative sanction. In **Cooperative Sugars (Chittur) Ltd. Vs. State of Tamilnadu** [1993 (Supp.) 4 SCC 42 (vide para 8)] and ***District Mining Officer Vs. T.I.S.C.O.*** [(2001) 7 SCC 358, (vide para 19)], it was held that a tax can only be levied by statutory provision. ***In Ahmedabad Urban Development Authority Vs. Sharadkumar Jayantikumar*** [JT 1992 (3) SC 417], it was held that whenever there is compulsory exaction of money, whether as a tax or a fee, there should be a specific statutory provision for the same.

15. In view of the above, respondent no. 4 is directed to refund the aforesaid amount deposited by the petitioner under protest within a month from the date of production of a copy of this order, failing which the authority concerned shall be liable to pay interest @ 8% per annum till the date of actual payment.

16. In the result, the writ petition succeeds and is allowed.

17. No order as to costs.

(2021)02ILR A312
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.12.2020

BEFORE

THE HON'BLE SURYA PRAKASH KESARWANI, J.
THE HON'BLE DR. YOGENDRA KUMAR SRIVASTAVA, J.

Writ C No. 22409 of 2020

M/s Prince Filing Station ...Petitioner
Versus
Union Gov. of India & Ors. ...Respondents

Counsel for the Petitioner:
Sri Awadhesh Kumar Singh, Sri Abhai Kumar Singh

Counsel for the Respondents:
A.S.G.I., Anand Tiwari, C.S.C., Sri Vikas Budhwar

Constitution of India Art. 19(1)(g), 226- Competitor in business-Locus standi- where the claim of the petitioner is solely to prevent a rival from exercising a right to carry on business, he has no locus standi to maintain a writ petition - as the same would be aimed at eliminating healthy competition in business - a person cannot claim that no other person shall carry on business or trade so as to adversely affect his trade or business (Para 8,9)

Petitioner having retail outlet dealership, challenged letter of intent (LOI) whereunder it was proposed to offer retail outlet dealership to respondent - *Held* - petitioner being rival business man cannot be said to be a person aggrieved & has no locus standi to maintain writ petition - writ petition dismissed.

Writ Petition dismissed. (E-4)

List of Cases cited: -

1. Rinki Gupta Vs St. of U.P. & ors. WritC No. 14091 of 2020, 05.11.2020

2. Nagar Rice & Flour Mills Vs N.T. Gowda (1970) 1 SCC 575

3. Jas Bhai Moti Bhai Desai Vs Roshan Kumar (1976) 1 SCC 671

4. Mithilesh Garg & ors. Vs U.O.I. & ors. (1992) 1 SCC 168

(Delivered by Hon'ble Surya Praksh Kesarwani, J.
&
Hon'ble Dr. Yogendra Kumar Srivastava, J.)

1. Heard learned counsel for the petitioner, learned Standing Counsel for the respondent no. 4 and Sri Yash Padia holding brief of Sri Anand Tiwari, learned counsel for the respondent nos. 1, 2 and 3.

2. The petitioner having a retail outlet dealership of MS/HSD, awarded by the Bharat Petroleum Corporation Limited, has filed the present writ petition principally seeking to raise a grievance with regard to issuance of a letter of intent (LOI) dated 15.06.2019 and Addendum to LOI dated 26.8.2020 whereunder it is proposed to offer to the respondent no. 6 a retail outlet dealership of Bharat Petroleum Corporation Ltd. pursuant to an advertisement dated 25.11.2018, issued for the purpose.

3. In paragraph eight of the writ petition, the petitioner has stated as under :-

"8. That the petitioner has also been awarded outlet dealership of MS/HSD by Bharat Petroleum Limited under CC category and the proposed outlet is only 800 meter away from the side of the petitioner's outlet and in this way, sale of Bharat Petroleum Limited shall be badly effected and petitioner shall be sufferer on

account of the aforesaid outlet and as such the petitioner is an aggrieved person."

4. Learned counsel appearing for the respondents have objected to the maintainability of the writ petition on the ground that the petitioner being a rival business man, has no locus standi to maintain the writ petition as he cannot be said to be a person aggrieved, and in this regard reliance is placed on a recent judgment of this Court in **Rinki Gupta Vs. State of U.P. and others1.**

5. The question as to whether a competitor in business can seek to prevent a rival party from exercising its right to carry on business came up for consideration in **Nagar Rice and Flour Mills Vs. N.T. Gowda2.** It was a case of a rice mill seeking to oppose the setting up of another rice mill in its vicinity on the ground that its business was likely to be adversely affected, and in that context it was held that a competitor in business cannot seek to prevent a rival from exercising its right to carry on business. The observations made in the judgment in this regard are as follows :-

"8.The Parliament has by the Rice Milling Industry (Regulation) Act, 1958, prescribed limitations that an existing rice mill shall carry on business only after obtaining a licence and if the rice mill is to be shifted from its existing location, previous permission of the Central Government shall be obtained. Permission for shifting their rice mill was obtained by the appellants from the Director of Food and Civil Supplies. The appellants had not started rice milling operations before the sanction of the Director of Food and Civil Supplies was obtained. Even if it be assumed that the previous sanction has to be obtained from the authorities before the machinery is moved from its existing site, we fail to appreciate what grievance the respondents may raise against the grant of permission by the authority permitting the installation of machinery on a new site. The right to carry on business being a fundamental right under Article 19(1)(g) of the Constitution, its exercise is subject only to the restrictions imposed by law in the interests of the general public under Article 19(6)(i).

9. Section 8(3)(c) is merely regulatory, if it is not complied with the appellants may probably be exposed to a penalty, but a competitor in the business cannot seek to prevent the appellants from exercising their right to carry on business, because of the default, nor can the rice mill of the appellants be regarded as a new rice mill. Competition in the trade or business may be subject to such restrictions as are permissible and are imposed by the State by a law enacted in the interests of the general public under Article 19(6) but a person cannot claim independently of such restriction that another person shall not carry on business or trade so as to affect his trade or business adversely. The appellants complied with the statutory requirements for carrying on rice milling operations in the building on the new site. Even assuming that no previous permission was obtained, the respondents would have no locus standi for challenging the grant of the permission, because no right vested in the respondents was infringed."

6. The requirement of a person being "an aggrieved person" in order to maintain a writ of certiorari fell for consideration in **Jas Bhai Moti Bhai Desai Vs. Roshan Kumar3,** and after discussing various authorities, it was held that in order to have the locus standi to invoke certiorari

jurisdiction, the petitioner should be "an aggrieved person", and if he does not fulfil that character, the Court will, in its discretion, deny him this extraordinary remedy. The stand taken by the appellant therein that the setting up of a rival cinema house in the town would adversely affect his commercial interest, causing pecuniary harm and loss of business from competition was held to be not affecting his legally protected interest so as to give him justiciable claim and it was held that issuance of a writ of certiorari at his instance would eliminate healthy competition in business.

7. A similar view was taken in **Mithilesh Garg and others Vs. Union of India and others4,** wherein a challenge to grant of permit under the Motor Vehicles Act, 1988 by existing permit holders, was repelled on the ground that the right under Article 19 (1) (g) does not extend to shutting out competition and that more operators would mean a healthy competition and an efficient transport system.

8. Having regard to the foregoing discussion, we may reiterate the position that in normal course it would not be open to a competitor in business to seek to prevent a rival from exercising a right to carry on business. Competition in a trade or business may be subject to restrictions as are permissible and as may be imposed by a law enacted in the interests of general public. However, independent of any such restriction, a person cannot claim that no other person shall carry on business or trade so as to adversely affect his trade or business.

9. In order to have the locus standi to invoke the extraordinary jurisdiction of this Court under Article 226 of the Constitution, the petitioner should be "an aggrieved person". We are of the view that where the claim of the petitioner is solely to prevent a rival from exercising a right to carry on business, he would not have the locus standi to maintain a writ petition as the same would essentially be aimed at eliminating healthy competition in business.

10. For the aforestated reasons, the writ petition is liable to be dismissed and it is accordingly dismissed.

(2021)02ILR A314
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.01.2021

BEFORE

THE HON'BLE PANKAJ NAQVI, J.
THE HON'BLE PIYUSH AGRAWAL, J.

Writ C No. 22742 of 2020

Jagdish Prasad Gupta ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Nitin Chandra Mishra, Sri Anoop Trivedi

Counsel for the Respondents:
C.S.C., Sri Islam Ahmad, Sri Vinod Kumar Sahu

U. P. Municipalities Act (2 of 1916) S. 48 (2) - Proceedings for removal of Chairman - Cessation of financial and administrative powers - It is not necessary to permit Chairman concerned *to participate before the inquiry committee to contest the allegation* - person concerned must be confronted with show cause containing charges, so as to enable him to respond - It is only after receipt of the reply that State Government can pass an order, on

the available materials, as to whether facts of the case warrant urgent invocation of ceasing of administrative/financial power of the Chairman- State Government is to only *prima facie* record its satisfaction as to whether administrative/financial power is to be ceased or not – *Not required that person concerned be permitted.* (Para 7, 8)

Writ Petition dismissed. (E-4)

List of Cases cited: -

1. Hafiz Ataullah Ansari Vs St. of U.P. & ors. 2011 (3) ADJ 502

(Delivered by Hon'ble Pankaj Naqvi, J.
&
Hon'ble Piyush Agrawal, J.)

1. Heard Shri Anoop Trivedi, learned Senior Advocate, assisted by Shri Nitin Chandra Mishra, for the petitioner, learned Standing Counsel for the State - respondents and Shri Vinod Kumar Sahu for respondent no. 4.

2. The petitioner was elected as Chairman, Nagar Palika Parishad, Banda (for short, 'the Parishad') on 01.12.2017. A complaint was made against the petitioner and Executive Officer of the Parishad, alleging irregularities and defalcation of accounts before the District Magistrate, Banda/respondent no. 3, who forwarded the same to the Commissioner of the Division/respondent no. 2. The Commissioner on 12.06.2019 constituted a three-member Committee to inquire into the allegations. The Committee comprised of Assistant Accounts Officer, Sub-Divisional Officer, Sadar and Joint Development Commissioner. The Committee submitted its report dated 06.08.2019 (first report) to the Commissioner. It appears that in the meanwhile, another complaint was preferred against the petitioner before the Commissioner, who took cognizance of the same and referred the same to a single member committee, comprising of Joint Development Commissioner, who was the Chairman of the earlier Committee. The Joint Development Commissioner submitted a report (second report) dated 21.10.2019 on 15 charges to the Commissioner and the latter forwarded the same to the State Government vide letter dated 23.10.2019. The State Government acting under section 48 of the Uttar Pradesh Municipalities Act, 1916 (for short, 'the Act') issued a show cause on 9 charges on 11.02.2020, served on the petitioner on 07.06.2020. The petitioner submitted his reply on 12.06.2020. The State Government under section 48(2) of the Act, after consideration of the reply, proceeded to cease the administrative/financial power of the petitioner on 29.10.2020 and a consequential order dated 30.10.2020 by the District Magistrate appointing Deputy Collector as administrator in the Parishad.

3. Learned Senior Counsel for the petitioner broadly raised three contentions:-

(i) The petitioner was not afforded any opportunity by both the Committees, depriving him of a valuable right to contest the allegations;

(ii) failure to furnish the first report dated 06.08.2019 to the State Government has occasioned prejudice to the petitioner; and

(iii) impugned order is based on non-application of mind as there is no consideration of the reply of the petitioner.

4. Learned Standing Counsel opposed the submission.

5. Section 48 of the Act reads as under:-

"48. Removal of President.

(1) ...

(2) Where the State Government has, at any time, reason to believe that,-

(a) there has been a failure on the part of the President in performing his duties; or

(b) the President has -

(i) incurred any of the disqualifications mentioned in Sections 12-D and 43-AA; or

(ii) within the meaning of Section 82 knowingly acquired or continued to have, directly or indirectly or by a partner, any share or interest, whether pecuniary or of any other nature, in any contract or employment with by or on behalf of the[Municipality]; or

(iii) knowingly acted as a President or as a member in a matter other than a matter referred to in clauses (a) to (g) of subsection (2) of Section 32, in which he has, directly or indirectly or by a partner, any share or interest whether pecuniary or of any other nature, or in which he was professionally interested on behalf of a client, principal or other person; or

(iv) being a legal practitioner acted or appeared in any suit or other proceeding on behalf of any person against the[Municipality]or against the State Government in respect of nazul land entrusted to the management of the[Municipality]or against the State Government in respect of nazul land entrusted to the management of the[Municipality], or acted or appeared for or on behalf of any person against whom a criminal proceeding has been instituted by or on behalf of the[Municipality]; or

(v) abandoned his ordinary place of residence in the municipal area concerned; or

(vi) been guilty of misconduct in the discharge of his duties; or

(vii) during the current or the last preceding term of the Municipality, acting as President or as Chairman of a Committee, or as member or in any other capacity whatsoever, whether before or after the commencement of the Uttar Pradesh Urban Local Self-Government Laws (Amendment) Act, 1976, so flagrantly abused his position, or so wilfully contravened any of the provisions of this Act or any rule, regulation or bye-law, or caused such loss of damage to fund or property of the[Municipality]as to render him unfit to continue to be President; or

(viii) been guilty of any other misconduct whether committed before or after the commencement of the Uttar Pradesh Urban Local Self-Government Laws (Amendment) Act, 1976 whether as President or as[* *], exercising the powers of President, or as[* * *], or as member; or*

(ix) caused loss or damage to any property of the municipality; or

(x) misappropriated or misused of Municipal found; or

(xi) acted against the interest of the municipality; or

(xii) contravened the provisions of this Act or the rules made thereunder; or

(xiii) created an obstacle in a meeting of the municipality in such manner that it becomes impossible for the municipality to conduct its business in the meeting or instigated someone to do so; or

(xiv) wilfully contravened any order or direction of the State Government given under this Act; or

(xv) misbehaved without any lawful justification with the officers or employees of the municipality; or

(xvi) disposed of any property belonging to the municipality at a price less than its market value; or

(xvii) encroached, or assisted or instigated any other person to encroach upon the land, building or any other immovable property of the municipality;

it may call upon him to show cause within the time to be specified in the notice why he should not be removed from office.

[Provided that where the State Government has reason to believe that the allegations do not appear to be groundless and the President isprima facieguilty on any of the grounds of this sub-section resulting in the issuance of the show-cause notice and proceedings under this sub-section he shall, from the date of issuance of the show-cause notice containing charges, cease to exercise, perform and discharge the financial and administrative powers, functions and duties of the President until he is exonerated of the charges mentioned in the show-cause notice issued to him under this sub-section and finalization of the proceedings under sub-section (2-A) and the said powers, functions and duties of the President during the period of such ceasing, shall be exercised, performed and discharged by the District Magistrate or an officer nominated by him not below the rank of Deputy Collector].

[* *]*

[* *]*

[(2B) An order passed by the State Government under sub-section (2-A) shall be final and shall not be questioned in any Court.

(3)[* *]*

(4) A President removed under sub-section (2-A) shall also cease to be a member of the] [Municipality]and in case of removal on any of the grounds mentioned in clause (a) or sub-clause (vi), (vii) or (viii) of clause (b) of subsection (2) shall not be eligible for re-election as President or member for a period of five years from the date of his removal."

6. The scope of above provision came to be examined by a Full Bench of this Court in ***Hafiz Ataullah Ansari Vs. State of U.P. & Others*** [2011 (3) ADJ 502]; wherein, it held as under:-

"133. Our conclusions are as follows:

(a)There can be proceeding for removal of president under section 48(2) of the Municipalities Act without ceasing his financial and administrative power under its proviso;

(b)The following conditions must be satisfied before cessation of financial and administrative powers of a president of a Municipality can take place:

(i) The explanation or point of view or the version of the affected president should be obtained regarding charges and should be considered before recording satisfaction and issuing notice/ order under proviso to section 48(2) of the Municipalities Act;

(ii) The State government should be objectively satisfied on the basis of relevant material that:

The allegations do not appear to be groundless; and The president is prima facie guilty of any of the grounds under section 48(2) of the Municipalities Act.

(iii) The show cause notice must contain the charges against the president;

(iv) The show cause notice should also indicate the material on which the objective satisfaction for reason to believe is based as well as the evidence by which charges against the president are to be

proved. Though in most of the cases they may be the same;

(c)It is not necessary to pass separate order under proviso to section 48(2) of the Municipalities Act. It could be included in the notice satisfying the other conditions under proviso to section 48(2). In fact it is not even necessary. It comes into operation by the Statute itself on issuance of a valid notice under proviso to section 48(2) of the Municipalities Act.

(d)In case a notice/ order ceasing financial and administrative powers is held to be invalid on any ground then this does not mean that the proceeding of removal are also invalid. They have to continue and taken to their logical end. The proceeding to remove can come to an end only if the charges on the their face or even taken to be proved do not make out a case for removal under section 48(2) of the Municipalities Act.

(e)It is not necessary to involve the president with the process of collecting material or give president the copies of the material before asking his explanation or point of view or version of the president to the charges.

(f)In the present case, the impugned notice/ order cannot be invalidated on the following ground that:

(i)The explanation or point of view of the petitioner to the charge was not obtained (as it was asked). However, we have not considered, whether his explanation was considered or not;

(ii)The letters of the SDM and DM were not given to the petitioner before obtaining petitioner's explanation or his point of view to the charges as this was unnecessary at that stage. In case these copies were not given along with show cause notice by the State government, it is open to the petitioner to ask for the same and then file an additional reply."

7. A perusal of the above legal position would indicate that a power is conferred upon the State Government to cease the administrative/financial power under section 48(2) of the Act and the requirement of law is that the person concerned must be confronted with show cause containing charges, so as to enable him to respond. It is only after receipt of the reply that State Government can pass an order ceasing the administrative/financial power of the Chairman. The object of this provision is only to enable the State Government to take a decision on the available materials as to whether facts of the case warrant urgent invocation of ceasing of administrative/financial power. At this stage, the State Government is to only prima facie record its satisfaction as to whether administrative/financial power is to be ceased or not.

8. In this view of the matter, the contention of the petitioner that he was not permitted to participate before the inquiry committee is of no avail.

9. We carefully examined the contents of both the reports, the show cause and the impugned order and find no merit in the second contention. The reason is that the first report alleged five charges and the second report alleged 15 charges. To recapitulate the report is by a three-member committee, of which Joint Development Commissioner was the Chairman and the second report is by a single-member, i.e., the same Joint Development Commissioner. The Joint Development Commissioner was fully aware of the contents of the first report as he was a Chairman and in the second report, there is a recital that same charges have already been inquired into the first report. Thus, non-supply of the first report cannot be said

to have occasioned any prejudice to the petitioner.

10. The Commissioner was not obliged to send the first report (three member) to the State Government for the simple reason that the Joint Development Commissioner was the Chairman in both the Committees and while sending the second report dated 21.10.2019, he was aware of contents of the first report. The matter can be viewed from another perspective also. The petitioner was put to show cause on certain charges to which he, admittedly, responded. If the State has chosen not to rely on the first report dated 06.08.2019, then how can the petitioner insist that show cause must be issued on the basis of first report?

11. We, in view of above factual/legal position, are not impressed with the plea that the impugned order suffers from the vice of non-application of mind.

12. Admittedly, inquiry proceedings are pending. The pending inquiry before the State Government is directed to be concluded as expeditiously as possible, preferably, within six weeks from the date a copy of this order is produced before it.

13. The writ petition is dismissed, subject to above observations.

(2021)02ILR A319
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.08.2019

BEFORE

THE HON'BLE SHASHI KANT GUPTA, J.
THE HON'BLE SAURABH SHYAM SHAMSHERY, J.

Writ C No. 26033 of 2019

Yamuna Prasad Yadav ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Babu Ram Yadav, Sri Shashi Nandan

Counsel for the Respondents:
C.S.C.

Criminal Law-Code of Criminal Procedure, 1973 (2 of 1974) - S. 154 - Registration of FIR - against government officer /public servant, after his retirement - *Held* - There is no bar in lodging the FIR against the public servant who has retired, in case cognizable offence is disclosed - Lodging of FIR cannot be refused on the ground that there is no relationship of Master and Servant - once public servant retires or superannuates or ceases to be in his office, then no sanction of the competent authority is required to prosecute him for the offences committed by him under the colour of his office. (Para 11, 12)

Writ Petition dismissed. (E-4)

List of Cases cited: -

1. Abhay Singh Chautala Vs CBI (2011) 7 SCC 141

2. Lalita Kumari Vs Govt. of U.P. & ors (2014) 2 SCC 1

(Delivered by Hon'ble Shashi Kant Gupta, J.
&
Hon'ble Saurabh Shyam Shamshery, J.)

1. Heard Sri Shashi Nandan, learned Senior Counsel assisted by Shri Babu Ram Yadav, learned counsel for the petitioner, learned Standing Counsel for respondents and perused the record.

2. The petitioner has retired from the post of Gram Panchayat Adhikari, Block

Bahadurpur, District Prayagraj on 30.06.2019. On 03.07.2019, a news was published in the Hindi news paper "Dainik Jagran" with heading "Rishwat Lete ADO Ka Video Viral, Afsaro me Hadkamp". In the newspaper, it was mentioned that the petitioner before his retirement had demanded and accepted bribe of Rs.20,000/- from a Pradhan and his act was recorded by a mobile phone and the said video was circulated on the social media.

3. It has been alleged by the petitioner that subsequent to this news, payment of retiral benefits of the petitioner has also been stopped without any prior information.

4. Taking cognizance of the aforesaid news, the District Magistrate, Prayagraj directed the Additional District Magistrate, Prayagraj to conduct an inquiry in regard to aforesaid news and to submit a report. The Additional District Magistrage, Prayagraj issued notice to petitioner and sought his explanation on the said viral news. In pursuance of the notice, petitioner submitted an explanation dated 06.07.2019 wherein he has denied all the allegations made against him in the news as well as in the viral video. The petitioner also submitted that the Gram Pradhan as well as other persons have submitted affidavit to the effect that no such incident took place as alleged in the newspaper. The petitioner also made a statement before Additional District Magistrate, Prayagraj on 06.07.2019 wherein he has denied the allegations made in the news as well as in the viral video.

5. Smt. Sapna, Gram Pradhan has gave statement before the A.D.M., Prayagraj on 06.07.2019 wherein she has accepted that the petitioner has taken Rs.20,000/- from her husband for construction of toilet under Swach Bharat Mission at her place, however, she has denied that she recorded the video.

6. Shri Gore Lal, husband of Smt. Sapna also gave statement before A.D.M. Prayagraj on 06.07.19 wherein he has also accepted that the petitioner has taken Rs.20,000/- from him. However, he denied that he recorded the video.

7. The A.D.M. City Prayagraj after considering the incident shown in the video clip, statement recorded as well as reports submitted by the Panchayat Raj Officer, Prayagraj as well as Block Development Officer, Block - Bahadurpur, Prayagraj in regard to the earlier misconduct of the petitioner prepared his report dated 6.7.2019 whereby the A.D.M. recommended to lodge an FIR against the petitioner. In the inquiry report, the A.D.M. has taken note of the fact that earlier an FIR was lodged against the petitioner and in pursuance of the said FIR, the petitioner remained in jail for certain period.

8. The inquiry report dated 6.7.2019 prepared by the Additional District Magistrate, Prayagraj was communicated to the District Magistrate, Prayagraj. On the basis of the said inquiry report, the District Magistrate, Prayagraj, vide order dated 8.7.2019 directed the District Development Officer, Prayagraj to lodge an FIR against the petitioner. The District Development Officer further directed the District Panchayat Raj Officer, Prayagraj, vide letter dated 15.7.2019 to lodge an FIR against the petitioner. The Zila Panchayat Raj Officer, Prayagraj further directed the Additional Development Officer, vide letter dated 27.7.2019 to lodge an FIR against the petitioner. The above mentioned orders

dated 8.7.2019, 15.7.2019 and 27.7.2019 are impugned in the present petition.

9. Shri Shashi Nandan, learned Senior Counsel submitted that the entire inquiry conducted against the petitioner by the department and direction for lodging FIR against the petitioner is illegal as the respondents have no authority to lodge an FIR against the petitioner. The petitioner has already retired before the initiation of such inquiry and thus, there is no relationship of Master and servant, and as such the direction for initiaiting inquiry as well as direction for lodging an FIR is patently illegal. Learned Senior counsel further submitted that the affidavit filed on behalf of the Pradhan and others wherein allegations made in the video have been denied have not been taken into consideration and the inquiry has been conducted in arbitrary manner. Learned Senior Counsel also relied upon the Second Proviso of Section 8 of the Prevention of Corruption Act, 1988 that in case, a person is aggrieved regarding the offence relating to demand of bribe by a public servant, he should inform the concerned authorities within a period of 7 days. However, in the present matter, the alleged aggrieved person has not approached any authority to ventilate his grievances, therefore the entire exercise undertaken by the respondents is illegal and liable to be quashed.

10. Learned Standing Counsel on behalf of the respondent has submitted that there is no bar to lodge an FIR against any retired employee. The direction of lodging an FIR is passed after conducting an inquiry wherein the statement of the petitioner as well as the person shown in the video, who gave bribe to the petitioner have been recorded and only after considering the materials, A.D.M. Prayagraj come to the conclusion that a case is made out against the petitioner for lodging an FIR. Learned counsel further submitted that still, no FIR is lodged and the petitioner has remedy available under the provisions of Code of Criminal Procedure, 1973 (hereinafter referred as Cr.P.C.) to challenge the FIR as and when an FIR is lodged against him. Therefore, the present writ petition is premature and liable to be dismissed.

11. It is well settled that a public servant cannot be removed from his office without prior sanction of the competent authority only when he holds the office, but once he retires or superannuates or ceases to be in his office, then no sanction of the competent authority is required to prosecute him for the offences committed by him under the colour of his office. It is relevant at this stage to quote the following paragraphs 32, 33, 34, of the judgment passed by the Hon'ble Supreme Court in the matter of ***Abhay Singh Chautala V. CBI reported in (2011) 7 SCC 141*** that :-

"32. Same argument was tried to be raised on the question of plurality of the offices held by the public servant and the doubt arising as to who would be the sanctioning authority in such case. In the earlier part of the judgment, we have already explained the concept of doubt which is contemplated in the Act, more particularly in Section 19(2). The law is very clear in that respect. The concept of `doubt' or `plurality of office' cannot be used to arrive at a conclusion that on that basis, the interpretation of Section 19(1) would be different from that given in Antulay's case (cited supra) or Prakash Singh Badal v. State of Punjab (cited supra). We have already explained the situation that merely because a concept of

doubt is contemplated in Section 19(2), it cannot mean that the public servant who has abused some other office than the one he is holding could not be tried without a sanction. The learned senior counsel tried to support their argument on the basis of the theory of "legal fiction". We do not see as to how the theory of "legal fiction" can work in this case. It may be that the appellants in this case held more than one offices during the check period which they are alleged to have abused; however, there will be no question of any doubt if on the date when the cognizance is taken, they are not continuing to hold that very office. The relevant time, as held in S.A. Venkataraman Vs. State (cited supra), is the date on which the cognizance is taken. If on that date, the appellant is not a public servant, there will be no question of any sanction. If he continues to be a public servant but in a different capacity or holding a different office than the one which is alleged to have been abused, still there will be no question of sanction and in that case, there will also be no question of any doubt arising because the doubt can arise only when the sanction is necessary. In case of the present appellants, there was no question of there being any doubt because basically there was no question of the appellants' getting any protection by a sanction.

33. We do not, therefore, agree with learned Senior Counsel Shri Mukul Rohtagi as well as Shri U.U. Lalit arguing for the appellants, that the decision in Antulay's case (cited supra) and the subsequent decisions require any reconsideration for the reasons argued before us. Even on merits, there is no necessity of reconsidering the relevant ratio laid down in Antulay's case (cited supra). 34. Thus, we are of the clear view that the High Court was absolutely right in relying on the decision in Prakash Singh Badal v. State of Punjab (cited supra) to hold that the appellants in both the appeals had abused entirely different office or offices than the one which they were holding on the date on which cognizance was taken and, therefore, there was no necessity of sanction under Section 19 of the Act as held in K.Karunakaran v. State of Kerala (cited supra) and the later decision in Prakash Singh Badal v. State of Punjab (cited supra). The appeals are without any merit and are dismissed." ***(emphasis supplied)***

12. We have considered the rival submissions and perused the record. Admittedly that the petitioner got retired even before the news of video was published in the newspaper. However, the respondents after considering the replies made on behalf of the petitioner as well as of concerned parties have come to the conclusion that an FIR should be lodged against the petitioner for committing offence. As the petitioner has unable to produce any record to show that the FIR has been lodged against him, therefore, we are of the considered opinion that the writ petition is premature. Sofar as filling of an FIR after retirement is considered, learned Senior Counsel for the petitioner has failed to substantiate his arguments to submit that after retirement, no FIR can be lodged. There is no bar in lodging the FIR against the public servant who has retired, in case cognizable offence is disclosed. Against the lodging of an FIR, the petitioner has all the remedy available in the Code of Criminal Procedure. The Constitution Bench of the Supreme Court in ***Lalita Kumari vs. Government of U.P. and others*** reported in ***(2014) 2 SCC 1*** has held that the registration of First Information Report is mandatory under Section 154 of the Cr.P.C. if the information discloses commission of a cognizible offence. The lodging of FIR

cannot be refused on the ground of the status of the complaint or of an accused. Therefore, the impugned direction for lodging an FIR in the present matter cannot be held illegal on the ground that the such direction has been passed by a Government Officer after the petitioner has retired. Lodging of FIR cannot be refused on the ground that there is no relationship of Master and Servant. Conclusion/Direction passed by Supreme Court in ***Lalita Kumari (supra)*** are as follows:-

"Conclusion/Direction:-

120. In view of the aforesaid discussion, we hold:

120.1. The registration of FIR is mandatory under Section 154 of the Code, if the information discloses commission of a cognizable offence and no preliminary inquiry is permissible in such a situation.

120.2. If the information received does not disclose a cognizable offence but indicates the necessity for an inquiry, a preliminary inquiry may be conducted only to ascertain whether cognizable offence is disclosed or not.

120.3. If the inquiry discloses the commission of a cognizable offence, the FIR must be registered. In cases where preliminary inquiry ends in closing the complaint, a copy of the entry of such closure must be supplied to the first information forthwith and not later than one week. It must disclose reasons in brief for closing the complaint and not proceeding further.

120.4. The police officer cannot avoid his duty of registering offence if cognizable offence is disclosed. Action must be taken against erring officers who do not register the FIR if information received by him discloses a cognizable offence.

120.5. The scope of preliminary inquiry is not to verify the varacity or otherwise of the information received but only to ascertain whether the information reveals any cognizable offence.

120.6. As to what type and in which cases preliminary inquiry is to be conducted will depend on the facts and circumstances of each cases. The category of cases in which preliminary inquiry may be made are as under:

(a) Matrimonial disputes/family disputes

(b) Commercial offences

(c) Medical negligence cases

(d) Corruption cases

(e) Cases where there is abnormal delay/laches in initiating criminal prosecution, for example, over 3 months' delay in reporting the matter without satisfactorily explaining the reasons for delay.

The aforesaid are only illustrations and not exhaustive of all conditions which may warrant preliminary inquiry.

120.7. While ensuring and protecting the rights of the accused and the complainant, a preliminary inquiry should be made time-bound and in any case it should not exceed 7 days. The fact of such delay and the causes of it must be reflected in the General Diary entry.

120.8. Since the General Diary/Station Diary/Daily Diary is the record of all information received in a police station, we direct that all information relating to cognizable offences, whether resulting in registration of FIR or leading to an inquiry, must be mandatorily and meticulously reflected in the said diary and the decision to conduct a preliminary inquiry must also be reflected, as mentioned above."

13. In the present matter, Learned Senior Counsel for the petitioner has faild

to show any provision which imposes bar on lodging of an FIR against any retired Government officer. Therefore, we do not find any merit in the present writ petition. However, the petitioner is at liberty to take legal recourse if so advised as provided under the law for redressal of his grievances.

14. With the aforesaid observations, the writ petition stands ***dismissed.***

(2021)02ILR A324
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.01.2021

BEFORE

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

Writ C No. 26097 of 2020

Ahmad Mujtaba Faraz ...Petitioner
Versus
Aligarh Muslim University & Ors. ...Respondents

Counsel for the Petitioner:
Sri Nitin Chandra Mishra, Sri Vibhu Rai, Sri Anoop Trivedi

Counsel for the Respondents:
Sri Shashank Shekhar Singh, Sri Neeraj Tripathi (Addl. Advocate General)

A. Constitution of India,1950-Article 226-challenge to-cancellation of candidate admission in Ph.D. Program in AMU-the candidate raised slogan against Vice-Chancellor and the Registrar at Republic Day Celebration-an expression of dishonour of the national festival-person seeking admission in University must be up to mark as an educated person-gross indiscipline and misdeeds detrimental to the public at large-anti-social activity and attitude should not be compromised at the cost of national interest-conclusion drawn by the controller of examination is justified for not allowing admission to the applicant.(Para 1 to 14)

The writ is dismissed. (E-5)

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

1. Computer Section is directed to correctly describe name of the petitioner as Ahmad Mujtaba Faraz in place of Ahmad Majaba Faras in the array of the parties.

2. Heard Sri Anoop Trivedi, learned Senior Counsel assisted by Nitin Chandra Mishra, learned counsel for the petitioner, Sri Neeraj Tripathi, learned Additional Advocate General (through video conferencing) assisted by Sri Shashank Shekhar Singh, learned counsel for the Aligarh Muslim University.

3. By way of the instant petition, the petitioner has sought following relief (s):

1. Issuance of writ, order or direction in the nature of certiorari quashing the impugned order dated 26.11.2020 (annexure no.1) passed by respondent no.3 with direction to respondent no.3 to call the petitioner for presentation cum interview in Ph. D. Programme in Human Rights as well as Women's Studies.

2. Further direction was sought to be issued to respondent nos.2 and 3 to consider candidature of the petitioner for Ph. D. in subjects of Human Rights as well as Women's Studies.

3. Issue any writ order or direction, which the Court may deem fit and proper in the facts and circumstances of the case.

4. Claim of the petitioner is that the petitioner is qualified to be admitted to Ph. D. Programme in Human Rights as well as Women's Studies as he had done his post graduation i.e. M.A. (Human Rights) from the respondent's University in 2019. Claim is to the ambit that he applied for the admission for doctor of philosophy in two subjects that is to say - Human Rights and Women's Studies. Respondent no.3 issued admit card to the petitioner consequently, the test for doctor of philosophy in both the above subjects were scheduled for 07.11.2019.

5. Relevant to take note of fact that the petitioner appeared in the test of both the above subjects and he was much confident to secure 50% marks in both the subjects. Respondent nos.3 declared the answer keys of both the subjects. After receiving photocopy of OMR sheet of both subjects, the petitioner secured marks more than 50% in both the subjects. On 10.08.2020, respondent no.3 declared result of the selected candidates called for interview in both the above subjects. As per Chapter XXV (D), eligibility for admission in Ph.D., the candidate must have master's degree or its equivalent recognized by University in a subject relevant to the proposed field of research with not less than 55% marks or its equivalent. The petitioner secured 55% marks in his post graduation and he was fully eligible and qualified for admission to Ph. D. course in both the aforesaid subjects. Learned counsel for the petitioner claimed that there was no shortcoming which could have stopped the petitioner seeking admission in Ph. D. course / Programme in Human Rights as well as Women's Studies.

6. Claim of the respondent no.3 that the petitioner misbehaved is not applicable to him because at the time of the occurrence, he was neither student of University nor any disciplinary proceeding as such could have been initiated against him. He is fully qualified to be admitted to the aforesaid Ph. D. Programme in Human Rights as well as Women's Studies.

7. Learned Senior Counsel further added that as per Rule 1, - by virtue of test, candidature of the petitioner was refused. Assuming it to be that any right vested in respondent no.3 to pass such order, like the present one under challenge (annexure no.1), which is dated 26.11.2020 taking into consideration that the petitioner and other persons attempting to disturb Republic Day function (26.01.2020) by raising Slogan against the Vice Chancellor and the Registrar of the University then for the same, the entire future of the candidate cannot be blocked and the right of the petitioner to seek education in higher course / class cannot be denied to him.

8. Sri Neeraj Tripathi, learned Additional Advocate General assisted by Sri Shashank Shekhar Singh, Advocate for the respondents has refuted aforesaid contentions by claiming that misbehavior and conduct of a person seeking admission in the University must be up to mark as an educated person, and the person owes an explanation for what reason and cause he attempted to misbehave along with others on 26.01.2020 and raised Slogan against Vice Chancellor and the Registrar and shown black placards and chart papers etc. which amounts to gross indiscipline and a person who is seeking admission must not indulge in such type of misdeeds in full public view which is not only detrimental to the public at large but also expression of dishonour to the national festival ? say the Republic Day function being celebrated on

26.01.2020. Rule 1 was itself part of the process where clearance from office of proctor was must for admission / call for presentation and viva voce for the admission to the aforesaid Ph.D Programme in the two subjects. Misdeed committed on the whole is admitted to the petitioner and was made part of the process along with declaration of list of candidates to be called for presentation and the viva voce.

9. Next added that the right to education is not a fundamental right but it is strictly subject to statutory Rules and guidelines. In the wake of obstinate and insolent conduct of the petitioner himself, he is answerable to his own misdeeds. The gross misbehavior has been committed by the petitioner on the Republic Day function. Can an educated person be expected to raise Slogan on the occasion of Republic Day because that amounts to creating disturbance in peaceful celeberation of the Republic Day which misbehaviour as such is a bid to show dishonour to all the persons attending the Republic Day function and to show dishonour to the institution itself - say the Aligarh Muslim University.

10. Moreover, as per entire prayer, no challenge has been made to Rule 1 seeking proctorial clearance and the entire prayer made is silent on that point. The derogatory Slogan is aimed at defaming the celebration by attempting to disturb function of Republic Day. His act amounts to gross misbehavior. His admission to the Ph. D course would serve and act as provocative example to other students to create such disturbance to undermine national dignity and national honour apart from maligning the image of the Institution (AMU) itself.

11. I have considered rival submissions and perused the entire petition and the impugned order dated 26.11.2020 whereby it transpires that the entire episode which had taken place on 26.01.2020, was taken into consideration by the Controller of Examinations and conclusion was drawn holding that the petitioner was a threat to the law and order in the campus as well as to the smooth functioning of the University in future, therefore, he should not be given admission in any course / class in the University. In the light of above, he was not called for presentation cum interview for admission to the Ph. D course for Human Rights and Women's Studies and his representation dated 18.08.2020 was thus found without merit and was rejected, accordingly.

12. Insofar as question regarding future of the petitioner is concerned, the petitioner has not given any reason whatsoever as to how and why he indulged in such misdeed. Can an educated be expected, by any stretch of imagination, to do such misdeed in open public view which is equivalent to an act trying to sacrilege national dignity and national honour on the auspicious day 26th of January, 2020? The answer to the above query is certainly and always in the negative that one cannot be expected to act violently in such manner as the applicant has acted. The Republic Day function could be celebrated peacefully only on account of intervention of the security guards in apprehending the applicant on the spot and handing him over to the police authority concerned which kept him in confinement till the next day i.e. 27.01.2020. His act in fact tantamounts to indulging in anti social activity and anti-national activity and such recalcitrant act and attitude should not be compromised at the cost of national interest.

13. In the light of the entire proctorial report dated 26.11.2020, obviously the

petitioner himself is to be blamed for creating trouble for himself. Therefore, conclusion drawn by the respondent no.3 (Controller of Examinations) for not allowing admission to the applicant in the Ph. D course in the two subjects is justified.

14. Consequently, the instant petition is dismissed.

(2021)02ILR A327
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 29.01.2021

BEFORE

THE HON'BLE MUNISHWAR NATH BHANDARI, J.
THE HON'BLE ROHIT RANJAN AGARWAL, J.

Writ C No. 26538 of 2020

M/S M.R.J.V. Constructions Co.,Delhi ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Siddharth Singhal, Sri Ankita Singhal

Counsel for the Respondents:
C.S.C., Sri Wasim Masood

A. Constitution of India, 1950 - Article 226 - Real Estate(Regulation and Development)Act,2016-Section 40-recovery of sum of Rs. 24 lacs and odd-consumer deposited the sum for possession of flat-despite agreement flat was not handed over to the consumer-object of the speedy dispute redressal mechanism would frustrate if the consumer seek execution of the order through civil court-while it shall be recoverable as prescribed u/s 40(1) of the Act, in such a manner as may be an arrears of land revenue, so as to expeditiously give relief to the consumer having suffered in the hands of Promoter-writ petition is not maintainable as the consumer can avail the remedy of appeal.(Para 1 to 25)

The writ petition is dismissed. (E-5)

List of Cases cited:-

1. M/s K.D.P. Build Well Pvt. Ltd. Vs St. of U.P. & 4 ors.(Writ C No. 2248 of 2020)

2. Ms. Proview Realtech Pvt. Ltd. Vs St. of U.P. & 5 ors. (Writ C No . 27147 of 2020)

3. Rudra Buildwell Construction Pvt. Ltd. Vs Poonam Sood & anr.(Writ-C No . 3289 of 2020)

4. Janta Land Promoters Pvt. Ltd. Vs U.O.I .& ors. (CWP No. 8548 of 2020)

(Delivered by Hon'ble Munishwar Nath Bhandari, J.
&
Hon'ble Rohit Ranjan Agarwal, J.)

1. None appears for the petitioner though the case was called twice. Sri Wasim Masood has put in appearance on behalf of respondents.

2. The writ petition could have been dismissed for non-prosecution. However, taking into consideration that issue raised in this petition has already been settled by this Court in the case of ***Writ C No. 27147 of 2020 (Ms. Proview Realtech Pvt. Ltd. Vs. State of U.P. and 5 others)*** and two other connected petitions decided on 12.01.2021, this petition is also governed by the judgment aforesaid.

3. The writ petition has been filed with the following prayers:

"(i) Issue a writ, order or direction in the nature of Certiorari calling for the records and quashing the recovery

citation dated 13.03.2020 insofar as the same relates to principal amount (Annexure No.1 to the present writ petition).

(ii) Issue a writ, order or direction in the nature of Certiorari calling for the records and quashing the impugned order dated 20.08.2019 passed by respondent no.2 (Annexure-2 to the present writ petition).

(iii) issue a writ, order or direction in the nature of Certiorari calling the record and quashing the minutes/resolutions dated 14.08.2018 alleged to have been passed by the respondent no.2 (Annexure No.3 to the writ petition).

(iv) Issue a writ, order or direction in the nature of Certiorari calling for the records and quashing the minutes/resolution dated 05.12.2018 alleged to have been passed by respondent no.2 (Annexure -4 to the writ petition).

(v) Issue an appropriate writ, order or direction for striking down Regulation 24(a) of the U.P. Real Estate Regulatory Authority (General) Regulation, 2019."

4. The petitioner has challenged the order passed by Real Estate Regulatory Authority (in short "RERA") dated 20.08.2019 though an appeal against the said order lies under Section 43(5) of Real Estate (Regulation and Development) Act, 2016 (in short "Act of 2016").

5. It is a case where a complaint was filed by the non-petitioner alleging that despite payment towards unit No. A-2/307 in the scheme introduced by the petitioner, the possession of a unit has not been given. The unit (flat) was booked on 18.12.2013 and was to be delivered in the year 2019. The prayer was made for refund of the amount of Rs.24,13,713/- with interest. The Authority found that as per the agreement entered between the parties, possession of the flat in question should have been delivered by 2019. The petitioner-Company failed to show delivery of possession of the flat in question. Thus, taking into consideration the default of the Promoter (petitioner herein) and referring to the judgment of Apex Court, an order was passed by RERA on 20.08.2019 for refund of the principal amount alongwith interest. In pursuance thereof, order dated 20.08.2019 was issued for its execution. The amount of Rs.25,36,985/- was shown towards the principal amount while component of interest was Rs.12,85,070/-. The petitioner has filed this writ petition to challenge not only the order dated 20.08.2019 passed by RERA but the recovery citation dated 13.03.2020 on the execution application.

6. Learned counsel for the petitioner submits that an appeal against the order passed by RERA is maintainable but this case has exceptional circumstances thus even a writ petition would be maintainable. One member of RERA has passed the order going against the Act of 2016. Section 21 provides for formation of Authority consist of Chairperson alongwith two whole time Members. The impugned order is by one Member alone going against the mandate of Section 21 of the Act of 2016. In view of the above, there is no need to prefer an appeal as the order dated 20.08.2019 is without jurisdiction.

7. It is also stated that the order to award interest by the Authority is again going contrary to the provisions. Rules for award of interest was introduced in the year 2018. The amount deposited with the Promotor has been ordered to be returned with interest. The interest has been allowed

even for the period prior to introduction of U.P. Real Estate (Regulation and Development) (Agreement for Sale/Lease) Rules, 2018 (in short "Rules of 2018"). It is even ignoring the rate of interest agreed by the parties. Challenge to the order has been made on that ground also.

8. We are first taking challenge to the order dated 20.08.2019, passed by the Authority to find out as to whether one member was competent to pass the order.

9. The issue has been raised in reference to Section 21 but it is not open for debate having been decided by this Court in ***Writ -C No.2248 of 2020 (M/s K.D.P. Build Well Pvt. Ltd. vs. State of U.P. and 4 Others) vide judgment dated 04.02.2020 and in Writ- C No.3289 of 2020 (Rudra Buildwell Constructions Pvt. Ltd. vs. Poonam Sood and Another) vide judgment dated 06.02.2020*** holding order by one member to be legal. The issue regarding composition of RERA was considered in reference to Sections 21 and 81 of the Act of 2016. Section 81 provides for delegation of power/function and taking the aforesaid provision into consideration, the argument was not accepted.

10. At this stage, learned counsel for the petitioner has made a reference to the judgment of Punjab and Haryana High Court on the same issue in ***Civil Writ Petition No.8548 of 2020 (Janta Land Promoters Private Limited vs. Union of India and others) vide judgment dated 16.10.2020.*** It is stated that judgment of this Court has been referred by Punjab and Haryana High Court and has taken a different view.

11. What we find is binding effect of the judgment rendered by this Court than to follow the judgment of other High Court. Accordingly, we are unable to accept the first argument in reference to Section 21 of the Act of 2016. It is more so when the petitioner did not raise objection before the single Member about his competence to adjudicate the complaint. In absence of objection, the Authority proceeded with the matter. If the objection would have been taken and was sustainable, the complaint could have been decided by the Authority consisting of three Members. The petitioner has challenged the order in reference to the composition only when he lost in the complaint.

12. It is further necessary to refer Sections 21, 29 and 30 of the Act of 2016 to discuss the issue independent to the earlier judgments. The provisions aforesaid are quoted hereunder :

"21. Composition of Authority.- *The Authority shall consist of a Chairperson and not less than two whole time Members to be appointed by the appropriate Government."*

29. Meeting of Authority*.- (1) The Authority shall meet at such places and times, and shall follow such rules of procedure in regard to the transaction of business at its meetings, (including quorum at such meetings), as may be specified by the regulations made by the Authority.*

(2) If the Chairperson for any reason, is unable to attend a meeting of the Authority, any other Member chosen by the Members present amongst themselves at the meeting, shall preside at the meeting.

(3) All questions which come up before any meeting of the Authority shall be decided by a majority of votes by the Members present and voting, and in the event of an equality of votes, the Chairperson or in his absence, the person

presiding shall have a second or casting vote.

(4) The questions which come up before the Authority shall be dealt with as expeditiously as possible and the Authority shall dispose of the same within a period of sixty days from the date of receipt of the application.

Provided that where any such application could not be disposed of within the said period of sixty days, the Authority shall record its reasons in writing for not disposing of the application within that period.

30. ***Vacancies, etc., not to invalidate proceeding of Authority.- No act or proceeding of the Authority*** *shall be invalid merely by reason of--*

(a) any vacancy in, or any defect in the constitution of, the Authority; or

(b) any defect in the appointment of a person acting as a Member of the Authority; or

(c) any irregularity in the procedure of the Authority not affecting the merits of the case."

13. Section 21 of Act of 2016 speaks about composition of the Authority, which shall consist of a Chairperson and not less than two whole time Members to be appointed by the appropriate Government. Section 29, however, talks about the meeting of Authority and perusal of sub-section (2) thereof shows that in absence of Chairperson for any reason, the other Member chosen by the Members present amongst themselves at the meeting, shall preside thereby. Sub-section (2) to Section 29 permits adjudication of complaint even in absence of Chairperson so appointed by the appropriate Government. Thus, it is not necessary that the adjudication of the complaint has to be made by the composition of Authority, as given under Section 21 of the Act of 2016 though as per Section 29 also, it should be by two Members in absence of the Chairperson.

14. Section 30 of Act of 2016 is, however, relevant and address the issue raised in this petition. The vacancies, etc. not to invalidate proceeding of the Authority. It shows that in case of vacancy, or any defect in the constitution of the Authority or any defect in the appointment of a person acting as a Member of the Authority, the proceeding of the Authority would not be invalidated. Section 30 of the Act of 2016 give complete answer to the objection raised by the petitioner regarding composition of the Authority. It is not that whatever composition given under Section 21 of the Act alone can decide the complaint rather reference of Section 29 has been given to indicate that complaint can be heard even in absence of the Chairperson and, in any case, due to the vacancy or any defect in the constitution of Authority, the proceeding would not be invalidated. This aspect was not brought to the notice of Punjab and Haryana High Court in the case of ***Janta Land Promoters Private Limited (supra).***

15. It is otherwise a fact that the petitioner kept silence on the hearing of the complaint by one Member and thereby he cannot now be allowed and to seek invalidation of the proceeding going contrary to Section 30 of the Act of 2016 and his conduct. The first argument cannot be addressed simply by referring to Section 21 of the Act of 2016 but has to be reference of other provisions, more specifically, Section 30 of the Act of 2016, which was inserted by the legislature to save the proceeding if the vacancy exist in the Authority or other reason. It is otherwise a fact that an order was issued to

delegate the power to a Member for hearing of the complaint, which was considered by this Court in earlier judgment. Thus the first ground raised by the petitioner cannot be accepted. The resolution of the Authority has also been challenged but in the light of Section 30 of the Act of 2016, we find no ground to set aside the resolution as otherwise Section 81 saves it.

16. So far the second issue regarding rate of interest is concerned, it is nothing but a challenge on the merit of the order. We hold writ petition for it to be not maintainable as petitioner has remedy of appeal. Thus, we are not causing interference in the order on merit but allowing the petitioner to take remedy of appeal, if so desires. It is after taking note of the fact that the order of RERA is not otherwise onerous so as to maintain a writ petition.

17. The other challenge in the writ petition is to execution of the order made in reference to Section 40(1) of the Act of 2016. The recovery of the amount is to be made as arrears of land revenue. It is stated that recovery of interest, penalty or compensation alone can be made as arrears of land revenue. In the instance case, RERA has issued citation for return of the amount so deposited with the Promoter with interest. The refund of the principal amount cannot be through the process of execution given under Section 40(1) of the Act of 2016 but can be as per Section 40(2) of the Act of 2016.

18. To deal with the argument aforesaid, we are quoting Section 40 of the Act of 2016, hereunder :

"40 Recovery of interest or penalty or compensation and enforcement of order, etc.- *(1) If a promoter or an allottee or a real estate agent, as the case may be, fails to pay any interest or penalty or compensation imposed on him, by the adjudicating officer or the Regulatory Authority or the Appellate Authority, as the case may be, under this Act or the rules and regulations made thereunder, it shall be recoverable from such promoter or allottee or real estate agent, in such manner as may be prescribed as an arrears of land revenue.*

(2) If any adjudicating officer or the Regulatory Authority or the Appellate Tribunal, as the case may be, issues any order or directs any person to do any act, or refrain from doing any act, which it is empowered to do under this Act or the rules or regulations made thereunder, then in case of failure by any person to comply with such order or direction, the same shall be enforced, in such manner as may be prescribed."

19. Before addressing the issue further it would be necessary to go through the object of the enactment i.e. as to why the Parliament brought the Act of 2016. The object of Act of 2016 is to protect the interest of consumer in real estate sector apart from others. The Bill was introduced with the following object :

"An Act to establish the Real Estate Regulatory Authority for regulation and promotion of the real estate sector and to ensure sale of plot, apartment or building, as the case may be, ***or sale of real estate project, in an efficient and transparent manner and to protect the interest of consumers in the real estate sector and to establish an adjudicating mechanism for speedy dispute redressal*** *and also to establish the Appellate Tribunal to hear appeals from the decisions,*

directions or orders of the Real Estate Regulatory Authority and the adjudicating officer and for matters connected therewith or incidental thereto."

20. A perusal of the object reveals that the Act of 2016 has been enacted to save interest of consumers apart from others and thereby to regulate real estate in a proper manner. It is even to give speedy dispute redressal mechanism. Section 40(1) of Act of 2016 no doubt provides for mechanism for recovery of interest, penalty or compensation. It cannot however be ignored that recovery of the amount is provided under Section 40(1) alone. Section 40(2) is for execution of any other order or direction to any person to do any act, or refrain from doing any act, which is not empowered to do under the Act of 2016 and in case of failure to comply, execution can be enforced in the manner prescribed. Sub-section (2) of Section 40 was to enforce any direction of the nature of restrain or injunction which cannot be enforced as an arrears of land revenue. After coming into the force of the rules framed by the State of Uttar Pradesh, the matter of execution can be taken by the Adjudicating Authority. Sub-Section (2) of Section 40 is not meant for recovery of the amount but for any other direction either to act in a particular manner or to refrain a party in doing any act. Such order can be enforced firstly by the Adjudicating Authority and in case of failure, through the civil court. Rules 23 and 24 of Uttar Pradesh Real Estate (Regulation and Development) Rules, 2016 (in short "Rules of 2016") were brought for that purpose and provides the machanism for execution of the order.

21. In the light of the aforesaid, we are required to give proper interpretation to Section 40 so that the object sought to be achieved by enactment of Act of 2016 is carried out.

22. In the instant case, the consumer had deposited a sum of Rs.24 lacs and odd, in instalments but despite an agreement for giving possession of the flat in the year 2019, it was not handed over to the consumer. The direction for return of the amount with interest has been given in those circumstances. If a consumer is to seek execution of the part of the order through the civil court then the very purpose of the enactment of Act of 2016 to provide speedy dispute redressal mechanism would frustrate. If the argument of the petitioner is accepted then for recovery of a sum of Rs. 24 lacs and odd, the non-petitioner consumer is to be send to civil court while recovery of amount of interest of Rs.12 lacs and odd can be made as arrears of land revenue, as admitted by the counsel for the petitioner himself. If recovery of amount is to be sought by dividing it in two parts and by different method, it would be against the object of the Act of 2016. The object of speedy redressal would frustrate if recovery of the amount is also sought through the civil court. We thus hold that the purpose and object of Section 40(1) is to allow recovery of the amount as arrears of land revenue so as to expeditiously give the relief to the consumer having suffered in the hands of the Promoter. Section 40(1) has to be given interpretation by reading down the provision to make it purposeful and akin to the object of the Act of 2016. Section 40(2) is for any other direction either to act in a particular manner or to restrain a party to do certain act and execution of it can be made by the Adjudicating Authority and in case of failure, by the civil court. Section 40(2) covers basically the case of an order of injunction or mandatory injunction.

23. Accordingly, we are unable to accept even the last argument raised by the counsel for the petitioner. It would otherwise frustrate the very object of the

Act of 2016 and would give rise to the anarchy, existing earlier, in the hands of Promoters.

24. So far as challenge to Rule 24 (a) of U.P. Real Estate Regulatory Authority (General) Regulation, 2019 is concerned, the issue is kept open. It has not been debated for the reason that an order of the nature provided under Regulation 24 (a) has not been passed in the case in hand. Thus, there is no occasion for the petitioner to challenge the vires of the said Regulation in these proceedings However, as and when the Authority invokes Regulation 24 (a) of Regulation, 2019, the liberty is given to challenge the validity. Thus, issue is kept open for the aforesaid.

25. Thus, for all the reasons, we are unable to accept any of the arguments raised by the counsel for the petitioner. The writ petition is accordingly **dismissed,** however, with the liberty to avail the remedy of appeal if other than the issue decided by us remains, which may include the issue towards interest.

(2021)02ILR A333
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 09.02.2021

BEFORE

THE HON'BLE MRS. SANGEETA CHANDRA, J.

Consolidation No. 3736 of 2021

Angad Singh & Ors. ...Petitioners
Versus
D.D.C. Lakhimpur Kheri & Ors. ...Respondents

Counsel for the Petitioners:
Anoop Srivastava

Counsel for the Respondents:
C.S.C., Pankaj Gupta

A. Civil Law - Consolidation of Holding Act, 1953 – S. 48 – Civil Procedure Code – Sections 139 to 141 – Consolidation proceeding – Applicability of CPC – Nature of Consolidation authority – Whether it is a Court – Held, Consolidation Authorities cannot be said to be Courts although they may possess some of the 'trappings of a Court' while hearing and deciding matters related to title on land – Even if the consolidation authorities exercised some judicial functions also, they could not be said to possess all the attributes of a Court and could not therefore be considered to be Courts – Code of Civil Procedure was also inapplicable to the Consolidation Authorities in deciding objections, appeals and revisions – Ram Bharose Lal's case, Sita's case and Bijai Narain Singh's case followed. (Para 22)

B. Civil Law - Consolidation of Holding Act, 1953 – Section 48 – Fraudulent entry – Interest of Gao Sabha – No objection of the authority – Duty of Consolidation officers – Held, it is the duty of all Consolidation Courts to look after the interest of the Gaon Sabha and theSt. or local authority under Section 11 (c) of the Act, even though no objection has been filed by such authorities – If the D.D.C. on examination of documentary evidence had found that the entry was a fraudulent entry made to the detriment of the Gaon Sabha, he was duty bound to direct for its deletion under the provisions of the Act. (Para 24)

C. Practice and Procedure – *Ubi Jus Ibi Remedium* – Rights of the parties – Remedy – Role of the Court – Court must always aim to preserve and protect the rights of the parties and extend help to enforce them rather than denying the relief, and thereby render the rights themselves otiose, '*Ubi Jus Ibi Remedium*', where there is a right there is a remedy being the basic principles of jurisprudence. (Para 19)

Writ Petition dismissed. (E-1)

Cases referred :-

1. Jadu Nandan Ram Vs Parsotam Ginning Co. Ltd, AIR 1930 ALL 636

2. Ajeet Gupta Vs Mukteshwari Nigam, 1985 (3) LCD 68

3. Puran Singh Vs St. of Punj., (1996) 2 SCC 205

4. Sardar Amarjeet Singh Kalra (Dead) by L.R.& ors. Vs Pramod Gupta (Dead) by L.R. & ors., (2003) 3 SCC 272

5. Ram Bharose Lal Vs Deputy Director of Consolidation UP Fatehpur, 1964 RD 441

6. Sita & ors. Vs St. of U.P. & ors. , 1968 ALJ 144

7. Bijai Narain Singh Vs St. of U.P., 1969 ALJ 862

8. Thakur Jugal Kishore Sinha Vs Sitamarhi Central Cooperative bank Ltd, AIR 1967 SC 1494

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

(Oral)

1. Heard Sri Anoop Srivastava, learned counsel for the petitioners, Sri Upendra Singh, learned standing counsel and Sri Dilip Kumar, learned counsel appearing on behalf of the Gaon Sabha.

2. This petition has been filed challenging the order dated 13.01.2021 passed by the Deputy Director of Consolidation, Nighasan, Lakhimpur Kheri, in Revision No.2627 under Section 48(3) of the Consolidation of Holdings Act on an application made by one Muneem Singh dated 07.06.2012, wherein the DDC has found on consideration of all documentary evidence that a fraudulent entry had been made in C.H. Form 45 with regard to the land of Gata No.1054 ad-measuring 7.70 acres which had continued to be recorded for the past several years as *Naveen Parti* land and on which the Gaon Sabha, Land Management Committee had granted pattas to several persons including the applicant Muneem Singh.

3. The Land Management Committee Village Teliyar had made proposal on 17.10.2007 to the Sub Divisional Officer Nighasan, which was approved on 13.10.2007 for grant of patta to the applicants Muneem Singh and others of 0.202 hectares each. When the Revenue Officials of the Tehsil concerned tried to hand over possession of the land given on patta, the father of petitioners herein Shiv Prasad stopped them from delivering such possession saying that the land was recorded in his name as Bhumidhar with transferable rights.

4. At the time of grant of leases/ pattas, the land had been recorded in *Naveen Parti* Khata of Gaon Sabha but due to connivance of officials of the Revenue Department, the land was recorded in the name of the petitioner as his Bhumidhari.

5. The petitioners' case is that the order which has been set aside by the DDC was passed on 10.08.1987 in Revision No.2627 under Section 48(3) in a case filed by Shiv Prasad s/o Balkhera, the father of the petitioners, with regard to Gata No.1054 M area 1.70 and Gata No.1026 M area 1.00. The application for recall was filed by the respondent nos.2 to 5 after 25 years in 2012 and Shiv Prasad after being served notice had also appeared and his counsel had filed his power. The application was dismissed for non-prosecution on one occasion and thereafter its restoration was allowed by the DDC without issuing any fresh notice to Shiv Prasad, as a result whereof he could not appear to plead his case.

6. It has also been submitted by learned counsel for the petitioners that in

the meantime the father of the petitioners, namely, Shiv Prasad, the erstwhile tenure holder, died on 20.10.2020 and the order has been passed against a dead person and is thus a nullity in law in view of the observations made by Hon'ble Supreme Court in *Jadu Nandan Ram Vs. Parsotam Ginning Co. Ltd;* **AIR 1930 ALL 636**, which has been relied upon by the Co-ordinate Bench of this Court in the case of *Ajeet Gupta Vs. Mukteshwari Nigam*; **1985 (3) LCD 68**.

7. Learned counsel for the petitioners has placed before this Court paragraph-15 of the judgment rendered by the Co-ordinate Bench in *Ajeet Gupta* (supra), to say that since the order impugned has been passed by the DDC without noticing the fact that Shiv Prasad, the recorded tenure holder was dead, such order cannot be said to have been legally passed and ought to be set aside by this Court.

8. This Court on perusal of the order impugned finds that the applicants therein, the respondent nos.2 to 5 on being granted patta had approached the Revenue Officials for delivery of possession but when delivery of possession was attempted, the petitioners' predecessor-in-interest had stopped them from taking possession. Thereafter, when the revenue records were examined, it was found that since past several years, the land in question had been recorded as *Naveen Parti* land but in the Khatauni of 1403 to 1408 Fasli, the name of Shiv Prasad was recorded as Bhumidhar with transferable rights. It came into the knowledge of the applicant that it was on the basis of a entry made in C.H. Form 45. A restoration application was filed praying for recall of order dated 10.08.1987 without further delay. The predecessor-in-interest Shiv Prasad had appeared on service of notice through registered post and had filed his Advocate's power also and when the case was taken up, an objection was filed on 25.04.2015 saying that in a Revision **made** earlier bearing No.2627, the order of the DDC had been passed and after 25 years, no application for restoration/ recall of such order can be entertained. It was also stated by father of the petitioners that the objections regarding limitation/ delay should be considered first before proceeding on the merits of the case by the DDC.

9. The DDC therefore, looked into the delay and the merits of the case simultaneously while passing the order impugned. In the order impugned, the DDC after examining documentary evidence has come to the conclusion that C.H. Form 45 on which the entry of the petitioners' father was alleged to have been made was not deposited along with other records relating to consolidation operations in the Revenue Record Room. The report of the Revenue Record Keeper dated 29.11.2014 stated clearly that neither any case of the number as referred to hereinabove i.e. Revision No.2627 under Section 48(3) was ever filed nor it was registered nor there was any evidence of it having been ever heard, or such order having been passed by the DDC. Moreover, Shiv Prasad, the father of the petitioners also not produced the certified copy of the order allegedly made on C.H. Form 45.

10. It was also found by the DDC on examination of the copy of the order dated 10.08.1987 produced before him by Shiv Prasad that going against the settled practice of scoring out blank spaces of C.H. Form 45 to prevent fraudulent entries; in the case of the father of the petitioners, the line that was diagonally drawn to score out

the empty space was somehow managed in such a manner that the entry came to be recorded in the empty space just before the diagonal line. It was apparently a fraudulent entry.

11. This Court has perused annexure-2, which is a copy of C.H. Form 45, and does not find any infirmity in the observations made by the DDC with regard to the entry being fraudulent as it is apparent to the naked eye that it has been managed to be transcribed in such a manner that it fits into the empty space of the diagonal line drawn scoring out the page.

12. The DDC has also referred to the judgment of this Court and of the Board of Revenue, namely, **2010 (110) R.D. 736** *Daharilal and others Vs. DDC and others*, and **2007 (102) RD 564** *Hiralal Vs. Shambhu Prasad and others*, wherein it was observed that an order obtained by playing fraud can be set aside and as such there is no embargo of limitation for setting aside such an order, and also that the person playing fraud should not be benefited in the garb of the intricacies and technicalities of law.

13. The DDC in the order impugned has also referred to the judgment rendered by Hon'ble Supreme Court in *Gama Vs. Board of Revenue*; **2015 (126) R.D. 334,** wherein the Supreme Court has observed that limitation starts running from the date when the fraud is discovered for the first time by the aggrieved person. Admittedly, the fraud was discovered only after the respondent nos.2 to 5 were granted patta by the Land Management Committee and an attempt was made by the revenue officials to deliver possession of land in question to the allottees.

14. The DDC has also referred to the provisions of Consolidation of Holdings Act wherein Section 48(3) provides for a Reference to be made and a Revision is entertained only under Section 48(1). There was no Reference ever made by any Subordinate consolidation court under Section 48(3) of the Act. The order impugned does not suffer from any illegality or infirmity.

15. This Court now comes to the objection taken by learned counsel for the petitioners that the order impugned was passed against a dead person as Shiv Prasad had died on 20.10.2020 and the order was passed on 13.01.2021.

16. It is apparent that after 2015 when the petitioners' father had filed his objection to the application for recall/ restoration, he had not appeared nor did his counsel appear before the DDC during hearing of the case.

17. The Supreme Court in ***Puran Singh vs State of Punjab***, **(1996) 2 SCC 205**, was considering the appeal against an order passed by the High Court dismissing the writ petition arising out of consolidation proceedings on the ground that the legal heirs and representatives of one Bir Singh who was the beneficiary of the order impugned and had died during the pendency of the writ petition, had not been substituted. The Supreme Court placed reliance upon judgement rendered in *Girijanandini Devi versus Bijendra Narain Choudhary* 1967 (1) SCR 93 and observed in paragraph-4:- "Personal action dies with the death of the person on the maxim action personalis moritur cum persona. But this operates only in a limited class of actions Ex delicto, such as action for damages for defamation, assault or other personal injuries not causing the death of the parties, and in other cases where after the death of

the party the granting of the relief would be nugatory (Girijanandini Devi vs Bijendra Narain Choudhary), but there are other cases where the right to sue survives in spite of the death of the person against whom the proceeding had been initiated and such right continues to exist against the legal representatives of the deceased who was a party to the proceedings. Order 22 of the Code deals with this aspect of the matter. Rule 1 of Order 22 says that the death of a plaintiff or defendant shall not cause the suit to abate as the right to sue survives. That is why whenever a party to a suit dies, the first question which is to be decided is as to whether the right to sue survives or not. If the right is held to be a personal right which is extinguished with the death of the person concerned and does not devolve on the legal representatives or successors, then it is an end of the suit. Such suit therefore cannot be continued. But if the right to sue survives against the legal representatives of the original defendant, then procedures have been prescribed in order 22 to bring the legal representative on record within the time prescribed....". The Court went on to observe that with regard to proceedings under Article 226 and 227 of the Constitution, an Explanation has been added by way of amendment in 1976 to Section 141 of the C.P.C. clarifying that Section 141 shall not be applicable to proceedings under Article 226 of the Constitution of India.

18. Section 141 of the Civil Procedure Code provides that the "procedure provided in this Code in regard to suits shall be followed, as far as it can be made applicable, in all proceedings in any court of civil jurisdiction." However, the Supreme Court considered the question in greater detail and observed that it cannot be said that the High Court can pass an order without hearing the legal representatives of such deceased respondent even in cases where the right to sue survives against the legal representatives of such deceased respondent. If such legal representative is not brought on record, any order passed against the original respondent after his death shall not be binding on them because they have not been heard. The order of the High Court shall be deemed to have been passed against a dead person. If the right of the petitioner to pursue the remedy survives even after the death of the original respondent to the writ petition, then on the same principle even the right to contest that claim survives on the part of the legal representative of the deceased respondent. In such a situation, after the death of the respondent if the right to sue survives against the legal representatives of such a respondent, then the petitioner has to substitute the legal representative of such respondent before the writ petition can proceed and can be heard and disposed of. The petitioner has to take steps for substitution of legal representative within a reasonable time.....". The Court dismissed the appeal filed by the writ petitioners on this ground alone that they failed to substitute the respondent tenant by his legal heirs.

19. The Supreme Court considered the applicability of Section 141 again in *Sardar Amarjeet Singh Kalra (Dead) by L.R. and others Vs Pramod Gupta (Dead) by L.R. and others*, **(2003) 3 SCC 272**. The Constitution Bench of the Supreme Court observed that even in cases where Order 22 of C.P.C. is applicable, also assuming that the decree appealed against or challenged is joint and inseverable, as and when it is found necessary to interfere with the judgement and decree challenged before it,

the Court can always declare the legal position in general and restrict the ultimate relief to be granted by confining it to those before the Court only, rather than denying the relief to one and all on account of a procedural lapse or action or inaction of one of the other parties before it. As far as possible, the Court must always aim to preserve and protect the rights of the parties and extend help to enforce them rather than denying the relief, and thereby render the rights themselves otiose, "Ubi Jus Ibi Remedium', where there is a right there is a remedy being the basic principles of jurisprudence. Such a course would be more conducive and better conform to a fair reasonable and proper administration of justice. *"Laws of procedure are meant to regulate effectively, assist and aid the object of doing substantial and real justice and not to foreclose even an adjudication on merits of substantial rights of citizens under personal, property and other laws. Procedure has always been viewed as a handmaiden of justice and meant to hamper the cause of justice or lead to miscarriage of justice." The Supreme Court further observed that the "interest of justice would have been better served had the High Court adopted a positive and constructive approach then merely scuttled the whole process to foreclose adjudication of the claims of others on merits. The rejection by the High Court of the application to set aside abatement, condonation and bringing on record the legal representatives did not appear to be a just a reasonable exercise of the Court's power or in conformity with the object of the court to do real, effective and substantial justice. With the march and progress of law the new horizons explored and modalities discerned and the fact that the procedural laws must be liberally construed to really serve as a handmaiden, make it workable and advance the ends of justice, technical objections which tend to be the stumbling blocks to defeat and deny substantial and effective justice should be strictly viewed for being discouraged, except where the mandate of the law inevitably necessitates it."*

20. Observations made by the Supreme Court in the case of *Puran Singh* (supra) and *Sardar Amarjeet Singh Kalra* (supra) were made in respect of applicability of Code of Civil Procedure in Jurisdiction exercised by the High Court under Article 226 & 227.

21. However this Court has specifically considered the applicability of section 139 to 141 of the the Civil Procedure, to proceedings under the Consolidation of Holdings Act. ***In Ram Bharose Lal vs Deputy Director of Consolidation UP Fatehpur, 1964 RD 441***, a Division Bench of this Court considered the question whether proceedings before the Consolidation Officer can be termed to be "Court Proceedings". The Division Bench observed in paragraph 5 of the report that *"it is not disputed that authorities under the consolidation of holdings act as tribunals for the purpose of deciding controversies arising under the Act. All Tribunals however, are not Courts and the question which has fallen for our consideration is whether these authorities are courts. For finding this out an examination of the provisions of the Act which may furnish clues one way or the other appears to be essential."*

22. The Division Bench thereafter referred to the provisions of the Act and also to the judgements of the Supreme Court which refer to Courts "as those

Tribunal which are set up in an organised state for the administration of justice. *"By administration of justice is meant the exercise of judicial power of the State to maintain and uphold and to punish wrongs, whenever there is an infringement of a right or an injury, the Courts are there to restore the Vinculum Juris which is disturbed"*. After examining English Case Law also the Division Bench came to the conclusion that even if section 40 of the Consolidation of Holdings Act provides that proceedings before the Settlement Officer Consolidation, Consolidation Officer and Assistant Consolidation Officer shall be deemed to be judicial proceedings within the meaning of Sections 193 and 228 for the purposes of Section 196 of the Indian Penal Code, and Section 41 provides that the provisions of Chapter IX and X of the U.P. Land Revenue Act 1901 shall apply to all proceedings under the Act, the Consolidation Authorities cannot be said to be Courts although they may possess some of the "trappings of a Court" while hearing and deciding matters related to title on land. The observations made by the Division Bench in Ram Bharose Lal (supra) were affirmed by a Full Bench of this Court in ***Sita and others vs. State of U.P. and others;*** **1968 ALJ 144**, and were reconsidered in another Full Bench decision of this court in ***Bijai Narain Singh vs. State of U.P.*** reported in **1969 ALJ 862**. In the decision rendered by the Full Bench in Bijai Narain Singh (supra), the Full Bench of this Court considered the Consolidation of Holdings Act after amendments were carried out in the Act and the Rules in 1963 and in the light of subsequent observations made by the Supreme Court in a judgement rendered in *Thakur Jugal Kishore Sinha vs. Sitamarhi Central Cooperative bank Ltd*, AIR 1967 SC 1494; it nevertheless came to the conclusion that even if the consolidation authorities exercised some judicial functions also, they could not be said to possess all the attributes of a Court and could not therefore be considered to be Courts and the Code of Civil Procedure was also inapplicable to the Consolidation Authorities in deciding objections, appeals and revisions.

23. This Court also finds from the order impugned that it has been passed against the record and not against a person. The order impugned only finds the entry to be fraudulent and has therefore directed for its deletion from the records, and even in the case cited by learned counsel for the petitioners in *Ajeet Gupta* (supra), the Court had observed that it appeared that the Court had been kept in dark about the death of the predecessor-in-interest of the petitioners in the pending proceeding, and that is why the mistake crept in.

24. It is the duty of all Consolidation Courts to look after the interest of the Gaon Sabha and the State or local authority under Section 11 (c) of the Act, even though no objection has been filed by such authorities. If the DDC on examination of documentary evidence had found that the entry made out in favour of the father of the petitioners was a fraudulent entry made to the detriment of the Gaon Sabha, he was duty bound to direct for its deletion under the provisions of the Act.

25. Moreover, this Court is convinced that in such a case where illegality and the fraudulent entry is apparent to the naked eye, the extraordinary writ jurisdiction under Article 226 of the Constitution cannot be exercised in favour of such a litigant for setting aside the order dated 13.01.2021, which would revive a

fraudulent entry dated 10.08.1987 in favour of the father of the petitioners.

26. This petition stands ***dismissed***.

27. No order as to Costs.

(2021)02ILR A340
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 22.02.2021

BEFORE

THE HON'BLE MRS. SANGEETA CHANDRA, J.

Consolidation No. 4933 of 2021

Nandlal & Ors. ...Petitioners
Versus
Chakbandi Adhikari Akbarpur Ambedkar Nagar & Ors. ...Respondents

Counsel for the Petitioners:
Vijai Bahadur Verma, Pramod Kr. Chaudhary

Counsel for the Respondents:
C.S.C., Mohan Singh

A. Civil Law - Consolidation of Holding Act, 1953 – Ss. 9A (2), 10(1) 11C and 52 – Consolidation of Holding Rules, 1954 – Rule 109A – Notification u/s 52 issued – Application under Rule 109A (1) – Maintainability – Implementation of the order passed by the Consolidation Officer – Jurisdiction of Consolidation authority – Held, the question is no longer *res integra* that even after Section 52 Notification is issued, the Consolidation Authorities, if they are present in the District, having jurisdiction to implement the order passed by the Consolidation Officer or by any other Consolidation Authority for which the consolidation operations would be deemed to be pending – Necessary Direction issued. (Para 20, 21 and 22)

Writ Petition disposed of. (E-1)

Cases relied on :-

1. Ramraj Vs Deputy Director of Consolidation, 2002 (93) RD 884

2. Mukhtar Vs Deputy Director of Consolidation, Azamgarh, 1993 RD 457

3. Raja Ram Vs Deputy Director of Consolidation & ors., 1982 RD 387

4. Brij Bir Singh Vs Deputy Director of Consolidation, Ambedkar Nagar & ors., 1987 RD 66

5. Writ Petition No.3438 (Consolidation) of 1981, Mohd. Naimuddin & ors. Vs Deputy Director of Consolidation, Barabanki, decided on 08.01.2020

6. Raghunath Singh & anr. Vs St. of U.P. & anr., 1960 RD 337

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

(Oral)

1. Heard Shri Vijay Bahadur Verma, learned counsel for the petitioners, Shri Upendra Singh, learned counsel appearing for the State-respondents and Shri Mohan Singh, appearing for the Gaon Sabha and perused the record.

2. This petition has been filed challenging the order dated 23.01.2021 passed by the Consolidation Officer, Akbarpur, District Ambedkar Nagar, under Rule 109 A (1) of the Rules framed under the Consolidation of Holdings Act hereinafter referred to as Act.

3. It is the case of the petitioners that the old Gata No.813 Min. admeasuring 2 bigha and 15 Biswansi and old Gata no.875 Min. admeasuring 2 bigha i.e. a total of two plots of land measuring 4 bighas and 15 Biswansi situated in Village Sudhari, Mauja Afjalpur, Pargana and Tehsil Akbarpur, District Faizabad, later on,

District Ambedkar Nagar, was the Zamindari land of the Intermediary Musamaat Shakeena Bibi widow of Syed Rafiq Hussain resident of Lorpur. The said land was given on patta to the predecessor in interest of the petitioner on 01.07.1947. A copy of the patta/lease deed for agricultural purpose entered into between Power of Attorney holder of Intermediary and the father of the petitioners Bhola Ahir has been filed as Annexure-1 to the petition.

4. It has been submitted that even after Zamindari was abolished in 1952 the predecessor in interest of the petitioners continued to be in possession of the land in question and continued also to cultivate the same. It was recorded in the name of the father of the petitioners in 1363 to 1365 Fasli and again in 1366 to 1368 Fasli. When consolidation operation, began in the village, the land in question was recorded in CH Form-2A as Matruk and Banjar to some extent and also in the names of Badal and others and Beni Madhav, Daya Ram, Ram Sahay and others. The father of the petitioners Bhola Ahir filed a petition under Section 9A (2) saying that due to error the land in question had been recorded as Matruk and Banjar. The case was registered as Case No.585/6424 namely Bhola Vs. State and others. After the petitioners father produced evidence both oral and documentary, the Consolidation Officer, Akbarpur, passed an order on 08.06.1972 that name of the father of the petitioners be recorded in the Revenue Records instead of the land in question being recorded as Banjar and Matruk and the arrears of land revenue be also deposited by the tenure holder.

5. The order dated 08.06.1972, however, was not endorsed either in CH Form-11 or any other CH Form published thereafter, although there is a specific duty cast upon the Consolidation Authorities under Paragraph 249 to 254 of the Consolidation Manual for every order passed by the Assistant Consolidation Officer under 9A (1) or the Consolidation Officer under 9A (2) to be recorded in the Revenue Records.

6. Learned counsel for the petitioners submitted that under Section 10 (1) of the Act and Rule 28 it is the duty of the Consolidation Authorities to get all orders implemented by making a mention thereof in CH-11. Since, no mention was made in CH-11 of the order dated 08.06.1972, or in CH-41 to CH-45, Old Gata No.875/12 and 813/9 were converted into new numbers 520 Ka and recorded as Navin parti, and 429 Ka and recorded as Banjar in the Revenue Records.

7. It is the case of the petitioners that because certain portion of Old Gata No.875/12 and 813/9 was recorded as Banjar land and old parti it remained outside the consolidation operation and no chak was allotted thereon, therefore, the father of the petitioners could not come to know of the land being recorded as Navin parti and Banjar land in favour of the Gaon Sabha. It is only when the Lekhpal issued notice to the petitioners for removal of encroachment on Gaon Sabha land that the petitioners came to know about the entry of the order dated 08.06.1972 not being made in the Revenue Records and therefore, applied under Rule 109 A (1) of the Rules. The Consolidation Officer submitted a report on 19.02.2019 to the Assistant Consolidation Officer saying that the land in question was recorded as Navin parti and Banjar in CH Form-41 and CH Form-45. The matter was referred to the

Consolidation Officer who by his order dated 23.01.2021 impugned in this petition has rejected the application of the petitioners as being not maintainable and also observing that Section 52 Notification for the Unit concerned was issued on 08.04.1982 and the Consolidation Officer's order being of 08.06.1972 of which Amaldaramad was being sought he had no jurisdiction to consider the application.

8. It has also been submitted by Shri Vijay Bahadur Verma, that an order passed under Rule 109 A (1) is not appealable order and therefore, this Court has been approached by the petitioners instead of approaching the Settlement Officer (Consolidation) or the Deputy Director of Consolidation.

9. It has been submitted by the learned counsel for the petitioners that on the basis of judgment rendered in the case of **Ramraj Vs. Deputy Director of Consolidation** reported in 2002 (93) RD 884, Paragraph 12 that even after de-notification of the village under Section 52 the Consolidation Authorities could entertain an application under Rule 109A more particularly when fraud and forgery was being alleged by one of the parties, not only upon the parties to the dispute but also upon the Court. The Court had observed that the scope of Rule 109 is quite wide and the de-notification under Section 52 of the Act is of no consequence. The Consolidation Authorities, if they are present in the district, shall give effect to orders passed by the Competent Consolidation Courts, and for that purpose consolidation operations shall be deemed not to have closed as provided under Sub Section (2) of Section 52 of the Act.

10. Learned counsel for the petitioners has also placed reliance upon a Division Bench /Larger Bench decision of this Court in **Mukhtar Vs. Deputy Director of Consolidation, Azamgarh**, reported in 1993 RD 457 wherein learned Single Judge having found divergence of opinions between two judgments rendered by two learned Single Judges in the case of **Raja Ram Vs. Deputy Director of Consolidation and Others** reported in 1982 RD 387 and **Brij Bir Singh Vs. Deputy Director of Consolidation, Ambedkar Nagar and others** reported in 1987 RD 66 had referred the question as follows:-

"Whether after Gazette Notification under Section 52 of the Act, an application under Rule 109 A (1) of the Rules was maintainable or not?

11. The Court had observed on the basis of language of Section 52 (2) and on the basis of Rules framed thereunder that the duty for revising the Revenue Records is upon the Consolidation Authorities and it is for the Consolidation Authorities to implement the order which are passed under the Act. The scheme of the Act is not like the scheme which has been provided under the Code of Civil Procedure in the sense that after obtaining the judgment and decree in his favour, a party has to apply for Execution within a certain period of limitation prescribed under the Rules for implementation of the Decree. Here in the CH Act, the duty is enjoined upon the Consolidation Authorities themselves to implement orders which have been passed under the Act and no duty is cast on the person in whose favour the decision has been given to make an application to the Authorities, for implementation of the order within any prescribed period of limitation. The Court held that the Consolidation Authorities were bound to

implement the directions contained in the final order passed by the Deputy Director of Consolidation, and even though a Notification under Section 52 (1) of the Act had taken place the proceedings would necessarily be deemed to be pending for the said purpose.

12. It has been submitted on the basis of the aforesaid two judgments by the learned counsel for the petitioners that even if the order was passed in 1972 and Section 52 Notification had been issued thereafter in 1982, the proceedings would be deemed to be pending and therefore the application under Rule 109 A (1) was maintainable and the order passed by the Consolidation Officer, Akbarpur, is erroneous and ought to be set aside by this Court.

13. Shri Upendra Singh, learned Standing Counsel appearing on behalf of the State of U.P. has brought to the notice of the Court that fact that the petitioners themselves admit that the patta in question was granted by the intermediary in 1948 and such patta/lease of land become ineffective in view of Section 8 of the U.P.Z.A. & L.R. Act, wherein it has been provided that any contract for grazing or gathering of produce from land, or collection of forest produce or fishes from any forest or fisheries entered into after 8 day of August, 1946 between the intermediary and any other person in respect of any private fisheries or land shall become void with effect from the date of vesting.

14. It has been submitted that as soon as the Zamindari Abolition Act came into force the patta in question became ineffective and the land vested in the Gram Sabha and therefore, was recorded as Matruk and Banjar, and Old Parti in the Revenue Records.

15. It has been submitted by Shri Upendra Singh, that it is the case of the petitioners themselves that even before consolidation operation started om the village as is evident from CH Form 2A, the land in question was recorded as Matruk and Banjar and Old Parti and the petitioners father had initiated the proceedings under the 9A (2) claiming "Sirdari" over the land in question on the ground that patta had been given by the intermediary to him before Zamindari Abolition Act.

16. It has been further submitted by Shri Upendra Singh that the father of the petitioners could only show some entries in the Revenue Records from 1363 to 1368 Fasli. In his name but even in those entries that were in his name there were other co-tenure holders names also recorded, and a portion of the land in question continued to be recorded as Old Parti and Banjar land belonging to Gaon Sabha.

17. It has been submitted by Shri Upendra Singh that even if the petitioners' case is accepted that it was the duty of the Consolidation Authorities under Paragraph 2049-2050 of the Consolidation Manual to get the orders passed by the Consolidation Authorities recorded in the Revenue records and at each stage the entries were to be checked and rechecked, then it is highly improbable that the Consolidation Lekhpal, the Assistant Consolidation Officer, the Consolidation Officer all failed to notice the order passed allegedly on 08.06.1972 in favour of the father of the petitioners. It has also been submitted that this Court has held in several cases that such an old entry like that of the year 1972 if it is being sought to be implemented under Rule 109 after several decades, it becomes suspect.

18. It has further been argued that the entries in question on the land in dispute were initially of Banjar, and old parti in favour of Gaon Sabha. Even after the order dated 08.06.1972 they continued to be recorded as Banjar and Matruk and a New Parti in favour of the Gaon Sabha. Such old entries can be corrected only under Sections 38/39 of the U.P. Land Revenue Act by making an appropriate application in this regard to the Collector who would get all records examined for checking the veracity of the claim made by the petitioners. The Collector would have records of earlier days and the records of later dates with him and the order impugned has been passed taking into account the fact that the consolidation operations were closed in 1982 in the village concerned and this Court should not interfere in writ jurisdiction in such an order. It has been submitted that the petitioners have statutory remedy of approaching the Collector for correction of Revenue Records under the Land Revenue Act.

19. Shri Vijay Bahadur Verma, in rejoinder has submitted that the arguments regarding Section 8 of the U.P.Z.A. & L.R. Act would not be available to the State respondents as in the case of the petitioners the predecessor in interest had been given the land for cultivation by the intermediary and this Court by a Co-ordinate Bench decision in **Mohd. Naimuddin and Others Vs. Deputy Director of Consolidation, Barabanki**, in Writ Petition No.3438 (Consolidation) of 1981 decided on 08.01.2020 has held that Section 8 is not attracted in lease of land where the purpose of the lease is to use the land for the purpose of agriculture. A lease of land for the purpose of cultivation which confers on the lessee not merely a right in the land but also the right to exclusive possession of the land and to turn it to cultivation, is not a transaction covered by Section 8 of the U.P.Z.A. & L.R. Act. This Court had placed reliance upon the judgment a Division Bench judgment in the case of **Raghunath Singh and Another Vs. State of U.P. and Another** reported in 1960 RD 337.

20. This Court having considered the arguments raised by the learned counsel for the parties as also gone through the order dated 23.01.2021. It finds therefrom that the Consolidation Officer had expressed his inability to entertain the application under Rule 109 A (1) only because Section 52 Notification had been published on 08.04.1982 and the order sought to be implemented was quite old i.e. of 08.06.1972. The maintainability of such application under Rule 109 A (1) being in question the Consolidation Officer refused to exercise his jurisdiction to consider the merits of the case as set up by the learned counsel for the petitioners.

21. In view of the judgment of a Division Bench of this Court in **Mukhtar Vs. Deputy Director of Consolidation, Azamgarh**, reported in 1993 RD 457, the question is no longer *res integra* that even after Section 52 Notification is issued, the Consolidation Authorities, if they are present in the District, having jurisdiction to implement the order passed by the Consolidation Officer or by any other Consolidation Authority for which the consolidation operations would be deemed to be pending. The order impugned is set aside only on this ground alone.

22. However, this petition is **finally disposed of** with a direction to the Consolidation Officer to consider his

responsibility under Section 11 C of the Act also, when the orders sought to be implemented has been passed allegedly on 08.06.1972 i.e. nearly fifty years ago. He will summon all records regarding to the entry of Banjar, Old Parti and New Parti in favour of the Gaon Sabha, and after considering the same as also after hearing the counsel for the Gaon Sabha he should pass appropriate orders strictly in accordance with law.

(2021)02ILR A345
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 02.02.2021

BEFORE

THE HON'BLE RAJNISH KUMAR, J.

Consolidation No. 7498 of 1989

Krishna Dutt Pandey & Ors. ...Petitioners
Versus
Jt Director of Consolidation & Ors. ...Respondents

Counsel for the Petitioners:
H S Sahai, Priti Saxena, Uma Shankar Sahai

Counsel for the Respondents:
S P Shukla, Anand Kumar Shukla, Avinash Chandra Pandey, R P Shukla, Rahul Roshan Dubey, Ravi Kishore Joshi, Vivek Kumar Tiwari

A. Civil Law - Consolidation of Holding Act, 1953 – Sections 9 and 11(1) – U.P. Zamindari Abolition and Reform Act, 1950 – Sections 8 and 20 – Khasra and Khatauni of 1356 Fasli – Entry of the name – Entitlement of possession – Names of the petitioners were recorded in 1356 Fasli and 1359 Fasli as well as in the basic year entry of 1386 Fasli – Said entries could not have been unsettled without any substantial evidence – Section 20 of UP ZA&LR Act secure the possession of the person, whom name is recorded as an occupant of any land, other than grove land…., in Khasra or Khatauni of 1356 Fasli – Held, in case a lease of land was issued for agricultural purpose and not covered by Section 8 of U.P. Z.A. & L.R. Act and the name was recorded as occupant of the land in the Khasra or Khatauni of 1356-Fasli, the entry shall be deemed to be correct and final and confers all the rights, if not challenged. (Para 16, 17 and 18)

Writ Petition partly allowed .(E-1)

Cases relied on :-

1. Ram Avadh Vs Ram Das, (2008) 8 SCC 58,

2. Mohd. Naimuddin & ors. versus Deputy Director of Consolidation Barabanki, 2020(147) RD 90.

3. Raghunath Singh & anr. Vs St. of U.P. & anr., 1961 RD 337

4. Mohd. Naimuddin & ors. versus Deputy Director of Consolidation Barabanki, 2020(147) RD 90

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

1. Heard Sri U.S. Sahai, learned counsel for the petitioners and Sri Avinash Chandra Pandey, learned counsel for the respondent.

2. The instant writ petition has been filed challenging the order dated 13.07.1982 passed in Case No.3563 by the Consolidation Officer and the order dated 26.07.1989 passed in Revision No.1402/942 by the Joint Director of Consolidation, Sultanpur, by means of which the order passed by the Settlement Officer Consolidation, Musafirkhana, District-Sultanpur in Appeal No.234 has been set aside and the order passed by the Consolidation Officer has been upheld.

3. The brief facts of the case, for adjudication of the present writ petition, are

that the dispute pertains to Plot No.366, which was recorded in the name of the petitioners as bhumidhars in the basic year. On publication of record under Section 9 of the U.P. Consolidation of Holdings Act 1953(hereinafter referred to as the Act of 1953), the opposite party nos. 3 to 8 filed objections claiming that the parties hailed from common ancestor and the land in dispute is old grove and the names of the opposite parties have been omitted to be recorded, as such, their names should also be recorded alongwith the petitioners. The claim of the opposite parties was refuted by the petitioners and according to them, the pedigree shown by the opposite parties before the Consolidation Officer was incomplete, the family is not joint family, the parties have their separate holdings and separate groves. It was further alleged that no party has any concern with the land of the others and the zamindar had executed patta on 14.04.1950 in favour of the petitioners and at no point of time, neither the land in dispute was recorded in the name of the common ancestor nor the opposite parties were in possession over the land in dispute. The dispute was referred by the Assistant Consolidation Officer to the Consolidation Officer and the parties tendered their evidence. After evidence, the Consolidation Officer, placing reliance on a partition deed dated 04.05.1948 allowed the objection filed by the opposite parties by means of the order dated 13.07.1982. The petitioners had challenged the order passed by the Consolidation Officer in appeal under Section 11(1) of Act of 1953, which came up before the Assistant Settlement Officer Consolidation, who by means of the order dated 10.05.1985 allowed the appeal in favour of the petitioners. Being aggrieved, the opposite party nos. 3 to 8 had filed a revision under Section 48 of Act of 1953 which came up before the Joint Director of Consolidation, who by means of the order dated 26.07.1989 allowed the revision and set aside the order passed by the Assistant Settlement Officer Consolidation and maintained the order passed by the Consolidation Officer. Hence the present writ petition has been filed by the petitioners.

4. During pendency of the writ petition, the petitioner nos.1 to 7 had died. Therefore their legal heirs were substituted. Opposite party nos. 13 to 19 were also impleaded on an application moved by the petitioners as predecessor-in-interest of them who was party before the courts below was not impleaded while filing the writ petition. The opposite party nos. 4 to 6 and 8 had also died. Therefore their legal heirs were also substituted.

5. Submission of learned counsel for the petitioners was that the Plot No.366 was recorded in the name of the predecessor-in-interest of the petitioners in the basic year and there was no jointness between the petitioners and the private opposite parties. The names of the predecessor- -in-interest of the petitioners were recorded in 1356 Fasli and 1359 Fasli. Therefore they have matured their title and right as bhumidhars because the said entries were in the nature of title. The name of the petitioners were also recorded in the basic year, i.e.,1386 Fasli as bhumidhar. There was no jointness between the petitioners and the private opposite parties. The petitioners and the private opposite parties had separate holdings and separate groves which has come in the evidence before the courts below. The Zamindar had granted patta on 14.04.1950 in favour of the predecessor-in-interest of the petitioners and on the basis of same, they were continuing in possession of the said

plot. The land was never recorded in the name of the common ancestor of petitioner and the private opposite parties and the opposite parties were never in possession whereas the petitioners are in possession of the property in question on the basis of aforesaid patta. The opposite parties never claimed their possession. Therefore, the petitioners are entitled for the said plot on the basis of adverse possession also. Learned court below has recorded a finding that at the time of patta, the land was in the possession of the Zamindar. Therefore question of partition does not arise.

6. He further submitted that the patta was proved before the Consolidation Officer. Therefore its validity cannot be questioned. The private respondents have claimed their rights on the basis of the partition deed, which is a private document and it was not proved. He further submitted that while filing objection, the partition deed was not claimed and subsequently, the case was developed and the claim was set up on the basis of alleged partition deed. Therefore also the private respondents are not entitled for the plot in question.

7. On the basis of above, learned counsel for the petitioners had submitted that the writ petition is liable to be allowed and the impugned orders are liable to be quashed. Learned counsel for the petitioners has relied on the judgment of the Hon'ble Apex court in the case of ***Ram Avadh versus Ram Das; 2008(8) SCC 58*** and judgment of this Court in the case of ***Mohd. Naimuddin and others versus Deputy Director of Consolidation Barabanki; 2020(147) RD 90.***

8. Learned counsel for the respondent had submitted that the plot in question was in possession of ancestors of the petitioners and the private opposite parties and it has been admitted by the petitioner no.1 in his evidence before the Consolidation Officer that in the grove, grave of the ancestors are situated. He has also admitted the partition but he had failed to disclose as to what was given to the opposite parties. The opposite parties had proved their case on the basis of partition deed and the recommendations of Prayag and Ram Narayan were also recorded. Prayag was the karta of the family and it has been admitted by the appellate authority also but even then the appeal was allowed without mentioning the facts and points raised by the opposite parties. It has been recorded by the revisional authority that the family tree was not disputed by the parties and in the Kafiyat column the names of trees are also mentioned. He further submitted that the petitioner no.1 had also admitted in his evidence that the plot in dispute is an old grove and it was not divided. Considering the evidence produced by the parties and recording a categorical finding, the revision has been allowed. He had also submitted that the alleged patta, on the basis of which the rights are being claimed by the petitioners, is of 14.04.1950 when the patta could not have been issued by the Zamindar because after 1947 there was ban on issuance of patta. He also submitted that patta of grove, which is a public land could not have been issued. On the basis of above, learned counsel for the respondent submitted that the writ petition has been filed on misconceived and baseless grounds and it is liable to be dismissed as order passed by the revisional authority and consolidation officer does not suffer from any illegality or infirmity.

9. I have considered the submissions of learned counsel for the parties and perused the orders passed by the courts

below,the documents placed on record and the pleadings of the parties.

10. The dispute in the present writ petition relates to plot no.366/3-3-0. The said plot was recorded in the basic year in Khata No.190 in the name of the predecessor-in-interest of the petitioners. Two objections were filed under Section 9 of the Act of 1953, one by Ram Milan and others and second by Kedar nath and others claiming their rights on the plot in question alleging that the petitioners and opposite parties are living together and the plot in question is an ancestral property. The Consolidation Officer had allowed the claim of the opposite parties on the basis of admission of the petitioner's witness that the grove is old and graves of ancestors are in grove and the partition had taken place 50-60 years ago but he failed to disclose as to what was given to the opposite parties in lieu of the said plot. The Settlement Officer Consolidation recorded a finding in the appellate order that there is no mention of partition deed in the objection filed under Section 9 and the plea of partition was taken subsequently during pendency of the case and it is a private document. Therefore it is not admissible. It has also been recorded that the partition is dated 04.05.1948 while the patta filed by the petitioners is dated 14.04.1950 and the said patta has been proved and it was also proved that at the time of grant of patta, the Zamindar was in possession of the land in question and since the partition is not proved therefore allowed the appeal and directed to continue the entries recorded in the basic year. On being challenged, the revisional authority held that the appellate authority without considering that the grove was old and also as to whether the patta could have been made in the year 1950 and as to why only names of three branches has been mentioned in the patta has allowed the appeal. It has also not considered that whether on the basis of names of three branches in the patta, the rights of the fourth branch, whose name has been left, would be extinguished and maintained the order passed by the Consolidation Officer.

11. The claim by the opposite parties has been setup on the plot on the ground of old and ancestral property and on the basis of old trees and grove on the plot in question and on the basis of a document dated 04.05.1948, which is in the nature of a partition deed. They had given a family tree before the Consolidation Officer, in which the name of the father of Prayag, Kashiram, Ram Narayan and Mahaveer was not given as it is not mentioned in the order while they were claiming the same on the basis of old and ancestral property whereas the name of their father has been given in the order passed by the revisional authority as Girja and it is mentioned that the petitioner has stated in his evidence that Girja was the head of the family. The revisional authority has recorded a finding that, at the time when the alleged patta was issued, there was grove on the plot in question and the patta of plot could not have been made while Izazat Nama for grove could have been given. It has also recorded a finding that after 1947, there was a ban on patta, therefore it could not have been issued and it has been got issued only to deprive the petitioners from their rights.

12. The learned revisional authority has though placed reliance on the document dated 04.05.1998 purporting to be a partition deed between the parties and allowed the claim of the opposite parties on the basis of the said deed but failed to consider as to whether the same could have

been considered to be a valid document because on the one hand plea of same was not taken in the objection under Section 9 and on the other hand the same was not proved. The revisional authority has also not considered and recorded any finding as to whether the document dated 04.05.1948 is worthy of acceptance or not in view of finding recorded by the appellate authority. As per evidence of one Sahab deen, who claimed that he was recovering the lagan at the time of Zamindar, plot in question was in possession of the Zamindar at the time of patta. Therefore if the plot in question was in possession of Zamindar at the time of patta then the question of it in possession of opposite parties and it's partition by means of alleged partition deed does not arise.

13. In case the plot in question could not have been ancestral property and in possession of Zamindar at the relevant point of time then the question arises as to whether the patta could have been issued by the Zamindar or not and if it could have been issued as to whether the patta was valid and not void under Section 8 of U.P. Z.A. & L.R. Act 1950, which reads as under:-

*"**8.Contract entered into after August 8,1946 to become void from the date of vesting**-Any contract for grazing or gathering of produce from land or the collection of forest produce or fish from any forest or fisheries entered into after the eighth day of August, 1946 between an intermediary and any other person in respect of any private forest, fisheries, or land lying in such estate shall become void with effect from the date of vesting.*

14. A Division Bench of this Court in the case of ***Raghunath Singh and another versus State of U.P. and another; 1961 RD 337*** has held that a lease of land for the purpose of cultivation which confers on the lessess not merely a right in the land but also the right to exclusive possession of the land and to turn it to cultivation, is not a transaction covered by Section 8. The relevant paragraph is extracted below:-

"In our opinion Section 8 is not attracted in the case of leases of land where the purposes of the leases is to use the land for the purpose of agriculture, horticulture, pisciculture etc. It is sometimes unavoidable that in the process of using the land for these purposes reclamation also is done and what is known as forest produce is collected or removed in the process. Land must be cleared of unwanted growth to turn it usefully to agriculture etc. The mere fact that these operations are necessarily involved in making the land agriculture worthy will not take away from the transaction their true nature as leases of land. A contract for the collection of forest produce must in order that it may be such a transaction be contract essentially for the collection etc. of the produce. It will not be such a contract if the removal etc. of the forest has to be done to make the land agriculture worthy- the object and purpose of the lease. In the instant case, admittedly the leases were for using the land for purpose of agriculture and horticulture etc. As a matter of fact the lessees were also entered as hereditary tenants of the lands and later after the abolition of zamindaris as sirdars. They have been paying the land revenue also assessed on them to the government. It is not possible in these circumstances to hold that the leases were contracts for the collection of forest produce. The contract referred to in Section 8 does not contemplate the conferment on the promises any right in or over land, it, on

the other hand, merely refers to the right to collect forest produce or to perform certain acts over the land. A lease of land for the purpose of cultivation which confers on the lesses not merely a right in the land but also the right to exclusive possession of the land and to turn it to cultivation, is not a transaction covered by Section 8. It is not possible under the circumstances to accept that the leases in favour of the petitioners were void under Section 8 of the U.P. Zamindari Abolition & land Reforms Act. Being leases for agricultural purposes the lessee acquired, at first the status of hereditary tenants and later when the Zamindari Abolition and Land Reforms Act was enforced of Sirdars of the lands therein transferred."

15. A Coordinate bench of this Court, in the case of ***Mohd. Naimuddin and others versus Deputy Director of Consolidation Barabanki; 2020(147) RD 90***, after considering the judgment in the case of ***Raghu Nath Singh and Anr. versus State of U.P. and Anr.(supra)*** has held that a lease of land for the purpose of cultivation which confers on the lessee not merely a right on the land but also the right to exclusive possession of the land and to turn it to cultivation is not a transaction covered by Section 8. Hence, where the land was for agricultural purpose the lessee acquired at first a status of hereditary tenant and later when the U.P. Zamindari Abolition and Land Reforms Act was enforced of Sirdar of the lands therein transferred.

16. Section 20 of the U.P. Z.A. & L.R. Act provides that where a person is recorded as an occupant of any land [other than grove land....] in Khasra or Khatauni of 1356 Fasli, which has been taken as the base year, he shall be entitled to retain possession thereof. The Hon'ble Apex Court, in the case of ***Ram Avadh versus Ram Das; 2008 (8) SCC 58***, has held that if the entry was not challenged it could not be doubted and have to be deemed to be correct in view of explanation III to Section 20 which provides that the entries in the year 1356 Fasli is final and confers all rights on occupant. Section 20 reads as under:-

*" **20. A tenant of Sir, sub-tenant or an occupant to be an adhivasi E**very person who-*

(a) on the date immediately preceding the date of vesting was or has been deemed to be in accordance with the provisions of this Act]-

(i) except as provided in[sub-clause (i) of Clause (b)], a tenant of sir other than a tenant referred to in Clause (ix) of Section 19 or in whose favour hereditary rights accrue in accordance with the provisions of Section 10; or

(ii) except as provided in[sub-clause (i) of Clause (b)], a sub-tenant other than a sub-tenant referred to in proviso to sub-section (3) of Section 27 of the United Provinces Tenancy (Amendment) Act, 1947 (U.P. Act X of 1947), or in sub-section (4) of Section 47 of the United Provinces Tenancy Act, 1939 (U.P. Act XVII of 1939) of any land other than grove land,

(b) was recorded as occupant,-

(i) of any land[other than grove land or land to which Section 16 applies or land referred to in the proviso to sub-section (3) of Section 27 of the U.P. Tenancy (Amendment) Act, 1947]in the khasra or khatauni of 1356-F prepared under Section 28[33]respectively of the U.P. Land Revenue Act, 1901 (U.P. Act III of 1901), or who was on the date immediately preceding the date of vesting entitled to regain possession thereof under

Clause (c) of sub-section (1) of Section 27 of the United Provinces Tenancy (Amendment) Act, 1947 (U.P. Act X of 1947); or

(ii) of any land to which Section 16 applies, in the[khasra or khatauni of 1356 fasli prepared under Sections 28 and 33 respectively of]the United Provinces Land Revenue Act, 1901 (U.P. Act III of 1901), but who was not in possession in the year 1356-F;

shall, unless he has become a bhumidhar of the land under sub-section (2) of Section 18 or an asami under Clause (h) of Section 21, be called adhivasi of the land and shall, subject to the provisions of this Act, be entitled to take or retain possession thereof.

Explanation I.- Where a person referred to in Clause (b) was evicted from the land after June 30, 1948, he shall notwithstanding anything in any order, be deemed to be a person entitled to regain possession of the land.

Explanation II.. Where any entry in the records referred to in Clause (b) has been corrected before the date of vesting under or in accordance with the provisions of the U.P. Land Revenue Act, 1901 (U P. Act III of 1901), the entry so corrected shall for the purposes of the said clause, prevail].

[Explanation III.- For the purposes of Explanation II an entry shall be deemed to have been corrected before the date of vesting if an order or decree of a competent Court requiring any correction in records had been made before the said date and had become final even though the correction may not have been incorporated in the record.

Explanation IV.- For purposes of this section 'occupant' as respects any land does not include a person who was entitled as an intermediary to the land or any share therein in the Year 1356 fasli.]"

17. In view of above, in case a lease of land was issued for agricultural purpose and not covered by Section 8 of U.P. Z.A. & L.R. Act and the name was recorded as occupant of the land in the Khasra or Khatauni of 1356-Fasli, the entry shall be deemed to be correct and final and confers all the rights, if not challenged.

18. In the present case, it is not in dispute that the names of the petitioners were recorded in 1356 Fasli and 1359 Fasli as well as in the basic year entry of 1386 Fasli. Therefore the said entries could not have been unsettled without any substantial evidence in favour of the opposite parties and without examining the correctness of the document dated 04.05.1948 which is in the nature of partition deed. The revisional authority posed some questions but without answering the same on the basis of any cogent evidence and any finding regarding nature of land in dispute on the basis of revenue records and without considering the provisions of Section 8 and 20 of U.P. Z.A. & L.R. Act has allowed the revision.

19. In view of above, this Court is of the view that the impugned order is not sustainable in the eyes of law, which is liable to be set aside and reconsidered by the revisional authority. Thus the order dated 26.07.1989 passed in Revision No.1402/942 by the opposite party no.1 is set aside and the matter is remanded to the revisional authority to decide the revision afresh in accordance with law and in the light of the observations made hereinabove expeditiously. An endeavour shall be made by the revisional authority to decide the revision within a period of six months from

the date of production of certified copy of this order on priority basis.

20. The writ petition is **partly allowed** in the aforesaid terms. No order as to costs.

(2021)02ILR A352
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 02.02.2021

BEFORE

THE HON'BLE ABDUL MOIN, J.

Contempt No. 240 of 2021

Baquar Husain Zaidi ...Applicant
Versus
Safdar Husain ...Opposite Party

Counsel for the Applicant:
Pradeep Kumar Tiwari, Varun Kumar Singh

Counsel for the Opposite Party:

A. Contempt of Courts Act, 1971-Section 10 r/w 12-application-initiation of contempt proceedings for non-compliance of the order- the board of revenue passed order of status quo which have been violated by the respondents-court declines to issue notice in the contempt proceedings as applicant can avail other alternate remedy as available in Manual(Uttar Pradesh Revenue Court Manual) under the provision of Chapter 43 Clause 460-clause 460 clearly provides that any decree or order passed under the provision of the Code, 2006 can be executed as per the procedure prescribed in Chapter 5 of the Manual.(Para 1 to 20)

The petition is dismissed. (E-5)

List of Cases cited:-

E. Bapanaiah Vs K.S. Raju (2015) 1 SCC 451

(Delivered by Hon'ble Abdul Moin, J.)

1. Heard learned counsel for the petitioner and Sri H.K. Bhatt, learned Additional Chief Standing Counsel.

2. The present contempt petition has been filed under Section 10 read with Section 12 of Contempt of Courts Act, 1971 (hereinafter referred to as 'Act 1971') praying for initiation of contempt proceedings for the non compliance of the orders dated 13.12.2017 and 11.02.2020 passed by Board of Revenue, Lucknow in Revision No.2060 of 2017 (Safdar Husain vs. Atahar Husain & others), under Section 209 of Land Revenue Act, 1901 (hereinafter referred to as "Act, 1901").

3. It is contended that the Board of Revenue had passed orders of status quo which have been violated by the respondent herein and thus, it is prayed that the contempt proceedings be initiated against the respondent.

4. A question before this Court would be as to whether the present contempt petition filed under Section 10 of the Act, 1971 praying for initiation of contempt proceedings against an order passed by the Board of Revenue would be maintainable. for deciding this question, the Court has taken the assistance of Sri. H.K.Bhatt, learned Additional Chief Standing counsel.

5. The Apex Court in the case of **E. Bapanaiah vs. K.S. Raju** reported in **(2015) 1 SCC 451**, has held as under:-

"25. Powers of the High Courts to punish for contempt including the powers to punish for contempt of itself flow from Article 215 of the Constitution of India. Section 10 of the Contempt of Courts Act,

1971 empowers the High Courts to punish contempts of its subordinate courts which reads as under: -

"10. Power of High Court to punish contempts of subordinate courts. - Every High Court shall have and exercise the same jurisdiction, powers and authority, in accordance with the same procedure and practice, in respect of contempts of courts subordinate to it as it has and exercises in respect of contempts of itself:

Provided that no High Court shall take cognizance of a contempt alleged to have been committed in respect of a court subordinate to it where such contempt is an offence punishable under the Indian Penal Code (45 of 1860).

27. The present case relates to a civil contempt wherein an undertaking given to Company Law Board is breached. Normally, the general provisions made under the Contempt of Courts Act are not invoked by the High Courts for forcing a party to obey orders passed by its subordinate courts for the simple reason that there are provisions contained in Code of Civil Procedure, 1908 to get executed its orders and decrees. It is settled principle of law that where there are special law and general law, the provisions of special law would prevail over general law. As such, in normal circumstances a decree holder cannot take recourse of Contempt of Courts Act else it is sure to throw open a floodgate of litigation under contempt jurisdiction. It is not the object of the Contempt of Courts Act to make decree holders rush to the High Courts simply for the reason that the decree passed by the subordinate court is not obeyed."

6. From the perusal of the aforesaid judgment in the case of **K.S. Raju (Supra)**, it is apparent that the power exercised by the High Court under Section 10 of the Act, 1971 can be exercised where there is no provision for execution or compliance of such orders meaning thereby that where there is an effective remedy for enforcing the order of court below, then the High Court would be justified in declining to entertain the contempt petition.

7. Being armed with the aforesaid proposition of law, the Court now sets out to see whether there is a remedy available to the petitioner of having the orders passed by the Board of Revenue complied with?

8. The orders of which contempt is alleged, have been passed by the Board of Revenue on a revision filed by the petitioner under Section 209 of the Act, 1901.

8. With the promulgation of the Uttar Pradesh Revenue Code, 2006 (hereinafter referred to as "Code, 2006"), in terms of Section 230 of the Code, 2006, the enactments specified in the first schedule of the Code, 2006 were repealed. The first schedule List- A at Serial No. 10 indicates the United Provinces Land Revenue Act, 1901 meaning thereby that with the promulgation of the Code, 2006, the Act, 1901 stood repealed.

9. A query was put to the learned counsel for the applicant that once the Code, 2006 was promulgated w.e.f 11.02.2016 and considering Section 230 of the Code, 2006 as to how the revision under Section 209 of the Act, 1901 would be maintainable.

10. To the said query, learned counsel for the applicant contends that considering Section 231 of the Code, 2006, all cases pending before the Revenue Court

immediately before the commencement of the Code, 2006 have to be decided in accordance with the provisions of the appropriate law which would have been applicable to them had the Code, 2006 not been passed and thus he contends that as the revision would fall within the ambit of "Case Pending", it being a continuance of the proceedings that were initiated before the Revenue Court, consequently the said revision could be filed and in fact was filed considering Section 231 of the Code, 2006 under the provisions of the Act, 1901.

11. Learned counsel for the applicant further contends that considering Section 231 of the Code, 2006, the order passed by the Board of Revenue, alleging non compliance of which the present contempt petition has been filed under the provisions of the Section 10 of the Act, 1971, being an order passed by a Court subordinate to the High Court and there being no other mode for compliance of the interim order passed by the Board of Revenue and the same having been violated, the present contempt petition would be maintainable.

12. For considering the argument of the learned counsel for the applicant this Court would have to consider the provisions of Section 231 of the Code, 2006 which read as under:-

" (1) Save as otherwise expressly provided in this Code, all cases pending before the State Government or any Revenue Court immediately before the commencement of this Code, whether in appeal, revision, review or otherwise, shall be decided in accordance with the provisions of the appropriate law, which would have been applicable to them had this Code not been passed.

(2) All cases pending in any civil court immediately before the commencement of this Code which would under this Code be exclusively triable by a [Revenue Court] shall be disposed of by such civil court according to the law in force prior to the date of such commencement."

13. Section 231 of the Code, 2006 clearly indicates that all cases **pending** before the State Government or any Revenue Court **immediately before the commencement of this Code**, whether in appeal, **revision**, review or otherwise, shall be decided in accordance with the provisions of the appropriate law, which would have been applicable to them had the Code not been passed.

14. Section 231 of the Code, 2006 would thus be applicable on all **pending** cases on the date of promulgation of the Code, 2006 i.e as on 11.02.2016. The cases have been dealt separately i.e whether by way of appeal, revision, review or otherwise meaning thereby that in the present case once a revision was filed by the applicant on 13.12.2017 under Section 209 of the Act, 1901, as comes out from a perusal of the copy of the revision which has been filed as annexure 6 to the contempt petition it is apparent that the Act, 1901 stood repealed with the promulgation of Code, 2006 w.e.f 11.02.2016.

15. Accordingly, the next question which arises is that when a revision had been filed by the applicant in December, 2017 and the same was entertained, whether wrong mentioning of the title in the revision of it being filed under the provisions of Section 219 of the Act, 1901 would render it liable to be dismissed ?,

16. The said issue is no longer *res integra* considering that it is settled proposition of law that mere mentioning of wrong provision of law in the title would not render the said application to be rejected rather the Board of Revenue correctly proceeded to entertain and decide the same and the said decision would have to be under the provisions of Section 210 of the Code, 2006 which is akin to Section 219 of the Act, 1901.

16. This aspect of the matter would also be clear from the heading of the revision filed by the applicant which itself indicates that a revision was being filed under the provisions of Section 219 of the Act, 1901 along with Section 210 of the Code, 2006.

17. The next question which arises is as to whether when the said revision has been entertained and an order passed, as to whether the applicant has a remedy of having the said order enforced.

18. For this, the Court has taken the assistance of the provisions of the Uttar Pradesh Revenue Court Manual (hereinafter referred to as "Manual") which provides in Chapter 43 Clause 460 for compliance of a decree or order passed by the Board of Revenue under the provisions of the Code, 2006 or rules framed under the provisions of Code, 2006. Clause 460 clearly provides that any decree or order passed under the provisions of the Code, 2006 can be executed as per the procedure prescribed in Chapter 5 of the Manual.

19. Consequently, considering the law laid down by the Apex Court in the case of **K.S.Raju (supra)** as well as the provisions of Chapter 43 Clause 460 it is apparent that the applicant would have a remedy of having the orders dated 13.12.2017 and 11.02.2020 enforced under the provisions of the Manual and thus, once such a remedy is available to the applicant, this Court declines to issue notice in the contempt proceedings.

20. The contempt petition is **dismissed**.

(2021)02ILR A355
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 18.02.2021

BEFORE

THE HON'BLE ABDUL MOIN, J.

Contempt No. 1213 of 2019

Sudhir Kumar Srivastava ...Applicant
Versus
Alok Kumar Mukherjee, The Then Sr. Registrar Of Hon'ble High Court ...Opposite Party

Counsel for the Applicant:
Jyotinjay Verma

Counsel for the Opposite Party:
Gaurav Mehrotra

A. Contempt of Courts Act, 1971-Section 19-maintainabilty of-contempt petition was dismissed-application -for recall of order-rejection-court has no power to review or recall the order dismissing the contempt petition on merit-a division bench judgment held that the Act of 1971 impliedly excludes the power of recall or review-application for recall filed by the petitioner simply indicating it to be a recall of the order is in fact an order for review as would be apparent from perusal of the averments made in the said affidavit along with the averments made in the written submissions-Hence, keeping in view the law laid down by the Apex Court, it is apparent that the application in

effect and in substance is one for review.(Para 1 to 21)

The application is rejected. (E-5)

List of Cases cited:-

1. Delhi Adminstration Vs Gurdip Singh Uban & ors.,(2000) 7 SCC 296

2. Sharwan Kumar Vs Harminder Raj Singh(IAS),Contempt Petition No. 1591 of 2000

3. St. Vs. Baldev Raj (1991) SCC Online All 1070

4. Municipal Corporation of Greater Mumbai & anr. Vs Pratibha Industries Ltd. & ors.(2019) 3 SCC 203

5. Maharaja Dharmendra Prasad Singh & anr. Vs Vivek Agarwal & ors. (2010) 28 LCD 323

(Delivered by Hon'ble Abdul Moin, J.)

(C.M. Application No.11525 of 2020)

1. Heard learned counsel for the applicant and Sri Gaurav Mehrotra, learned counsel for the respondent.

2. An application for recall has been filed seeking recall of the order dated 20.01.2020 passed in Contempt Petition No.1213 of 2019 in re: Sudhir Kumar Srivastava vs. Alok Kumar Mukherjee, by which the contempt petition had been dismissed. The said application has been filed by learned counsel for the applicant duly supported by an affidavit of one Sri Shanti Sewak, describing himself to be the Clerk of learned counsel for the applicant. It has also been indicated in paragraph 2 of the affidavit that the applicant is an affected person and has been falsely implicated. It is not understood as to what prevailed upon the Clerk of the learned counsel for the applicant to file an application for recall inasmuch it has not been indicated in the said affidavit as to what has precluded or prevented the applicant himself namely Sudhir Kumar Srivastava from filing the said application and it has been left for the Clerk of the learned counsel to indicate that the applicant has been falsely implicated.

3. Be that as it may, the fact of the matter is that the Court vide order dated 20.01.2020 had dismissed the contempt petition after considering the facts and circumstances of the case.

4. Upon the application for recall being taken up, a preliminary objection has been raised by Sri Gaurav Mehrotra, learned counsel for the respondent, that the application for recall in effect is seeking review of the order dated 20.01.2020 by which the contempt petition had been dismissed and once no power of review is vested with the Court under the Contempt of Courts Act, 1971 (for short, 'Act of 1971') as such the said application merits to be rejected on this ground alone.

5. In support of the said argument, learned counsel for the respondent has placed reliance on a judgment of the Apex Court in the case of **Delhi Administration vs. Gurdip Singh Uban and others** - (2000) 7 SCC 296, to contend that an application for "clarification, modification or recall" in substance is an application for review.

6. Placing reliance on a judgment of this Court passed in **Contempt Petition No.1591 of 2000** in re: **Sharwan Kumar vs. Harminder Raj Singh (IAS)**, decided on **09.02.2016**, it is argued that the Court has held that where a contempt petition has been dismissed on merits then an application for recall would not be maintainable.

7. Reliance has also been placed on a Division Bench judgment of this Court in the case of **State vs. Baldev Raj - 1991 SCC OnLine All 1070**, which has also held the same.

8. Placing reliance on the aforesaid judgments, Sri Gaurav Mehrotra, learned counsel for the respondent, submits that the preliminary objection merits to be upheld and the application for recall merits to be rejected.

9. On the other hand, learned counsel for the applicant on the basis of averments contained in paragraph 5 of the application for recall as well as paragraph 13 of the written submissions filed by the learned counsel for the applicant dated 04.03.2020 contends that as this Court has "failed" to peruse the records of the case and notice the averments made on affidavit as such the application for recall would be maintainable. Various other grounds have also been taken on the merits of the case so much so that in paragraph 6 of the application it has been contended that certain submissions of the counsel for the applicant as have been quoted verbatim in the said paragraph of the application, were not the submissions of the counsel for the applicant/petitioner.

10. Strangely, the averments of paragraph 6 of the affidavit have been sworn by the Clerk on the basis of information derived from the learned counsel for the applicant. What is strange is that the order dated 20.01.2020 was dictated in the open Court and no demur or protest was raised by the learned counsel for the applicant at the time of dictation of the said order that allegedly wrong submissions were being recorded and now in an affidavit sworn by the Clerk of the learned counsel for the applicant the said plea is being taken !

11. On the ground of maintainability of the application for recall, learned counsel for the applicant has placed reliance on the judgment of the Apex Court in the case of **Municipal Corporation of Greater Mumbai and another vs. Pratibha Industries Limited and others** - (2019) 3 SCC 203, to contend that the High Court being a Court of record has jurisdiction to recall its own order and that while exercising the power under Article 226 of the Constitution of India nothing precludes the High Court from exercising the power of review which inheres in every Court of plenary jurisdiction.

12. Reliance has also been placed on a Division Bench judgment of this Court in the case of **Maharaja Dharmendra Prasad Singh and another vs. Vivek Agarwal and others** - 2010 (28) LCD 323 that following the maxim "Actus Curiae Neminem Gravabit", i.e. an act of the Court shall prejudice no man, this Court is vested with the power to recall the order dated 20.01.2020 passed on merits.

13. Having heard learned counsel for the parties and having perused the records, what is apparent is that the order dated 20.01.2020 had been passed on merits dictated in open Court whereby the Court not finding any contempt to have been committed by the respondent/contemnor, proceeded to dismiss the contempt petition.

14. Now an application for recall has been filed trying to argue certain points and trying to indicate that the Court "failed" to peruse the records and notice the averments made on an affidavit and supporting annexures.

15. The order dated 20.01.2020 is not an order by which the contempt petition may have been dismissed in default rather it is an order passed on merits. Thus, the application for recall filed by the applicant/petitioner by simply indicating it to be a recall of the order is in fact an order of review as would be apparent from perusal of the averments made in the said affidavit along with the averments made in the written submissions. Thus, keeping in view the law laid down by the Apex Court in the case of **Gurdip Singh Uban (supra)**, it is apparent that the application in effect and in substance is one for review.

16. It is settled proposition of law that a review or an appeal is a statutory remedy. In this regard, a coordinate Bench of this Court in the case of **Sharwan Kumar (supra)** has held as under:-

"After hearing learned counsel for parties and going through the record, the first and foremost question to be considered that if the contempt petition has already been dismissed on merit then the whether the application for recall of the said order is maintainable or not ?

Answer to the said question finds place in the Division Bench judgment of this Court passed in the case of Mahaveer Prasad Verma Vs. Central Administrative Tribunal, Lucknow and others, 2013 (31) LCD 351, in paragraph No. 4 held as under:-

"By the order dated 10.1.2012, the contempt petition filed by the petitioner, was dismissed in his absence on the ground that the petitioner respondent has not moved any application to bring on record the successor since the contemner was transferred. Tribunal noted that an application for recall of an order passed in a contempt proceeding, is not maintainable. So far as the finding of Tribunal that recall/review application is not maintainable, seems to be correct. Virtually, recalling of the order dated 10.1.2012, will amount to review of earlier decision was was passed with the finding on merit to the extent that successor officer has not been brought on record. Review/recall or appeal are the statutory remedies, vide AIR 1966 SC 641, Harbhajan Singh v. Karam Singh and others, 1988 (14) ALR 706, Vijai Bahadur Vs. State of U.P., 1995 (26) ALR 627, Ram Jiwan Singh and others Vs. The District Inspector of Schools, Kanpur and others, 1979 (5) ALR 168, 1998 (33) ALR 456, New India Assurance Co. Ltd. Vs. Smt. Bimla Devi and others, 1997 (88) RD 562, Smt. Shivraji and others Vs. Dy. Director of Consolidation, Allahabad and others, AIR 1970 SC 1273, Patel Narshi Thakershi and others Vs. Pradyumansinghji Arjunsinghji, 1987 (13) ALR 680, Dr. (Smt.) Kuntesh Gupta Vs. Mgt. of Hindu Kanya Mahavidyalaya, Sitapur etc., AIR 1964 SC 436, Laxman Purushottam Pimputkar Vs. The State of Bombay and others, and AIR 1965 SC 1457, Patel Chunibhai Dajibha etc. Vs. Narayanrao Khanderao Jambekar and another. Unless provided under the Act, no application for review/recall may be moved. The contempt of Courts Act, 1971 does not contain any provision for review of a judgment. Hence the impugned order dated 13.9.2012 does not seem to suffer from any impropriety or illegality"

17. Apart from above, there is no power under the Act of 1971 conferring any power of review and thus no such power can be exercised by this Court.

18. A Division Bench of this Court in the case of **Baldev Raj (supra)** has also

held that the Act of 1971 impliedly excludes the power of recall or review.

19. So far as the judgment of the Division Bench of this Court in the case of **Maharaja Dharmendra Prasad Singh (supra)** is concerned, that was a case in which despite filing of a caveat by learned counsel for the respondent, the caveat had not been noted by the Registry, with the result that an ex-parte interim order was passed by the High Court. Considering the said fact, the High Court after applying the maxim *Actus Curiae Neminem Gravabit* recalled the said order. Thus, the facts and ratio of the said case are not applicable here.

20. Likewise, the judgment of the Apex Court in the case of **Pratibha Industries Limited (supra)** was a case in which the application filed under Section 9 of the Arbitration and Conciliation Act, 1996 (for short, 'Act of 1996') had been entertained and an injunction had been granted on the ground that there was an arbitration clause in the contract. An arbitrator had also been appointed by the High Court. An application for recall was filed contending that there was no arbitration clause and thus the order was recalled by the Single Judge. Upon an appeal being filed under Section 37 of the Act of 1996, the Division Bench set-aside the order of recall on the ground that there was no power to review or recall the said order vested with the Court under the Act of 1996. Upon the matter being carried to the Apex Court, the Apex Court held that once there was no arbitration agreement consequently the provisions of the Act of 1996 were itself not applicable and hence proceeded to set-aside the Division Bench judgment of the High Court. Thus, the very applicability of the Act of 1996, in which the order was passed, was held to be inapplicable by the Apex Court and accordingly, the order of Single Judge of High Court recalling his order appointing the arbitrator was upheld despite there being no provision in the Act 1996 for review an order. In the instant case it is not the case of the applicant/petitioner that the Act of 1971 is not applicable. Hence, the judgment in the case of **Pratibha Industries Limited (supra)** may not be of any help to the applicant/petitioner.

21. Considering the aforesaid discussions, it is apparent that this Court has no power to review or recall the order dismissing the contempt petition on merits. Accordingly, the preliminary objection is upheld and the application for recall of order dated 20.01.2020 is rejected.

(2021)02ILR A359
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 22.01.2021

BEFORE

THE HON'BLE VED PRAKASH VAISH, J.
THE HON'BLE MRS. SAROJ YADAV, J.

Criminal Appeal No. 89 of 1987

Chaman Lal ...Appellant
Versus
State of U.P. ...Respondent

Counsel for the Appellant:
G.K. Pandey, Anurag Shukla (Ac)

Counsel for the Respondent:
Govt. Advocate

A. Criminal Law - Code of Criminal Procedure, 1973-Section 374(2) & Indian Penal Code, 1860-Section 302/34-challenge to-conviction-acquittal for want of trial court record-after a long gap of

about 39 years, there remains no possibility of retrial-there remains no alternative except to close the matter and acquit the appellant-hearing of appeal in accordance with the provisions of section 386 Cr.P.C. is not possible.(Para 1 to 23)
B. It is settled law that for deciding the appeal, perusal of the record of trial court is necessary and if the record is not available and reconstruction is not possible, then two courses are open to the appellate court, one is to order for retrial after setting aside the conviction-the other is, if there is a long gap, then close the matter for want of record as the retrial will also not serve any purpose in the absence of trial court record. (Para 15 to 23)

The appeal is allowed. (E-5)

List of Cases cited:-

1. Pati Ram & anr. Vs St. of U.P. (2010) Cri. L. J. 2767

2. Sita Ram & ors. Vs St. of U.P. (1981) Cri. L.J.65

3. Shyam Deo Pandey Vs St. of Bih.(1971) 1 SCC 855

(Delivered by Hon'ble Mrs. Saroj Yadav, J.)

1. This criminal appeal has been preferred by the appellant accused namely Chaman Lal, son of Shri Satya Narain against the judgemnt and order dated 29.1.1987 passed in Sessions Trial No.352 of 1981 (State Vs. M.P.Singh and another) under Section 302 I.P.C. read with Section 34 I.P.C. convicting the appellant to undergo life imprisonment.

2. While admitting the appeal on 5.2.1987, this Court enlarged the appellant on bail. During pendency of the appeal, the appellant/accused absconded and this court issued non bailable warrant against him and he could be arrested after a long time on 10.2.2020. Now appellant/accused is in jail.

3. When the appeal was put up for hearing, the record of the trial court was summoned but the record could not be received and it was reported that the trial court record had already been weeded out and only the impugned judgement is available.

4. The court ordered for reconstruction of the record and attempts were made at various levels for the same but all proved a futile exercise. The District Judge, Lucknow vide its letter no.594/Antim Jaanch No.30113 dated 14.2.2019 reported that the reconstruction of the record of Sessions Trial No.352 of 1981 is not possible. Alongwith above report of the District Judge, the report of the officer-in-charge of the record room (Criminal), District Court, Lucknow has also been attached and according to that report also, the reconstruction of the record is not possible.

5. The attempts were also made at the level of prosecution to get the record re-constrcuted but all efforts remained unsuccessful to reconstruct the record. Hence, on the basis of the above quoted material, it is established **that the record has already been weeded out and the reconstruction of that record is not possible.**

6. Heard learned Amicus Curiae Shri Anurag Shukla appearing for the appellant and Shri Chandra Shekhar

Pandey, learned A.G.A. for the respondent State.

7. Learned Amicus Curiae submits that since the record is not available, the appeal cannot be decided on merits and even if merit is considered only on the basis of the impugned judgement available on record, there is no cogent evidence to sustain the conviction made because the trial court has convicted the appellant accused on the basis of the extra judicial confession allegedly made and acquitted the another accused on whose instigation, the present appellant accused has been alleged to commit the crime.

8. On the other hand, learned A.G.A. submitted that the appellant has committed the murder of Shri A.U.Siddiqui and has been convicted by the trial court on the basis of the evidence produced by the prosecution. The appellant accused cannot be acquitted only for want of record.

9. Learned Amicus Curiae has relied upon the judgments in the case of ***Pati Ram and another Vs. State of U.P. : 2010 Cri. LJ 2767, ii). Sita Ram and others Vs. State of U.P. : 1981 Cri. LJ 65, and iii). Shyam Deo Pandey Vs. State of Bihar : 1971 (1) SCC 855.***

10. We have considered the submissions made by both the sides and perused the record and the case laws cited above.

11. It is undisputed that the record of the trial court has been weeded out and the reconstruction of that record is not possible as has been reported by the concerned authorities, noted above.

12. It is settled law that for deciding the appeal, perusal of the lower court record is necessary.

13. In the case of Shyam Deo Pandey Vs. State (supra), the Hon'ble Apex Court has held that perusal of the record is necessary for the appellate court to adjudicate upon the correctness or otherwise of the judgement against whom appeal is preferred.

The relevant paragraph of the judgment runs as under :-

"18.Coming to section 425, which has already been quoted above, it deals with powers of the appellate court in disposing of the appeal on merits. It is obligatory for the appellate court to send for the record of the case, if it is not already before the court. This requirement is necessary to be complied with to enable the court to adjudicate upon the correctness or otherwise of the order or judgement appealed against not only with reference to the judgement but also with reference to the records which will be the basis on which the judgement is founded. The correctness or otherwise of the findings recorded in the judgment on the basis of the attack made against the same, cannot be adjudicated upon without reference to the evidence, oral and documentary and other materials relevant for the purpose. The reference to "such record" in "after perusing such record" is to the record of the case sent for the appellate court."

14. Thus, it is clear that for deciding the appeal, it is incumbent upon the appellate court to call for the record and to peruse the record.

15. As noted above, in the present matter, the record has already been weeded out and the reconstruction is not possible.

16. Similar situation arose in the case of *Sita Ram and others Vs. State (supra)* where the Division Bench of this Court held as under :-

"On a careful consideration of the relevant statutory provisions and the principles laid down in the cases cited before us, we are of the opinion that where it is not possible to reconstruct the record which has been lost or destroyed it is not legally permissible for the appellate court to affirm the conviction of the appeal since perusal of the record of the case is one of the essential elements of the hearing of the appeal. The appellant has a right to try to satisfy the appellate court that the material on record did not justify his conviction and that right cannot be denied to him. We are further of the opinion that if the time gap between the date of the incident and date on which the appeal comes up for hearing is short, the proper course would be to direct retrial of the cases since witnesses normally would be available and it would not cause undue strain on the memory of the witnesses. Copies of the F.I.R., statements of the witnesses under Section 161 Cr.P.C., reports of medical examinations etc. would also be normally available if the time gap between the incident and the order of retrial is not unduly long. Where, however the matter comes up for consideration after a long gap of years, it would neither be just nor proper to direct retrial of the case, more so when even copies of the F.I.R. and statements of the witnesses under Section 161 Cr.P.C. and other relevant papers have been weeded out or are otherwise not available. In such a situation even if witnesses are available, apart from the fact that heavy strain would be put on the memory of the witnesses, it would not be possible to test their statements made at the trial with reference to the earlier version of the incident and the statements of witnesses recorded during investigation. Not only that the accused will be prejudiced but even the prosecution would be greatly handicapped in establishing its case and the trial would be reduced to a mere formality entailing agony and hardships to the accused and waste of time, money and energy of the State."

17. Again, in Pati Ram and another Vs. State of U.P. (supra), in almost similar situation, this court held as under :-

" I have given my thoughtful consideration to the rival submissions made by parties' counsel. It is true that another Bench of this Court in case of Raj Narayan Pandey (supra) has decided the appeal on merit in the absence of lower court record on the basis of the impugned judgement only, but in my considered opinion, the appeal cannot be decided on merit in the absence of lower court record. Unless the evidence is available for perusal, in my opinion, the appeal cannot be considered and decided on merit merely on the basis of the lower court judgement, as evidence is essentially required to consider the merit of the impugned judgement and merely on the basis of the said judgment, no order on merit can be passed in an appeal."

18. Thus, it is settled law that for deciding the appeal, perusal of the record of trial court is

necessary and if the record is not available and reconstruction is not possible, then following two courses are open to the appellate court :-

(i). To order for re trial after setting aside the conviction; or,

ii). If there is a long gap, then close the matter for want of record as the retrial will also not serve any purpose as the relevant documents are not available.

It is also settled law that appeal cannot be decided in the absence of trial court record.

19. In the present matter, the merit of the case cannot be looked into for want of record. The report of the District Judge, Lucknow and the officer-in-charge of the record room have established that the construction of the record is not possible.

20. In the present matter, the incident took place in the year 1981 and after concluding the trial, the accused was convicted on 29.1.1987. Thereafter this appeal was filed on 4.2.1987 and record was called for but record could not be made available and several efforts were made to get record reconstructed but remained unsuccessful.

21. Now about 33 years have passed since conviction under challenge. It is a long gap. Since no paper relating to this case is available except the impugned judgement, there remains no possibility of retrial at this stage, after a long gap of about 39 years since the occurrence of the incident.

22. It is clear that in these circumstances, retrial will be a futile exercise. Therefore, there remains no alternative except to close the matter and acquit the appellant, as hearing of the appeal in accordance with the provisions of Section 386 Cr.P.C. is not possible. The order of retrial will also not serve any purpose as in the absence of relevant record, it is impossible for the prosecution to establish the charges against the appellant/accused.

23. Resultantly, the appeal is **allowed**.

24. The impugned judgment and order dated 29.1.1987 passed in Sessions Trial No.352 of 1981 (State Vs. M.P.Singh and another) under Section 302 I.P.C. read with Section 34 I.P.C. convicting the appellant to undergo life imprisonment, is hereby set aside and the appellant Chaman Lal, son of Satya Narain is hereby acquitted of the offence under Section 302 I.P.C. for want of trial court record and there being no possibility of the retrial. The appellant is in jail. He shall be released immediately, if not required in any other case.

25. Let copy of this judgement be sent to the Superintendent of Jail concerned.

26. Office is directed to send copy of this judgment to the trial court concerned.

27. The learned Amicus Curiae shall be paid remuneration as per rules.

The relevant record i.e. impugned judgment be also sent back to trial court concerned.

(2021)02ILR A363
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 18.01.2021

BEFORE

THE HON'BLE AJIT SINGH, J.

Criminal Appeal No. 209 of 2021

Ram Teerth ...Appellant (In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
Sri R.K. Verma, Sri A.K. Srivastava, Sri Ravindra Balkrishna Kanhere (Amicus Curiae)

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

A. Criminal Law-Code of Criminal Procedure, 1973-Section 374(2) & The Narcotic Drugs and Psychotropic Substances Act,1985-Section 20(b)(ii)(c)-modification of- quantum of sentence -on account of poverty, appellant has to undergo three years additional rigorous imprisonment in default of payment of fine of Rs. One lac as per section 18 of the Act- appellant continuously is in jail-he has already undergone 12 years of his sentence -period of rigorous imprisonment for three years in default of payment of fine may be reduced- appellant shall be released after the period of sentence, is over. (Para 2 to 13)

The appeal is partly allowed. (E-5)

List of Cases cited: -

1. Shanti Lal Vs St. of M.P. (2008) 1 SCC (Cri) 1

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

1. The instant appeal has been preferred against the impugned judgement and order dated 19.06.2008 passed by the Additional Sessions Judge/Fast Track Court, Court No. 2, Siddharth Nagar in Special Sessions Trial No. 11 of 2008 (State Versus Ram Teerth) arising out of Case Crime No. 11 of 2008, Police Station Dhebrua, District Siddharth Nagar whereby the appellant has been convicted under Section 20(b)(ii)(c)of N.D.P.S. Act and has been sentenced to undergo 12 years rigorous imprisonment with a fine of Rs.1,20,000/-. In default of payment of fine, he has to undergo three years additional rigorous imprisonment.

2. Heard Sri Ravindra Balkrishna Kanhere, learned counsel for the appellant as Amicus Curiae as well as learned A.G.A. for the State.

3. Learned counsel for the appellant has argued on merits but later on confined his arguments on the quantum of sentence as the appellant has already served the sentence awarded to him by the trial court and at present he is in jail in default of fine. According to the prosecution itself, he was arrested by the police on 11.01.2008 and is continuously in jail since the date of his arrest i.e. 11.01.2008. It is further stated that since the appellant has already undergone substantive period of sentence imposed upon him by the trial court, now his prayer is confined only for reduction of remaining period of imprisonment and the period which he has to undergo in default of payment of fine for a period of three years' additional rigorous imprisonment. In this behalf, it has been submitted that since higher than minimum punishment prescribed under N.D.P.S. Act upon the conviction under Section 20(b)(ii)(c)of N.D.P.S. Act has been awarded by the trial court to the appellant without assigning special reason and without even adverting Section 32(B) of N.D.P.C. Act, the sentence imposed by the trial court of 12 years rigorous imprisonment cannot be sustained.

4. Learned counsel for the appellant has submitted that the appellant is a very poor person and even during trial there was none to do proper pairvi on his behalf on account of financial constraint. Therefore, he is unable to deposit the heavy amount of fine imposed upon him by the trial court. It is stated that only on account of poverty, he has to undergo three years additional

rigorous imprisonment in default of payment of fine.

5. Learned A.G.A. has opposed the aforesaid prayer of the learned counsel for the appellant.

6. I have considered the rival submissions made by learned counsel for the parties and perused the impugned judgement and order.

7. The issue which next arises for consideration is that whether the sentence awarded to the appellants which is higher than the minimum sentence prescribed under the Act for a person convicted under Sections 20(b)(ii)(c)of N.D.P.S. Act of the NDPS Act is unduly harsh, excessive disproportionate and arbitrary and the same has been imposed, without assigning any reasons and without taking into consideration of provisions of Section 32(B) of the NDPS Act and hence liable to be modified. The minimum punishment prescribed for conviction under Section 20(b)(ii)(c)of N.D.P.S. Act is 10 years R.I. And a fine of Rs. 1 lakh. Section 32(B) of the NDPS Act enumerates the factors to be taken into account for imposing higher than the minimum punishment. It will be useful to reproduce Section 32(B) of the NDPS Act herein below:-

"32B. Factors to be taken into account for imposing higher than the minimum punishment. Where a minimum term of imprisonment or amount of fine is prescribed for any offence committed under this Act, the court may, in addition to such factors as it may deem fit, take into account the following factors for imposing a punishment higher than the minimum term of imprisonment or amount of fine, namely:

(a) the use or threat of use of violence or arms by the offender;

(b) the fact that the offender holds a public office and that he has taken advantage of that office in committing the offence;

(c) the fact that the minors are affected by the offence or the minors are used for the commission of an offence;

(d) the fact that the offence is committed in an educational institution or social service facility or in the immediate vicinity of such institution or faculty or in other place to which school children and students resort for educational, sports and social activities.;

(e) the fact that the offender belongs to organised international or any other criminal group which is involved in the commission of the offences; and

(f) the fact that the offender is involved in other illegal activities facilitated by commission of the offence.]"

8. After going through the impugned judgement and order very carefully, I find that the trial court while imposing higher than the minimum punishment prescribed under the NDPS Act on conviction under Section 20(b)(ii)(c)of N.D.P.S. Act of the NDPS Act, upon the appellant has failed even to advert to the factors enumerated in Section 32(B) of the NDPS Act. In fact no reason whatsoever is forthcoming in the impugned judgement which lead the trial court to impose higher than the minimum punishment prescribed under the Act upon the appellant.

9. The learned counsel has placed reliance on the law laid down by the Hon'ble Apex in **(2008) 1 SCC (Cri) 1, Shanti Lal Vs. State of M.P**., in which the Hon'ble Apex Court, almost under the similar circumstances, has reduced the sentence awarded to the accused-appellant

in default of payment of fine from three years to six month by observing as under:-

"But considering the circumstances placed before us on behalf of the appellant-accused that he is very poor; he is merely a carrier; he has to maintain his family; it was his first offence; because of his poverty, he could not pay the heavy amount of fine (rupees one lakh) and if he is ordered to remain in jail even after the period of substantive sentence is over only because of his inability to pay fine, serious prejudice will be caused not only to him, but also to his family members who are innocent. We are, therefore, of the view that though an amount of payment of fine of rupees one lakh which is minimum as specified in Section 18 of the Act cannot be reduced in view of the legislative mandate, ends of justice would be met if we retain that part of the direction, but order that in default of payment of fine of rupees one lakh, the appellant shall undergo rigorous imprisonment for six months instead of three years as ordered by the trial court and confirmed by the High Court."

10. A perusal of the record shows that the appellant was arrested by the police on 11.01.2008. During trial he is continuously in jail because no order has been passed on his bail application filed before this court alongwith this appeal.

11. Thus, it is clear that the appellant has undergone 12 years of his sentence and period of rigorous imprisonment for three years in default of payment of fine may be reduced.

12. Taking into account the totality of the facts and circumstances of the case and relying on the law laid down by Hon'ble Apex Court in the above cited **Shanti Lal's** case, period of sentence of 12 years' rigorous imprisonment has already undergone by him and the period of imprisonment for three years in default of payment of fine is reduced to the period of six months imprisonment.

13. Accordingly, the appeal is **partly allowed**. The appellant shall be released after the period of sentence as indicated herein above, is over.

14. The seized contraband shall be destroyed by the officer concerned in accordance with the notifications issued under Section 52A of The Narcotic Drugs and Psychotropic Substances Act.

15. Let a copy of this judgement and order be sent to the court below within a week for ensuring its compliance.

16. The registry is directed to pay Rs. 10,000/- to the learned counsel for the appellant/Amicus Curiae as counsel's fee without any delay and, in any case, within one month from the date of receipt of copy of this judgment.

(2021)02ILR A366
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 29.01.2021

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE GAUTAM CHOWDHARY, J.

Criminal Appeal No. 231 of 2012

Ram Pal ...Appellant (In Jail)
Versus
State of U.P. ...Respondent

Counsel for the Appellants:

Sri Rajesh Kumar Mishra

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

A. Criminal Law-Code of Criminal Procedure, 1973-Section 374(2) & Indian Penal Code, 1860- Sections 302, 201, 394-challenge to-conviction-no eye witness-no recovery from the accused of any incriminating article-he was named after considerable period of time-his fingerprints have not been sent for DNA examination-no forensic science report-no material on record to suggest that whether the death was accidental, suicidal or homicidal- as per the evidence of P.W.-8, no such body was discovered during the said time period-absence of the appellant from his duty on the date of the alleged incident, there is neither any document produced on the record of the case nor any witness was examined - The prosecution has not been able to prove, even, the aspect of last-seen together, and the motive for the crime.-appellant had spotted deceased talking with some unknown male at Theatre which prompted him to commit the alleged offence, that male was also not examined to establish the said fact- appellant granted the benefit of doubt- trial Court committed an error in solely relying on the alleged statement made by the appellant before the police, while in custody of police. (Para 1 to 29)

B. Merely relying on the confession alleged to be made by the appellant, while he was in custody of P.W.-8, the trial Court came to the conclusion that the appellant was guilty of the alleged offence. It is very well-known that a statement made by an accused before the police, while in custody of police, cannot be used against him. It is no doubt true that there are certain circumstances, which raises suspicion about the involvement of the appellant in the alleged offence. But there is a well settled principle of law that the suspicion howsoever strong it may be, cannot be substituted for the evidence. In the instant case, it cannot be said that the chain of events stands completed and it points towards the guilt of the appellant only and that it is not possible to take a different view, then, the one taken by the trial Court. (Para 24,25)

The Appeal is allowed. (E-5)

List of Cases cited: -

1. Nizam & anr. Vs St. of Raj. (2015) LawSuit (SC) 826

2. Trimukh Maroti Kirkan Vs St. of Mah. (2006) 10 SCC 681

3. St. of Raj. Vs Kashi Ram (2007) Suppl. ACC 485

4. Ram Nath Vs St. of U.P. & ors. 2007) Suppl. ACC 495

5. Kalu @Laxminarayan Vs St. of M.P. (2019) 10 SCC 211

6. Rambraksh alias Jalim Vs St. of Chatt. (2016) 12 SCC 251

7. Kanti Lal Vs St. of U.P. CRLA No.2183 of 2011

8. Chetankumar Dahyabhai Patel Vs St. of Guj. CRLA No.437 of 2003

9. Mohd. Younus Ali Tarafdar Vs St. of W. B. (2020) 3 SCC 747

10. Surendra Singh Vs St. of U.P. (2018) Supreme (All) 2467

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

1. Heard Sri Rajesh Kumar Mishra, learned counsel for the appellant and learned A.G.A. for the State.

2. This appeal challenges the judgment and order dated 1.12.2011 passed

by the Additional Sessions Judge, Kannauj in Sessions Trial No. 93 of 2011 convicting Ram Pal, appellant, for commission of offence under Sections 302, 201 and & 394 of Indian Penal Code, 1860 (hereinafter referred to as 'I.P.C.').

3. The factual matrix of the case in hand, as gleaned from the pleadings and submissions of the parties as also the record is that on 2.9.1992, a complaint was moved by Suraj Kumar to the police authority at Kannauj stating that Ram Beti, wife of the late brother of Suraj Kumar and Kumari Draupadi alias Bauna, daughter of Ram Beti were gone missing from 12.00 noon on the said date and he suspects that they have been abducted and killed as his search for them turned in failure.

4. On the aforesaid complaint, G.D. Report No.43 was made at 21.30 hrs on 2.9.1992 and the matter was investigated, during investigation, dead bodies of Ram Beti and Draupadi alias Bauna were found from the place of incident, description of the same were written in G.D. Report No.2 at 00.15 hrs on 3.9.1992 on the basis of which Case Crime No.548 of 1992 under Sections 302 and 201 of I.P.C. was lodged and investigation was moved into motion and after recording statements of various persons, the Investigating Officer submitted the charge-sheet to the competent court on 9.2.1993.

5. The accused was facing charges which were exclusively triable by the Court of Sessions, he was committed to it.

6. On being summoned, the accused pleaded not guilty and wanted to be tried.

7. The prosecution examined about 6 witnesses who are as follows:

1	Deposition of Prem Shanker	27/01/11	PW1
2	Deposition of Dr. Prithibi Raj Singh	14/03/11	PW2
3	Deposition of Ved Prakash Giri	07/04/11	PW3
4	Deposition of Ram Nandani	05/05/11	PW4
5	Deposition of Ram Ratan	18/06/11	PW5
6	Deposition of Pradeep Pradhan	18/07/11	PW6

8. In support of ocular version following documents were filed:

1	Written Report & Application	02/02/92	Ex.Ka.1 & Ex. Ka.3
2	Recovery memo and Supurdginama of Lock and Goods	03/09/92	Ex.Ka.14
3	Recovery Memo of White Cloth	03/09/92	Ex. Ka. 15
4	Recovery Memo of 'Suti Nara' (Kamarband)	03/09/92	Ex. Ka. 16
5	Postmortem Report	03/09/92	Ex.Ka.3
6	Postmortem Report	03/09/92	Ex.Ka.4
7	Panchayatnam	03/09/92	Ex. Ka.6

	a		
8	Charge-sheet	09/02/93	Ex. Ka.17

9. On the witnesses being examined and the prosecution having concluded its evidence, the accused was put to questions under Section 313 Cr.P.C.

10. Hearing the arguments on behalf of prosecution and the defence, the learned Sessions Judge convicted the appellant as mentioned aforesaid. Being aggrieved and dissatisfied with the impugned judgment, the appellant has preferred this appeal.

11. Learned counsel for the appellant has contended that there are several missing links and the learned judge has committed a grave error in convicting the accused on the basis of the statements made by witnesses who are not reliable.

12. Learned counsel for the appellant has relied on the decision in **Nizam and Anr. Vs. State of Rajasthan** reported in **2015 LawSuit (SC) 826** and has contended that the circumstantial chain was full of gaps; there is no consistency in their depositions and convection is based on mere hypothesis of the facts that the accused was working at the place where the dead bodies of the deceased were found.

13. He has further submitted that no incriminating circumstances have been proved against the accused also except the one wherein he was alleged to working in the house of deceased. It is submitted by the learned counsel for the appellant that the learned Judge below could not have convicted the accused as there was no dacoity or loot or robbery and nothing was recovered from the accused. Learned counsel for the appellant has further submitted that the learned judge had gone on the basis that it might be that the accused could have tried to hide the dead bodies of the deceased. It is further submitted that the conviction is based solely on these hypothesis.

14. As against this, learned A.G.A for the State has taken us through the record and has submitted that it was not a suicidal death but it was a murder. Circumstantial evidence proves to the hilt that the accused alone was the perpetrator of murder and he has relied on the decisions in **Trimukh Maroti Kirkan vs. State of Maharashtra, (2006) 10 SCC 681, State of Rajasthan Vs. Kashi Ram, 2007 (Suppl.) ACC 485, Ram Nath vs. State of U.P. and others, 2007 (Suppl.) ACC 495, Kalu alias Laxminarayan Vs. State of Madhya Pradesh, (2019) 10 SCC 211** and has contended that the circumstantial chain is complete and points only towards accused.

15. P.W.1, Prem Shankarm has deposed that he is aware that the deceased was staying in the house from where dead bodies of the two ladies were found.

16. We conclude that ligature mark on the dead bodies showed that it was a homicidal death. We are not delving further on this aspect as we have come to the conclusion that it was homicidal death but question is whether it was caused by the accused and accused alone?

17. In his oral testimony, P.W.3 has opined that he had received information on 2.9.1992 at 9:30 p.m. about fact that Ram Beti wife of late Tulsiram Mishra and Draupadi alias Bauna daughter of late Tulsiram were missing from home. It was registered as missing application and was

thereafter turned into a G.D. entry and S.I. M.B. Lal taken the statements. After the dead body was recovered, it was sent for postmortem. The broken lock and the cloth with which both were done to death, was also recovered at the place of incidence. The prosecution witness No.4, Ram Nandani, has also in his ocular version stated that the incident occurred about 18 years before and has stated that the accused used to work at her place and therefore she knew him and she had sent him to her mother's place and he has ran away. P.W. 5, Ram Ratan, also opined that the incident occurred 19 years back. Ram Beti and her daughter were staying together. Rampal was a carpenter at their place and for sometimes Ram Beti, her daughter and accused-Ram Pal were not seen. He did not see clothes with which they were done to death. According to the other witnesses also, similar facts are mentioned.

18. The statement of accused under section 313 Cr.P.C. was one of denial and the accused specifically stated that he was falsely implicated. He has stated that he was not there on the place of the incidents as the son of the deceased has conveyed to him that he would call him after a certain period of time and when he would come back on leave, he would call him and, therefore, he had gone away.

19. On appreciation of the depositions of the prosecution witnesses, there are certain facts which emerge namely there is no eye witness and can we convict the accused on the basis of oral testimony of being working at the place of deceased?

20. The circumstances of last seen together is one of the chain of circumstances which has to be corroborated by other factual data. None of the witnesses have remotely conveyed that death occurred when the accused was in the house. The son of the deceased, P.W.1, is also not aware as the death took place in his absence. None of them had given any name to anybody and when he came to his house on 3rd December his house was open and the lock in the internal rooms were not broken but the main door was brought down.

21. Hence, the learned judge has committed an error which can be said to be an error apparent on the face of record as there is no connecting link between the accused and the death of the two ladies. We are fortified in our view by the decision of the Apex Court in **Rambraksh alias Jalim Vs. State of Chattisgarh, (2016) 12 SCC 251**. Only on the basis of last seen, conviction cannot sustained and the accused had acquitted. Similar is the case here in our case. No one has seen the accused with the deceased. The only evidence is that he was staying in the said house.

22. Reference to a recent decision of this Court in **Criminal Appeal No.2183 of 2011 (Kanti Lal Vs. State of U.P)** decided on 19.1.2021 can be made.

23. We can safely rely on the decision of the Gujarat High Court in Criminal Appeal No. 437 of 2003 **(Chetankumar Dahyabhai Patel Vs. State of Gujarat)** decided on 3.9.2013 where in the Court has held as under:

"16. Thus, from the discussion of the evidence of the aforesaid witnesses following aspects emerges;

(1) Nobody has seen the crime actually being committed;

(2) There is no material on record to suggest that whether Sonali has expired or not or whether the death of Sonali was accidental, suicidal or homicidal;

(3) The case of the prosecution is based solely on the alleged disclosure made by the appellant, while he was in custody of the police in connection with the complaint made by P.W.-1;

(4) Even, as per the evidence of P.W.-8, when he made inquires about the discovery of body of a female from the river about the time of the incident, he was informed that no such body was discovered during the said time period and the aforesaid fact shakes the very basis of the case of the prosecution that the appellant had pushed Sonali from over the bridge;

(5) Though, P.W.-8 stated, in his evidence, that he had recorded the statement of the Manager of Relief Theater, Bharuch, to verify the aspect of running of movie "Meri Aan" on the date of the alleged offence, the Manager was not examined as a witness. Moreover, though, P.W.-8 stated that he had obtained evidence with regard to absence of the appellant from his duty on the date of the alleged incident, there is neither any document produced on the record of the case nor any witness was examined by the prosecution to establish the said aspect;

(6) P.W.-1 failed to explain as to why he did not made any inquires about Sonali for two years and as to what prompted him to lodge the complaint, Dated : 20.04.1996, after a period of about two years before the PI,Ankleshwar;

(7) In view of the fact that the body of Sonali was never recovered, it was incumbent on the prosecution to show as to on what basis Section 302 of the IPC was applied against the appellant;

(8) The prosecution has not been able to prove, even, the aspect of lastseen together, since, there is no witness was examined nor any material was produced to establish the same;

(9) The prosecution has not been able to establish the motive for the crime. Insofar as the aspect of doubt about the character of Sonali on the part of the appellant is concerned, there is no material on record was produced to substantiate the same.

Moreover, though, in the complaint it is stated that on the date of the alleged offence, the appellant had spotted Sonali talking with some unknown male at Relief Theater, Bharuch, which prompted him to commit the alleged offence, the aforesaid male was not examined by the prosecution to establish the said fact, and thus, the motive for commission of the alleged offence by the appellant remains shrouded in mystery.

17. Thus, from the above discussion it becomes clear that merely relying on the confession alleged to be made by the appellant, while he was in custody of P.W.-8, the trial Court came to the conclusion that the appellant was guilty of the alleged offence. It is very well-known that a statement made by an accused before the police, while in custody of police,cannot be used against him. We are, therefore, of the opinion that the trial Court committed an error in solely relying on the alleged statement made by the appellant before the police, while in custody of police. It is no doubt true that there are certain circumstances, which raises suspicion about the involvement of the appellant in the alleged offence. But, there is a well settled principle of law that the

suspicion howsoever strong it may be, cannot be substituted for the evidence. In the case on hand, in view of the above discussion, it cannot be said that the chain of events stands completed and it points towards the guilt of the appellant only and that it is not possible to take a different view, then, the one taken by the trial Court. We are,therefore, inclined to accept the submissions made by Mr. A. D. Shah, learned Sr. Advocate for the appellant that the appellant requires to be granted the benefit of doubt.

18. In the result, the appeal is ALLOWED. The judgment and order of the trial Court, Dated : 05.04.2003, rendered in Sessions Case No. 134 of 1998, is quashed and set aside. The appellant - original accused is given the benefit of doubt and is ordered to be acquitted. The appellant is on bail, and hence, his bail bond stands canceled. The amount of fine, if any, paid, be refunded to the appellant. A copy of this order be sent to the concerned jail authorities, immediately."

24. In this case there are certain aspects which requires to be seen namely there is no recovery from the accused of any incriminating article, he was named after considerable period of time, his fingerprints have not been sent for DNA examination and there is no forensic science report which would permit us to concur with the learned Sessions Judge in holding the appellant guilty.

25. The submission of the learned A.G.A for the State is that this was a cold blooded murder and the circumstantial evidence goes to show that it was the accused and accused alone who had perpetrated the murder.

26. The decisions cited by the learned A.G.A. are threadbare considered by us and the difference in those decisions are that there are no incriminating substances which are clearly established against the appellant. Explanations were given by the accused-appellant and, therefore, the judgment in **Kashi Ram (Supra)** cannot be made applicable. The accused has given cogent explanation. Unfortunately, the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established. In this case, there is nothing which point to the guilt of the accused leave apart cumulative chain. Hence, judgment in **Trimukh Maroti Kirkan (Supra)** will not apply. As far as the judgment in **Kalu alias Laxminarayan (Supra)** is concerned, the factual data will not permit us to confirm the conviction.

27. Recently, in **Mohd. Younus Ali Tarafdar Vs. State of West Bengal (2020) 3 SCC 747**, the dead body of the deceased was found floating in the well, postmortem was conducted and it was partially decomposed. Investigation led to the arrest of the appellant therein and there was a confession made by the appellant. Appellant alone was convicted by the courts below which has been upturned by the Hon'ble apex court. The circumstantial evidence which prosecution has relied has to prove the guilt of the appellant beyond all human probability. It must point out that it was the accused and accused alone who had perpetrated the offence. In our case there was no recovery from the accused, hence, we are unable to agree with the learned A.G.A. that section 114 of Indian Evidence Act, 1872 be read into and that the decision which have been cited would apply to the facts of this case.

28. Hence, we are unable to concur with the learned Sessions Judge. A further mention to the decision of this Court in **Surendra Singh Vs. State of U.P., 2018 0 Supreme (All) 2467** would also not permit us to concur with the learned judge.

29. The appeal is allowed. The conviction under Section 302 read with Sections 201 and & 394 of I.P.C. cannot be sustained. The accused will have to be set free.

30. Record and proceedings be sent back to the trial court forthwith.

(2021)02ILR A373
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 02.02.2021

BEFORE

THE HON'BLE AJIT SINGH, J.

Criminal Appeal No. 344 of 1981

Ram Kumar Sharma ...Accused Appellant
Versus
State of U.P. ...Opposite Party

Counsel for the Appellants:
Sri Amresh Kumar Sharma, Sri A. Kulshrestha, Sri Havaldar Verma, Sri S.N. Pandey

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

A. Criminal Law-Code of Criminal Procedure, 1973-Section 374(2) & Indian Penal Code ,1860-Section 161 & Prevention of Corruption Act,1947-Section 5(2)-modification of –quantum of sentence- incident is of the year 1978-accused -appellant posted as operator at the public tube-well, was habitual of accepting bribes from the farmers to irrigate their fields-Complainant's sugar cane *(perhi)* field measuring six bighas was not irrigated and it went dry-The tube well operator, the present accused appellant, was demanding Rs. 60/- as bribe from the complainant and the complainant gave the currency notes to the accused appellant who kept the same in his pocket-The appellant is now aged about 82 years and he is suffering from age related ailments-appellant has suffered physical and mental agony of criminal trial and conviction for more than 40 years in the trap case involving a petty amount-ratio of the law laid down by the Apex Court for reducing the substantive sentence by enhancing the fine is affirmed.(Para 1to 20)

The Appeal is partly allowed. (E-5)

List of Cases cited: -

1. Ashok Kumar Vs St. (Delhi Admin.) (1980) 2 SCC 282

2. Sharvan Kumar Vs St. of U.P. (1985) 3 SCC 658

3. Ajab & ors. Vs St. of Mah. (1989) Supp. 1 SCC 601

4. V.K. Verma Vs CBI CRLA NO. 404 OF 2014

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

1. Heard the learned counsel for appellant, learned AGA appearing for the State and perused the record of this case.

2. The prosecution story of this in brief is that on 20th June, 1978 one Suraj Mal moved a complaint against the present accused appellant Ram Kumar in writing (Ext. Ka-13) before the Superintendent of Police (Vigilance), Meerut. It was mentioned in the said complaint that the accused appellant posted as operator at the public tube-well No. 52 H.G. in village

Dehpa was habitual of accepting bribes from the farmers to irrigate their fields. Complainant's sugar cane *(perhi)* field measuring six bighas was not irrigated and it went dry. The tube well operator, the present accused appellant, was demanding Rs. 60/- as bribe from the complainant and the complainant gave the currency notes to the accused appellant who kept the same in his pocket after its verification and counting.

3. Further prosecution case is that the members of the trap party overheard the conversation going on in between the complainant and accused appellant. Inspector *Chawala* and and his other companions entered the *Gher* and the accused was surrounded. *Mr. Chawala*, after disclosing his identity to the accused appellant, made the search of the accused's person and recovered Rs. 60/- from the accused appellant. The currency notes of the recovered amount were the same which were given to the complainant to be given to the tube well operator (the present appellant) as bribe. The serial numbers of the currency notes were found exactly tallied with the memo, which is marked as Ext. Ka - 2. The currency notes along with the shirt of the accused wearing at that time were taken into custody by the concerned Inspector.

4. Thereafter, the accused as well as the complainant both were asked to put their hands into the liquid of sodium carbonate in two different glasses and the liquid turned red, which was sealed separately in two dry bottles. The recovery memo was prepared and marked as Ext. Ka - 3. All the relevant formalities were done and First Information Report of this incident was lodged by the Inspector, which is marked as Ext. Ka-12. Thereafter, investigation of this matter was entrusted to Inspector Harpal Singh - P.W. 5 under the direction of S.P. (Vigilance), Meerut. He prepared the site plan of the place of occurrence, recorded the statements of the members of the trap party and applied for and obtained sanction from the concerned Executive Engineer to prosecute the accused appellant, the sanction letter is marked as Ext. Ka – 16.

5. The trial started and concluded into conviction and sentence of the accused appellant, vide the impugned judgment and order dated 30.1.1981. By the impugned judgment and order the accused appellant had been convicted and sentenced to one year R.I. with a fine of Rs. 500/- and in default of payment of fine, three months' further R.I. Further, for the offence under Section 5(2) Prevention of Corruption Act the accused appellant was convicted and sentenced to one year R.I. for the offence under Section 161 IPC with a fine of Rs. 500/- and in default of payment of fine, three months' further R.I. It was also directed that both the sentence shall run concurrently.

6. The aforesaid judgment and order dated 30.1.1981, narrated above, has been challenged before this Court by means of the present appeal.

7. The learned counsel for the appellant submits that the incident is of the year 1978. The appellant is now aged about 82 years and he is suffering from age related ailments. For the last 42 years, the sword of punishment had been hanging over the head of the accused appellant. The appellant had been in imprisonment for about twenty days. Learned counsel has

further submitted that he does not want to press this appeal on merits but wants to argue only on the quantum of sentence.

8. The learned AGA has strongly opposed the submission made by the learned counsel for the appellant and he submits that the impugned judgment and order of the learned Trial Court is liable to be confirmed and the appeals deserves to be dismissed.

9. After having gone through the judgment and order assailed by this appeal and also going through the facts and circumstances of this case, it would not be out of context to have a glance on Section 5 of the Prevention of Corruption Act, 1947 which deals with criminal misconduct.

10. **Section 5(2)** deals with punishment, which reads as under:-

"5. Criminal misconduct.

(2) Any public servant who commits criminal misconduct shall be punishable with imprisonment for a term which shall not be less than one year but which may extend to seven years and shall also be liable to fine :

Provided that the court may, for any special reasons recorded in writing, impose a sentence of imprisonment of less than one year."

11. **Section 161 of IPC** was omitted by the introduction of the Prevention of Corruption Act, 1988. The pre-amended proviso dealt with the offence of public servant taking gratification other than legal remuneration in respect of an official act. The punishment was:

"... .....imprisonment of either description for a term which may extend to three years, or with fine or with both."

12. Thus, as far as punishment under the old Section 161 of IPC is concerned, there is no mandatory minimum punishment. The question is whether the sentence could be reduced for any special reason. Under the old Prevention of Corruption Act, 1947, there is a mandatory minimum punishment of one year. It may extend to seven years. However, under the proviso, the court may, for special reasons, impose a sentence of imprisonment of less than one year.

13. In imposing a punishment, the concern of the court is with the nature of the act viewed as a crime or breach of the law. The maximum sentence or fine provided in law is an indicator on the gravity of the act. Having regard to the nature and mode of commission of an offence by a person and the mitigating factors, if any, the court has to take a decision as to whether the charge established falls short of the maximum gravity indicated in the statute, and if so, to what extent.

14. The long delay before the courts in taking a final decision with regard to the guilt or otherwise of the accused is one of the mitigating factors for the superior courts to take into consideration while taking a decision on the quantum of sentence. As we have noted above, the FIR was registered by the police in 1978. The appellant has suffered physical and mental agony of criminal trial and conviction for more than 40 years in the trap case involving a petty amount.

15. In **Ashok Kumar v. State (Delhi Administration), 1980 (2) SCC 282**, the commission of offence of theft was in 1971 and the Judgment of this Court was delivered in 1980. The conviction was under Section 411 of IPC. This Court having regard to the purpose of punishment and "the long protracted litigation", reduced the sentence to the period already undergone by the convict.

16. In **Sharvan Kumar v. State of Uttar Pradesh, (1985) 3 SCC 658**, the commission of offence had taken place in 1968 and the judgment was delivered in 1985. The conviction was under Section 467 and 471 of IPC. In that case also, the long delay in the litigation process was one of the factors taken into consideration by the Court in reducing the sentence to the period already undergone.

17. In **Ajab and others v. State of Maharashtra, (1989) Supp. (1) SCC 601** also, the Hon'ble Apex had an occasion to examine the similar situation. The offence was committed in 1972 and this Court delivered the Judgment in 1989. The conviction was under Section 224 read with Section 395 of IPC. In that case also "passage of time was reckoned as a factor for reducing the sentence to the period already undergone". The Hon'ble Apex Court in that case, while reducing the substantive sentence, increased the fine holding that the same would meet the ends of justice.

18. In ***CRIMINAL APPEAL NO. 404 OF 2014: V.K. Verma Vs. CBI,*** decided on 14th February, 2014, the Hon'ble Apex Court has held in paragraphs - 15 and 16 thus:

"The appellant is now aged 76. We are informed that he is otherwise not keeping in good health, having had also cardio vascular problems. The offence is of the year 1984. It is almost three decades now. The accused has already undergone physical incarceration for three months and mental incarceration for about thirty years. Whether at this age and stage, it would not be economically wasteful, and a liability to the State to keep the appellant in prison, is the question we have to address. Having given thoughtful consideration to all the aspects of the matter, we are of the view that the facts mentioned above would certainly be special reasons for reducing the substantive sentence but enhancing the fine, while maintaining the conviction.

Accordingly, the appeal is partly allowed. The substantive sentence of imprisonment is reduced to the period already undergone. However, an amount of Rs.50,000/- is imposed as fine. The appellant shall deposit the fine within three months and, if not, he shall undergo imprisonment for a period of six months. On payment of fine, his bail bond will stand cancelled".

19. In the present case this Court finds that the appellant is now a senior citizen aged about 82 years. This Court has also been informed that he is not keeping good health and is suffering from age related ailments. The offence is of the year 1978. The accused has already served out twenty days' incarceration and he has suffered mental incarceration for about 42 years. Looking to the facts and circumstances of this case and also taking into consideration the ratio of the law laid down by the Hon'ble Apex Court as discussed above, this Court is of the firm view that certainly a case is made out for reducing the substantive sentence by enhancing the fine. However, no case is made out to interfere with the conviction of the accused appellant.

20. In the result, the appeal is **partly allowed**. The substantive sentence of imprisonment is reduced to the period already undergone. However, an amount of

Rs. 10,000/- is imposed as fine. The appellant shall deposit the fine within three months and, if not, he shall undergo imprisonment for a period of three months. On payment of fine, his bail bond will stand cancelled.

21. Let a copy of this judgment and order be transmitted to the learned District Judge, Meerut for compliance.

22. The record of the lower court be transmitted immediately to the lower court.

(2021)02ILR A377
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 08.01.2021

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE GAUTAM CHOWDHARY, J.

Criminal Appeal No. 380 of 2011

Ajai @ Nehne & Ors. ...Appellants (In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellants:
Sri Rajiv Lochan Shukla, Sri V.S. Kushwaha, Sri A.K. Awasthi, Sri Mahesh Kuntal, Sri Manish Tiwary, Sri Prashant, Sri Rajesh Kumar Dubey, Sri R.C. Shukla

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

A. Criminal Law-Code of Criminal Procedure, 1973-Section 374(2) & Indian Penal Code, 1860-Sections 498-A, 304B -Dowry of Prohibition Act,1961-Section ¾- deceased was died during her treatment in the nursing home of Doctor-He was produced as defense witness before the court and stated that the deceased was suffered since long from the Mirgi and tuber closes but the court below disbelieved the statement of the Doctor without any reasons- the death occurred not at parental home but the matrimonial home of the deceased-no overt act has been attributed to mother-in-law even in the evidence-there is no evidence on record which shows that after the deceased had come to the matrimonial home, the mother-in-law had soon before her death, demanded any money or she had perpetrated cruelty on the deceased-evidence of PW-1 and PW-2 that even in the earlier days, she was the root cause of asking for dowry-sentence of mother-in-law commuted to the period she had already undergone, while the husband shall be released only after completion of sentence.(Para 1 to 29)

The Appeal is partly allowed. (E-5)

List of Cases cited: -

1. Hem Chand Vs St. of Har., CRLA No.690 of 1994

2. Sunil Dutt Sharma Vs St. (Govt of NCT of Delhi), CRLA No.1333 of 2013

3. G.V. Siddaramesh Vs St. of Karnataka, CRLA No.160 of 2006

4. Hari Om Vs St. of Har. & anr. CRLA No.1167 of 2011

5. St. of Karnataka Vs M.V. Manjunathegowda & anr., CRLA No.1530-31 of 1995

6. Ankush Shivaji Gaikwad Vs St. of Mah., (2013) 6 SCC 770

(Delivered by Hon'ble Dr. Kaushal Jayendra Thaker, J.
& Hon'ble Gautam Chowdhary, J.)

1. Heard learned counsel for appellants and and learned A.G.A. for State.

2. This appeal has arisen from the judgement and order dated 19.1.2011 passed by Additional Sessions Judge, Court No.3, Mathura in Session Trial No. 497 of 2007, under Sections 498-A, 304-B I.P.C. and 3/4 Dowry of Prohibition Act, Police Station - Raya, District - Mathura convicting and sentencing the appellants to under go life imprisonment and Rs.20,000/- fine for committing offence under Section 304-B I.P.C. and further convicted the appellants to under go three years imprisonment and Rs.5,000/- fine for commission of offence under Section 498-A, I.P.C. and also convicted the appellants to under go for the period of one year imprisonment in Section 3/4 Dowry Prohibition Act.

3. This appeal arises out of conviction recorded of both mother-in-law and son who are alleged to have done to death wife of appellant no.1 and daughter-in-law of appellant Nos. 2 and 3 within the period of seven years of marriage.

4. The prosecution was moved by lodgement of First Information Report dated 17.4.2007, the accused were charged of the offences. The accused no.1 was in jail when the case was committed to court of session. However, Savitri Devi and Shivcharan were enlarged on bail. The accused Ajay is in jail past conviction, pre convition he was enlarged on bail by the court below.

5. The matter was triable by the court of session and, therefore, the learned Magistrate committed the case to the court of session.

6. On 5.3.2008 charge was framed against all the three accused for commission of offences under Section 304-B of the Indian Penal Code read with Section 498-A of the Indian Penal Code and also Section 3/4 of Dowry Prohibition Act.

7. The prosecution examined about seven witnesses so as to bring home the charge framed against the accused as enumerated:

1	Deposition of Banwari Lal	24/7/08	PW1
2	Deposition of Munish Kumar	20/10/08	PW2
3	Deposition of Balvir Singh	10/3/10	PW3
4	Deposition of Dr. A.S. Vashisth	15/7/10	PW4
5	Deposition of Nisad Ahmad	22/7/10	PW5
6	Deposition of Manoj Kkumar	10/8/10	PW6
7	Deposition of Veer Singh	21/9/10	PW7

8. In support of ocular version following documents were filed:

1	First Information Report	17/4/07	Ex.Ka.13
2	Written Report	17/4/07	Ex.Ka.5
3	Recovery Memo of Marriage-Card and Photo	12/5/07	Ex. Ka.1

4	Postmortem Report	9/4/07	Ex. Ka.6
5	Site Plan with Index	17/4/07	Ex.Ka.15

9. The accused also led evidence that of the Doctor so as to prove their case that the deceased was mentally not of sound mind as examined on which they examined D.W.-1, Dr. Ved Prakash Verma.

10. The accused were put to questions under Section 313 of the Cr.P.C. also. The arguments of both side were heard thereafter.

11. At the outset before we begin to pen down our reasons for modifying the judgment of the court below but concurring with it on the finding as to commission of offence by the husband, one aspect is required to be noted that the accused No.1, Ajay is in jail since 19.1.2011 which would be 9 years and more than 11 months without remission till the date we hear this appeal. He has a child who by now has grown up.

12. Learned counsel for the appellants Sri Rajiv Lochan Shukla has firstly relied on the following grounds raised in the memo of appeal to contend that the accused are not guilty namely:

"(i) Because the judgment and order passed by the Court below is not only illegal but is also against the weight of evidence on records.

(ii) Because the sentence awarded to the appellant is too severe.

(iii) Because conviction awarded to the appellant is not sustainable in the eye of law.

(iv) Because the medical evidence is not supported to the prosecution case and the court below has also not applied his judicial minds in convicting the appellants.

(v) Because the deceased was died during her treatment in the nursing home of Dr. Ved Prakash and Dr. Ved Prakash produced as defense witness before the court and stated that the deceased was suffered from the since long from the Mirgi and tuber closes but the court below disbelieved the statement of the Dr. Ved Prakash without any reasons as such the judgment and order passed by the court below is not justified with the appellant as such the judgment and order of the court below is liable to be set aside by this Hon'ble Court.

(vi) Because the appellants have filed the document of treatment paper which is indicates that the deceased was under treatment of the difference hospitals for her treatment this facts cannot be denied but the court below wrongly been disbelieved the same by his own expressions which is not correct and on that basis conviction of appellants can not be passed but the court below exercised his jurisdiction which is not vested in him and passed the order without his jurisdiction.

(vii) Because the statements of witnesses are found contradiction and the court below has failed to go the same and passed illegal and perverse conviction order and convicted the appellants."

13. Learned counsel for the State has contended that the judgment of the trial court does not deserve any modification or any leniency or no case is made out for reversing the judgment of the trial court. Learned counsel for the State has also focused and taken us to evidence on record so as to convince us that this was the case where the incident of all the three accused, namely, the deceased accused also were

such which brought to hilt the offence alleged and for which charges were framed. The death was within seven years of the marriage, learned counsel for the State has persuaded us to peruse the the provisions of Section 304-B of I.P.C., and has contended that the death occurred not at parental home but the matrimonial home of the deceased, namely, immediately after she was taken from the parental home. He has taken us to the oral testimony of the Doctor, D.W.-1 and has also taken us through the reasoning given by the learned trial court Judge.

14. Shri Shukla in the alternative has submitted that no role is assigned to the appellant no.3, mother-in-law.

15. It is submitted that from the evidence led it emerges that no role was played by her in causing the death of the deceased. Section 304-B has been extensively read by both the counsel and has contended that the mother could not have been convicted on the basis of the evidence, no overt act has been attributed to her even in the evidence. She has not been alleged to have caused tranquility. It is submitted that her conviction cannot be sustained as the deceased should have been subjected to cruelty by soon before her death by her, there is no evidence on record which shows that after the deceased had come to the matrimonial home, the mother-in-law had soon before her death, demanded any money or she had perpetrated cruelty on the deceased. It is further submitted that neither the husband perpetrated in cruelty on the deceased. It is also submitted that the deceased was suffering from disease and it was because of that the dispute had a reason.

16. The alternative prayer is made by Shri Shukla to show mercy on appellant no.1 though vehemently objected by the counsel for the State who has contended that leniency should not be shown in this matter where a pregnant lady died within seven years of her marriage.

17. As far as the first aspect is concerned, the evidence of PW-1 and PW-2 go to show that there were disputes for which litigation was going on. The child and the mother were brought to the matrimonial home, but it appears that on the very next day there again some cause arose as it is not proved as to how the deceased died as the viscera report only shows that it is no bodies case that it was administered by the appellant No.1 or 3.

18. We have to fall back on the antecedents as they were litigations, there were disputed about asking dowry which was demanded in the past and, therefore we concur with the learned Judge that between the husband and the wife, husband played the major role. Hence we are unable to persuade ourselves to take the view propounded by Sri Shukla that it was not a dowry death qua Ajay Kumar or no case under Section 304-B I.P.C. is made out.

19. As far as the mother is concerned, we do not find even in the evidence of PW-1 and PW-2 that even in the earlier days, she was the root cause of asking for dowry. The allegations even in evidence are against the father-in-law and the husband.

20. In that view of the matter, it cannot be said that the dowry death was caused due to the harassment given by the mother-in-law. There may be stray incidences where she might have caused some harassment but that was not immediately preceding incident which occurred, hence her conviction is set aside.

21. To bring home the alternative submission that life till the last breath is not necessary in this case, as it is not a gross case of such magnitude which requires life imprisonment to a person who has lost his wife. The appellant has a minor daughter. The learned counsel for appellants has relied on the following judgments of the Supreme Court:-

(i) Criminal Appeal No.690 of 1994, Hem Chand v. State of Haryana, decided on 6.10.1994;

(ii) Criminal Appeal No.1333 of 2013, Sunil Dutt Sharma v. State (Govt of NCT of Delhi), decided on 8.10.2013;

(iii) Criminal Appeal No.160 of 2006, G.V. Siddaramesh v. State of Karnataka, decided on 5.2.2010;

(iv) Criminal Appeal No.1167 of 2011, Hari Om v. State of Haryana & Another, decided on 31.10.2014;

(v) Criminal Appeal No.1530-31 of 1995, State of Karnataka v. M.V. Manjunathegowda & Another, decided on 4.1.2003.

22. Learned counsel for the respondent-State has contended that these decisions would not be applicable to the facts of the case where there are past antecedents of litigation under personal laws.

23. While considering the punishment to be inflicted on the appellant no.1, we have convinced ourselves that we cannot punish the accused for a period less than seven years, but ten years of jail period in this case, would be sufficient. Hence jail term of ten years with remissions would be sufficient under Section 304-B I.P.C. As there is no provision for fine under Section 304-B but learned counsel Shri Shukla states that while entertaining the appeal, this Court had directed payment of 50% of the fine. The initial order of bail qua Nos. 2 and 3, and the amount which was already deposited will not be refunded.

24. As far as the fine under Section 304-B is concerned, there is no provision for fine in the newly added Section inserted in 1986. The same is recalled, we hold that the fine deposited would be considered to be period under Section 357 Cr.P.C. for the benefit of the daughter and it will be kept in a fix deposit for three years for benefit of the daughter of the accused which amount shall be deposited within four weeks from today failing which the accused shall suffer three months simple imprisonment under Section 498-A of the I.P.C though there is no default clause.

25. As we are showing leniency in this matter, we have also invoked Section 357 Cr.P.C. as placing relieve on the judgment of ***Ankush Shivaji Gaikwad v. State of Maharashtra, 2013 6 SCC 770*** for the betterment of the child. The sentence under Section 498-A is reduced to that undergone by appellant No.3 and maintained for appellant No.1.

26. As far as the appellant No.3 is concerned the punishment is reduced to period already undergone for holding her duty under Section 498-A. She is acquitted of offence charges under Section 304-A, the fine of Rs.5000/- on her is maintained. The 80% of the amount will be kept in fix deposit. The fine is enhanced to Rs.3,000/- which shall be paid within four weeks, if the fine is not paid, she shall undergo two months of imprisonment instead of three years. This leniency is shown so that the future of daughter can be protected. As far as punishment under Section 3/4 of D.P. Act, the punishment is reduced to already

undergone by the lady. The learned Judge has also directed 80% of the amount to be invested in fix deposit we now make it 100%.

27. The accused Ajay Singh if he has completed his term of ten years along with remission he shall be released on completion of his sentence if not required in any other offence.

28. The appellant No.3 being already on bail need not surrender as we have commuted her sentence to that already undergone, but if the fines are not deposited, the procedure as prescribed be carried out by the Chief Judicial Magistrate against her.

29. The appeal is **partly allowed.**

30. This Court is thankful to the arguing counsels for ably assisting this Court and getting the appeal disposed of expeditiously.

31. The record and proceedings be sent back to the court below.

(2021)02ILR A382
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 28.01.2021

BEFORE

THE HON'BLE VIRENDRA KUMAR SRIVASTAVA, J.

Criminal Appeal No. 441 of 2003

Guddu & Anr. ...Appellants
Versus
State of U.P. ...Respondent

Counsel for the Appellants:
R.N.S. Chauhan

Counsel for the Respondent:
Govt. Advocate

A. Criminal Law-Code of Criminal Procedure, 1973-Section 374(2) & Indian Penal Code, 1860-Sections 376,366- first information report was lodged by delay of 8 days without any plausible explanation-victim was major, at the time of occurrence, no injury, either internal or external, was found on the person of victim -she was consenting party-ocular evidence is not supported with medical evidence. (P.W.-1) informant is not an eye witness-the statement of sole eye witness (victim) is not reliable and trustworthy-victim resided and moved with the appellants for more than 20 days and even travelled in Government Bus and did not make any complaint to any person - eyewitnesses, who saw the appellants taking away the victim, were also not examined by the prosecution, the prosecution case, based on sole testimony of the victim, is neither reliable and trust worthy nor is of sterling quality and the prosecution has failed to prove its case beyond reasonable doubt against the appellants- appellants are entitled for acquittal.(Para 1 to 35)

B. 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. (Para 27)

The Appeal is allowed. (E-5)

List of Cases cited: -

1. Rajak Mohammad Vs St. of H.P. (2018) 9 S.C.C. 248

2. Lilia @Ram Swaroop Vs St. of Raj. (2014) 16 S.C.C. 303

3. Mohd. Ali @ Guddu Vs St. of U.P. (2015) 7 S.C.C. 272

4. St. of M.P. Vs Munna (2016) 1 S.C.C. 696

5. Krishan Kumar Malik Vs St. of Har. (2011) 7 S.C.C. page 130

6. Santosh Prasad @ Santosh Kumar Vs St. of Bih. (2020) AIR SC 985

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

1. The instant criminal appeal, under Section 374 (2) Code of Criminal Procedure, 1973 (herein after referred to as 'Code') has, been preferred against the judgment and order dated 26.02.2003, passed by Additional Session Judge, Fast Track Court No.2 , Unnao, in Session Trial No.354 of 2001, arising out of case Crime No.111 of 2001, Police Station- Fatehpur Chaurasi, District- Unnao, whereby appellant Guddu has been convicted for offence under Section 366 I.P.C. for 5 years rigorous imprisonment with fine of Rs.5000/- and for offence under Section 376 I.P.C. for 7 years rigorous imprisonment and appellant Naresh has been convicted under Section 366 I.P.C. for 5 years rigorous imprisonment with fine of Rs.5000/-.

2. The prosecution case, in brief, is that the victim (P.W.-2) is sister of informant Om Prakash (P.W.-1). On 5.5.2001 at about 7:00 a.m., Om Prakash (P.W.-1) lodged a written report (Ext.Ka.-1) at police station- Fatehpur Chaurasi, District-Unnao, alleging therein, that his sister (P.W.-2), aged about 16 years, had gone on 27.4.2001, at about 8:30 p.m., to answer the nature's call, towards the field of northern side of village. It was further alleged that at that time informant and his family members were harvesting their crops in his field, meanwhile, appellants Guddu, Santosh along with co-accused his brother Naresh and his father Ramai Pasi enticed the victim away. It is further alleged that the said occurrence was seen by Uma Shanker son of Madhav Barai, co-villager of (P.W.-1), who narrated the whole story to him and since then he (P.W.-1) was searching his sister (P.W.-2) but failed to locate her.

3. On the said information, F.I.R. Chik (Ext.Ka.-6) was registered against the appellants and other co-accused and investigation was entrusted to Sub-Inspector Ram Awtar Diwakar (P.W.-4), who visited the place of occurrence, prepared the site plan (Ex.Ka.-8) and recorded the statement of (P.W.-1) including other witnesses Uma Shanker, Guddu and Ram Gopal. During investigation, on 17.5.2001 the victim (P.W.-2) was recovered by P.W.-4, in the

presence of P.W.-1, near Takia Crossing when she was traveling with appellant Guddu in Bus No.U.G.P.-04143. P.W.-2 was sent to Government Women Hospital, Unnao for medico legal examination. Dr. Tabbasum Khan (P.W.-3) examined the P.W.-2 on 18.5.2001 and prepared medico legal certificate (Ext.Ka.-4). According to her, the victim's height was 154 c.m. and her weight was 42 kg. In external examination of the P.W.-2, no mark of injury was present on any part of her body ; her both breast were developed ; pubic and auxiliary hairs were present.

4. According to doctor (P.W.-3) further, in internal examination of the victim (P.W.-2), no mark of injury was present on her private part ; hymen ruptured, old torn and healed ; and vagina admitted two fingers easily. According to P.W.-3 further, vaginal smear were taken and two slides were prepared, which were sent for pathological examination to ensure for presence of alive or dead human spermatozoa and the P.W.-2 was sent for radiological examination for determination of her age.

5. According to P.W.-3, further she had prepared supplementary report (Ex.Ka.-5), the victim's (P.W.-2) radiological age was more than 18 years and no definite opinion could be given regarding rape.

6. After conclusion of investigation, charge sheet was filed for offence under Sections 366 and 376 I.P.C. against the appellants before the concerned Magistrate, who after taking the cognizance of the offence, since the offence was exclusively triable by the Court of Sessions, after providing the copies of relevant police papers, as required under Section 207 of the Code, committed the case to the Court of Sessions, Unnao, for trial.

7. Learned trial Court framed charge for offence under Section 366 I.P.C. against the appellant Naresh and for offence under Sections 366 and 376 I.P.C. against the appellant Guddu, to which, they denied and claimed for trial.

8. The prosecution, in order to prove its case, examined Om Prakash (P.W.-1), victim (P.W.-2), Dr, Tabbasum Khan (P.W.-3) and Sub-Inspector Ram Awtar Singh (P.W.-4). The prosecution has also relied written information (Ex.Ka.1), recovery of victim and arrest memo of appellant Guddu (Ex, Ka,-2), handing over memo of victim (Ex.Ka.-3), proved by P.W.-1, medico legal certificate and supplementary report (Ex.Ka.-4) and (Ex.Ka.-5), proved by P.W.-3 and Chik F.I.R. (Ex.Ka.-6) Kayami G.D. (Ex.Ka.-7) site plan (Ex.Ka.-8), Chargesheet (Ex.Ka.-9), proved by (P.W.-4). The prosecution has also relied X-ray report (Ex.Ka.-10) and X-ray plate (Material Ex.-1), the genuineness whereof was admitted by defence Counsel under Section 294 of the Code.

9. After conclusion of prosecution evidence, the statement of appellants were recorded under Section 313 of the Code, who denied the prosecution evidence and stated that they had been falsely implicated.

10. Learned trial Court, after conclusion of trial, convicted and sentenced the appellants vide impugned judgment and order. Aggrieved by the judgment and order as above, the appellants have preferred this appeal.

11. Heard Sri R.N.S. Chauhan, learned counsel for the appellants and Sri Brijendra Singh, learned A.G.A.-I for the State.

12. Learned counsel for the appellants submitted that the appellants are innocent and falsely implicated. Learned counsel further submitted that the first information report was lodged by delay of 8 days without any plausible explanation. Learned counsel further submitted that victim was major, at the time of occurrence, no injury, either internal or external, was found on the person of victim ; she was consenting party ; and ocular evidence is not supported with medical evidence. Learned counsel further submitted that whole family members of the appellants were falsely implicated in this case. Learned counsel further submitted that (P.W.-1) informant is not an eye witness ; witnesses named in the F.I.R. as eye witness were not produced by the prosecution and the statement of sole eye witness (victim) is not reliable and trustworthy. Learned counsel further submitted that alleged recovery of the victim from Bus is also not trustworthy as no witness, traveling in the Bus or driver and conductor were examined by the prosecution. Learned counsel further submitted that the trial Court without considering the material, available on record, passed the impugned judgment and order in very casual and cursory manner, which is liable to be set-aside.

13. In support of the aforesaid submissions, learned counsel for the appellants placed reliance on law laid down by Hon'ble Supreme Court in ***Rajak Mohammad Vs. State of Himachal Pradesh***, (2018) 9 S.C.C. 248, ***Lilia Alias Ram Swaroop Vs. State of Rajasthan***, (2014) 16 S.C.C. 303, ***Mohd. Ali alias Guddu Vs. State of U.P.***, (2015) 7 S.C.C. 272 and ***State of Madhya Pradesh Vs. Munna***, (2016) 1 S.C.C. 696.

14. Per contra, learned A.G.A. vehemently opposing the submission made by learned counsel for the appellants, submitted that the prosecution case, supported by the statement of victim, has been proved beyond reasonable doubt. Learned A.G.A. further submitted that only on account of delay in lodging the F.I.R., the prosecution story cannot be held as doubtful because informant (P.W.-1), when failed to search the victim, had lodged the F.I.R. and such delay, caused in lodging the F.I.R., is natural and justified. Learned A.G.A. further submitted that in rape case statement of victim cannot be disbelieved only on account of non production of independent witness. Learned A.G.A. further submitted that there is no illegality in the impugned judgment and order, the appeal lacks merit and is liable to be dismissed.

15. I have considered the rival submissions, advanced by learned counsel for both the parties and perused the record.

16. The alleged offence was happened in 2001. The trial Court has convicted the appellant Naresh for offence under Section 366 I.P.C. and the appellant Guddu for offence under Sections 366 and 376 I.P.C.

17. Section 361 I.P.C. defines the offence of kidnapping. Section 362 defines the offence of abduction. Section 375 defines offence of rape. Section 366 I.P.C. is aggravated form of kidnapping and abduction and deals with punishment for offence of kidnapping, abducting or inducing woman to compel her marriage and Section 376 I.P.C. deals with the

punishment for the offence of rape. Sections 361, 362, 366, 375 and 376 I.P.C. as it was in the year of 2001, are as under :

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

362. ***Abduction****.--Whoever by force compels, or by any deceitful means induces, any person to go from any place, is said to abduct that person.*

366. ***Kidnapping, abducting or inducing woman to compel her marriage, etc.****--Whoever kidnaps or abducts any woman with intent that she may be compelled, or knowing it to be likely that she will be compelled, to marry any person against her will, or in order that she may be forced or seduced to illicit intercourse, or knowing it to be likely that she will be forced or seduced to illicit intercourse, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; and whoever, by means of criminal intimidation as defined in this Code or of abuse of authority or any other method of compulsion, induces any woman to go from any place with intent that she may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person shall also be punishable as aforesaid.*

375. ***Rape*** *- A man is said to commit rape" who except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions :*

First - Against her will.

Secondly - Without her consent.

Thirdly - With her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt.

Fourthly - With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly- With her consent, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

Sixthly - With or without her consent, when she is under sixteen years of age.

Explanation - .....

Exception - Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape.

376. (1) Whoever, except in the cases provided for by sub section (2), commits rape shall be punished with imprisonment of either description for a term which shall not be less than seven years but which may extend to ten years and shall also the liable to fine unless the woman raped is his own wife and is not under twelve years of age, in which case, he shall be punished with imprisonment of either description for a term which may extend to two years or with fine or with both :

Provided that the Court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than seven years.

(2) whoever, ..."

18. Thus, from perusal of aforesaid provisions, it is clear that if the victim is aged about 18 years or more than 18 years the prosecution has to prove by the cogent evidence and reliable evidence that victim was abducted and raped forcibly without her consent and willingness.

19. Om Prakash (P.W.-1), informant and brother of the victim (P.W.-2), in cross examination, admitting that P.W.-2 had passed high school examination in 1998, has stated that her (P.W.-2) date of birth is 04.01.1982. He has also admitted that he had not seen the P.W.-2 when she had gone from his house. He (P.W.-1) has specifically admitted that he had seen his sister (P.W.-2) after 15 - 20 days of her missing. This witness has not stated that either he had seen occurrence when the P.W.-2 was kidnapped by the appellants or when she had gone from her house to answer the nature's call. Thus, this witness is not an eye witness of the occurrence.

20. The victim (P.W.-2), sole eye witness, has stated that on 27.04.2001, at about 8:30 p.m., she had gone to answer the nature's call towards the field. She further stated that the appellant Guddu, brother of the appellant Naresh and their father Ramai Pasi including two unknown persons, suddenly appeared there with *Katta* (country made pistol) and they threatened her not to make noise otherwise they would kill her. Stating further, that appellants and co-accused carried her near Ganges river (*Ganga ki Katri*) and kept in a bungalow for 15 days, she further stated that they used to carry her in village at every night. She also stated that during that period appellant Guddu had forcibly committed rape with her for 2 - 4 occasions. Stating that at that time she was aged about 16 years, she further stated that one day appellants were carrying her for unknown place, by private bus but she was caught by the police along with appellant-Guddu, near Takia Crossing and appellant Naresh fled away from that bus. She further stated that she was brought by the police at concerned police station ; she was medically examined in the Government Women Hospital ; and thereafter she was handed over in the custody of her parents, after preparation of handing over memo (*Superdiginama*) (Ex.Ka.-3).

21. In cross examination, she (victim) stated that she had also told the involvement of Ramai Pasi, father of the appellant, in the said offence to the Investigating Officer (P.W.-4) and if he had not mentioned the involvement of Ramai Pasi in the said offence, she could not give any justification. She further stated that she had gone lonely to answer the nature's call (*Tatti*) nearby pond with mug (*Lota*) and said pond is situated 20 steps towards east of her house. Stating further, that it was dark night, the appellants were present behind the bush and threatened her by country made pistol (*Tamancha*), she further stated that she could not raise any alarm and said Mug (*Lota*) was left there. Stating further that she walked on foot whole night ; no one had met her on the way ; and she did not make any complaint to any person, she further stated that she reached in the morning in the village but did not make any complaint there also to any person. Stating further, that she stayed in that village 15 - 20 days, she further stated that there were appellants' relative in that village ; she did not make any complaint to them because she used to go out of her room, followed by the appellants with *Tamancha*, only to answer the nature's call. Admitting that she had passed intermediate examination one year before

the occurrence, she further stated that she did not know the appellant Guddu, prior to the occurrence.

22. In ***Mohd. Ali Alias Guddu*** (supra), relied by learned counsel for the appellants, Hon'ble Supreme Court, where the first information report was lodged by delay of 11 days and victim was taken from one place to another and remained at various places for almost two months with only explanation that she was ravished by the appellant for number of times but no injury was found on her private part, has held as under :

"Para-30. True it is, the grammar of law permits that the testimony of a prosecutrix can be accepted without any corroboration without material particulars, for she has to be placed on a higher pedestal than an injured witness, but, a pregnant one, when a court, on studied scrutiny of the evidence finds it difficult to accept the version of the prosecutrix, because it is not unreproachable, there is requirement for search of such direct or circumstantial evidence which would lend assurance to her testimony. As the present case would show, her testimony does not inspire confidence, and the circumstantial evidence remotely does not lend any support to the same. In the absence of both, we are compelled to hold that the learned trial Judge has erroneously convicted the appellant accused for the alleged offences and the High Court has fallen into error, without reappreciating the material on record, by giving the stamp of approval to the same."

23. In ***Lilia Alias Ram Swaroop (Supra)*** where the independent witness was not examined, victim was aged about 20 years and medical evidence was also not corroborating the prosecution story, Hon'ble the Supreme Court, allowing the appeal, set-aside the conviction of the appellant.

24. In ***Rajak Mohammad (Supra)*** where the victim was remained in the company of appellant for about 12 days until she was recovered and she had freely moved around with the appellant in the course of movement, she came across many people at different point of times, yet she did not make any complaint of the offence, committed by the appellant, to any person, Hon'ble Supreme Court, while setting aside the conviction of the appellant and expressing doubt on the age of victim, based on radiological examination and by giving benefit of doubt in favour of appellant, held as under :

"Para-9. *While it is correct that the age determined on the basis of a radiological examination may not be an accurate determination and sufficient margin either way has to be allowed, yet the totality of the facts stated above read with the report of the radiological examination leaves room for ample doubt with regard to the correct age of the prosecutrix. The benefit of the aforesaid doubt ; naturally, must go in favour of the accused."*

25. It is settled principle of law that for offence of rape, the prosecution case based on solitary evidence of the prosecutrix, whose evidence is trustworthy, unblemished and of sterling quality, cannot be thrown out for want of corroborative evidence and independent witness.

26. In ***Krishan Kumar Malik Vs. State of Haryana (2011) 7 S.C.C. page 130***, Hon'ble Supreme Court was also of

the view that for offence of rape, the solitary evidence of victim is sufficient, provided that it inspire confidence of the Court and is reliable trustworthy and of sterling quality.

27. Supreme Court in ***Santosh Prasad @ Santosh Kumar v. State of Bihar AIR 2020 SC 985***, while allowing the appeal against conviction, in a case based on the solitary evidence of prosecutrix, expressing its opinion regarding nature and quality of solitary evidence of victim as well as scope of false implication of accused in sexual offences, has held as under :

"5.2. From the impugned judgments and orders passed by both the courts below, it appears that the appellant has been convicted solely relying upon the deposition of the prosecutrix (PW5). Neither any independent witness nor even the medical evidence supports the case of the prosecution. From the deposition of PW1, it has come on record that there was a land dispute going on between both the parties. Even in the cross-examination even the PW5 - prosecutrix had admitted that she had an enmity with Santosh (accused). The prosecutrix was called for medical examination by Dr. Renu Singh - Medical Officer and PW7 - Dr. Renu Singh submitted injury report. In the injury report, no sperm as well as RBC and WBC were found. Dr. Renu Singh, PW7 - Medical Officer in her deposition has specifically opined and stated that she did not find any violence marks on the body of the victim. She has also categorically stated that there is no physical or pathological evidence of rape. It is true that thereafter she has stated that possibility of rape cannot be ruled out (so stated in the examination-in-chief). However, in the cross-examination, she has stated that there was no physical or pathological evidence of rape.

5.3. As per the FSL report, the blood group on the petticoat and the semen on the petticoat are stated to be inconclusive. Therefore, the only evidence available on record would be the deposition of the prosecutrix. It cannot be disputed that there can be a conviction solely based on the evidence of the prosecutrix. However, the evidence must be reliable and trustworthy. Therefore, now let us examine the evidence of the prosecutrix and consider whether in the facts and circumstances of the case is it safe to convict the accused solely based on the deposition of the prosecutrix, more particularly when neither the medical report/evidence supports nor other witnesses support and it has come on record that there was an enmity between both the parties.

5.4. Before considering the evidence of the prosecutrix, the decisions of this Court in the cases of Raju (AIR 2009 SC 858) (supra) and Rai Sandeep @ Deepu, (AIR 2012 SC 3157) relied upon by he learned Advocate appearing on behalf of the appellant-accused, are required to be referred to and considered.

5.4.1. In the case of Raju (AIR 2009 SC 858, Para 9) (supra), it is observed and held by this Court in paragraphs 11 and 12 as under:

"11. It cannot be lost sight of that rape causes the greatest distress and humiliation to the victim but at the same time a false allegation of rape can cause equal distress, humiliation and damage to the accused as well. The accused must also be protected against the possibility of false implication, particularly where a large number of accused are involved. It must, further, be borne in mind that the broad principle is that an injured witness

was present at the time when the incident happened and that ordinarily such a witness would not tell a lie as to the actual assailants, but there is no presumption or any basis for assuming that the statement of such a witness is always correct or without any embellishment or exaggeration.

12. Reference has been made in Gurmit Singh case [(1996) 2 SCC 384 : 1996 SCC (Cri) 316] : (AIR 1996 SC 1393) to the amendments in 1983 to Sections 375 and 376 of the Penal Code making the penal provisions relating to rape more stringent, and also to Section 114-A of the Evidence Act with respect to a presumption to be raised with regard to allegations of consensual sex in a case of alleged rape. It is however significant that Sections 113-A and 113-B too were inserted in the Evidence Act by the same amendment by which certain presumptions in cases of abetment of suicide and dowry death have been raised against the accused. These two sections, thus, raise a clear presumption in favour of the prosecution but no similar presumption with respect to rape is visualised as the presumption under Section 114-A is s extremely restricted in its applicability. This clearly shows that insofar as allegations of rape are concerned, the evidence of a prosecutrix must be examined as that of an injured witness whose presence at the spot is probable but it can never be presumed that her statement should, without exception, be taken as the gospel truth. Additionally, her statement can, at best, be adjudged on the principle that ordinarily no injured witness would tell a lie or implicate a person falsely. We believe that it is under these principles that this case, and others such as this one, need to be examined."

5.4.2. In the case of Rai Sandeep alias Deepu (AIR 2012 SC 3157, Para 15) (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 : (AIR 2011 SC 2877), 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."

5.5. With the aforesaid decisions in mind, it is required to be considered, whether is it safe to convict the accused solely on the solitary evidence of the prosecutrix? Whether the evidence of the prosecutrix inspires confidence and appears to be absolutely trustworthy, unblemished and is of sterling quality ?"

(Emphasis supplied)

28. Coming to the facts of the case, the first information report (Ex.Ka.-1) was lodged by delay of 8 days by Om Prakash (P.W.-1), who is not eye witness. In F.I.R. (Ex.Ka.-1) it has been specificially mentioned that Uma Shankar son of Madhav Barai, Guddu son of Ram Swarup, Ram Gopal son of Ram Ratan had seen the appellants and other accused persons that they were taking away the victim. Om Prakash (P.W.-1) has also stated in his examination that Uma Shanker, Guddu and Ram Gopal had seen that the victim was being taken away by the appellants and other co-accused. The prosecution has not examined the said Uma Shanker, Guddu and Ram Gopal. In addition to above, the prosecution has also not examined either driver or conductor of the bus or any person travelling in the bus where from the victim and appellant were alleged to be recovered and arrested by the police on 17.5.2001. The prosecution has not given any justification for non-examination of aforesaid eye witnesses. Non examination of these important witnesses creates a doubt in the prosecution story.

29. It is also pertinent to note that victim (P.W.-2) has stated that place of occurrence (pond), where she had gone to answer the nature's call, is situated at distance of only 20 steps from her house and the appellants along with other co-accused were hiding behind the bush. From perusal of site plan (Ex.Ka.-8), it is clear that said pond is situated nearby the field of one Shyam and Shiv Dular and grove land of one Rajendra Prasad. There are no residential house situated nearby the pond and in this site plan, no place has been shown where the appellant and co-accused were hiding whereas it has been mentioned that village of P.W.-1 i.e. Marookpur (Jasra) is situated one furlong away from there. Further, according to victim (P.W.-2) at the time of occurrence, she had gone with mug (*Lota*) and according to her that mug was left by her at the place of occurrence but no lota was either shown or

recovered by the Investigating Officer from the place of occurrence .

30. It is pertinent to mention, at this juncture, that after the recovery of the victim, she was not produced before any Magistrate for recording her statement under Section 164 of the Code and the Investigating Officer has also not prepared any site plan of the place from where the victim was recovered. In addition to above, the victim was major and according to Dr. Tabbasum Khan (P.W.-4), no mark of injury was found on her private part at the time of examination and no opinion regarding rape could be given by her.

31. It is also pertinent to note, at this juncture, that in rural areas, normally young and unmarried girls do not prefer to go alone in the night, out of their village, without informing any member of their family. In this case, according to the victim (P.W.-2) she had gone out of her house to answer the nature's call, at about 8.30 p.m. and according to P.W.-1 at that time, he along with his family members, was harvesting his crops. According to prosecution, the appellants along with their another brother and father, were hiding behind the bush and kidnapped the P.W.-2. Record shows that appellants are resident of village Jasara and P.W.-1 is resident of village Marookpur. Neither P.W.-1 nor P.W.-2 has stated that P.W.-2 used to go daily out of her house alone at 8.30 p.m., to answer the nature's call. Her (P.W.-2) going out of her house at 8.30 p.m., at the time of occurrence to answer the nature's call at any particular place where appellants along with his brother and father were already waiting her, having prior information or intimation of her (P.W.-2) movement, makes the conduct of P.W.-2 doubtful in peculiar facts and circumstances of the case.

32. It is also pertinent to note, at this juncture, that although in rape cases, normally the delay in lodging the F.I.R. is not material but if such delay was deliberately caused and was without any justification it may create doubts in the veracity of the prosecution case. In this case, the F.I.R. was lodged by delay of 8 days. According to P.W.-1, at the time of occurrence, he and his family members were present in the village and harvesting the crops. He has specifically stated that the occurrence was witnessed by one Uma Shanker, Guddu and Ram Gopal also, who informed him that the appellants, their brother and father had kidnapped the victim. He (P.W.-1) has not stated any thing, in his statement, as to why he lodged the F.I.R. by delay of 8 days. Thus, huge delay of 8 days in lodging the F.I.R., further has created doubt in the prosecution story.

33. In view of the above, as there is huge delay of 8 days in lodging the F.I.R. ; ocular evidence is not supported with medical evidence ; victim resided and moved with the appellants for more than 20 days and even travelled in Government Bus and did not make any complaint to any person and she was major at the time of occurrence ; eyewitnesses, who saw the appellants taking away the victim, were also not examined by the prosecution, the prosecution case, based on sole testimony of the victim, is neither reliable and trust worthy nor is of sterling quality and the prosecution has failed to prove its case beyond reasonable doubt against the appellants.

34. Thus, the prosecution has miserably failed to prove its case beyond reasonable doubt against the appellants. Learned trial Court, without considering the aforesaid fact and circumstance of the prosecution story, has passed the impugned judgment and order in cursory manner, which is liable to be set-aside. Appellants Guddu and Naresh are entitled for acquittal and consequently the appeal is liable to be allowed.

35. I am, therefore, unable to uphold the conviction and sentence of the appellants. The impugned judgment and order, dated 26.02.2003, passed in Session Trial No.354 of 2001 (State of U.P. Vs. Guddu and Another), is hereby set-aside. Both the appellants, Guddu and Naresh are acquitted and consequently, the appeal is ***allowed***.

36. Appellants are on bail. Their bail bonds are cancelled and sureties are discharged.

37. Keeping in view the provision of Section 437-A of the Code, appellants Guddu and Naresh are hereby directed forthwith to furnish personal bond of a sum of Rs.20,000/- each and two reliable sureties each of the like amount before the trial Court, which shall be effective for a period of six months, along with an undertaking that in the event of filing of Special Leave Petition against this judgment or for grant of leave, they, on receipt of notice thereof, shall appear before Hon'ble Supreme Court.

38. A copy of this judgment along with lower court record be sent to trial Court by FAX for immediate compliance.

(2021)02ILR A393
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 18.02.2021

BEFORE

THE HON'BLE VIRENDRA KUMAR SRIVASTAVA, J.

Criminal Appeal No. 917 of 2001

Smt. Phulau @ Phoolwati & Anr.
...Appellants
Versus
State of U.P. ...Respondent

Counsel for the Appellants:
Shishir Pradhan, Dhirendra Pratap Singh, Piyush Shrivastava, Surya Nath

Counsel for the Respondent:
Govt. Advocate

A. Criminal Law-Code of Criminal Procedure, 1973-Section 374(2) & Indian Penal Code,1860-Section 304-B, 498-A-challenge to-conviction- deceased had died inside the house of appellants due to burn injury-According to P.W.3 100% burn injury was caused to the deceased due to which her legs and feet were charred- prosecution witness had seen and found seven sarees and two petticoats worn/wrapped on the body of the deceased –soon before her death quarrel took place between husband and wife-he was demanding a piece of land and she-buffalo-appellants failed to produce any evidence in their defence to rebut the statutory presumption provided under Section 113-B of Evidence Act-appellants failed to provide any document that the deceased was suffering from mental weakness- the prosecution has succeeded to prove its case that deceased was being harassed and tortured for want of dowry-However, the Appellant no. 1 (mother-in-law) is acquitted-sentence of appellant no. 2 (husband) is affirmed.(Para 1 to 85)

B. 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.(Para 65)

The Appeal is partly allowed. (E-5)

List of Cases cited:-

1. Gurnaib Singh Vs St. of Punj. (2013) CJ SC 2413

2. St. of Karnataka Vs Dattaraj & ors. (2016) CJ SC 202

3. Baijnath & ors. Vs St. of M.P. (2017) 1 SCC 101

4. Sujit Biswas Vs St. of Assam (2013) 12 SCC 406

5. Sher Singh @ Partapa Vs St. of Haryana (2015) 3 SCC 724

6. Budhiman Singh Vs St. of U.P. (2018) CJ All 274

7. Kashmiri Devi Vs St. of U.K.(2020) AIR SC 652

8. Jatinder Kumar Vs St. of Haryana (2020) AIR SC 161

9. Shanti Vs St. of Haryana (1991) SCC (Cri.) 191

10. Anil Rai Vs St. of Bih. (2001) SCC (Cri.) 1009

11. Pala Singh & anr. Vs St. of Punj. (1972) AIR SC 2679

12. Sarwan Singh & ors. Vs St. of Punj. (1976) AIR SC 2304

13. Preet Pal Singh Vs St. of U.P. (2020) AIR SC 3995

14. Raj Kumar Vs St. of Punj. (2010) 15 SCC 362

15. Radha Mohan Singh @ Lal Saheb Vs St. of U.P. (2006) 1 SCC (Cri.) 661

16. Podda Narayana Vs St. of A.P. (1975) AIR SC 1252

17. Shakila Khader Vs Nausher Gama (1975) AIR SC 1324

18. Eqbal Baig Vs St. of A.P. (1987) AIR SC 923

19. Khujji @ Surendra Tiwari Vs St. of M.P. (1991) SC 1853

20. Kans Raj Vs St. of Punj. (2000) 5 SCC 207

21. Sham Lal Vs St. of Haryana (1997) 9 SCC 759:1997 SCC (Cri) 759

22. Rajindar Singh Vs St. of Punj. (2015) SC 1359

23. Surindra Singh Vs St. of Haryana (2014) 4 SCC 129

24. Sher Singh Vs St. of Haryana (2015) 3 SCC 724

25. Dinesh Vs St. of Haryana (2014) 12 SCC 532

26. Sher Singh Vs St. of Haryana (2015) 1 SCALE 250

27. Dinesh Vs St. of Haryana (2014) 5 SCALE 641

28. Om Prakash Vs St. of Punj. (1992) 4 SCC 212

29. Arun Garg Vs St. of Punj. (2004) 8 SCC 251

30. Trimukh Maroti Kirkan Vs St. of Mah. (2006) 10 SCC 681

31. Nika Ram Vs St. of H.P. (1972) AIR SC 2077

32. St. of T.N. Vs Rajendran (1999) 8 SCC 679

33. St. of Karn. Vs Suvarnamma (2015) 1 SCC 323

34. Behari Prasad & ors. Vs St. of Bih.(1996) SCC (Crl.) 271

35. Bahadur Naik Vs St. of Bih. (2000) AIR SC 1582

36. Ram Gulam Choudhary Vs St. of Bih.(2001) AIR SC 2842

37. Krishna Mochi & ors. Vs St. of Bih.(2002) AIR SC 1965

38. St. of Karn. Vs Bhaskar Kushali Kotharkar & ors. (2004) AIR SC 4333

39. Naresh Kumar Vs St. of Haryana (2015) 1 SCC 797

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

1. This criminal appeal, under Section 374 (2) Code of Criminal Procedure, 1973 (hereinafter referred to as "Code"), has been filed against the judgment and order dated 28.09.2001, passed by Additional Sessions Judge, FTC No.1, Raebareli in Sessions Trial No.76 of 1991, arising out of Crime No.89 of 1990, Police Station Shivratanganj, District Raebareli, whereby appellant no.1-Smt.Phulau @ Phoolwati and appellant no.2 Bharat Sharan Singh (hereinafter referred to as 'appellants') have been convicted and sentenced for seven years rigorous imprisonment for offence under Section 304-B IPC ; for one year rigorous imprisonment with fine of Rs.500/- each for offence under Section 498-A IPC. It has further been provided that both the sentences of the appellants shall run concurrently.

2. The prosecution case, in brief, is that deceased Smt. Geeta, sister of Ram Narain Singh, (P.W.1), was married with Bharat Sharan Singh-appellant no.2. Appellant no.1 Smt. Phulau @ Phoolwati is mother of appellant no.2. On 08.06.1990, the informant (P.W.1) received information through one Ram Krishna Raidas, resident of village Pure Subedar Halmet of Satgawan, (co-villager of appellants) that the deceased had died, due to burn injury on account of setting fire at her in-laws house. On the said information, informant (P.W.1) along with his family members, rushed to the matrimonial house of deceased and found that his sister Geeta was lying dead inside the kitchen, in burnt condition. Police was also present there and when the police took out the dead body of the deceased for inquest proceeding, informant (P.W.1) and other persons present there, saw that several sarees were wrapped in the waist and stomach of the deceased. The informant-(P.W.1) lodged First Information Report (in short 'FIR') (Ex.Ka.1) against the appellants and other co-accused Manju Devi (since deceased during trial), sister of appellant no.2, at Police Station Shivratanganj, District Raebareli, on same day at about 17:10 hours, alleging that appellants and other co-accused were torturing and harassing the deceased by making pressure on her parents to transfer the landed property in favour of appellant Bharat Sharan Singh and also demanding she-buffaloes and due to non-fulfillment of the said demand, they had beaten the deceased so many times and had caused her death by setting her ablaze.

3. On the basis of written report (Ex.Ka.1), Chik FIR (Ex.Ka.3) was prepared by S.I. Jai Karan Verma (P.W.4) and Case Crime No.89 of 1990, under Sections 498-A, 304-B IPC and Section 3/4 Dowry Prohibition Act (hereinafter referred to as 'D.P. Act') was registered against the appellants and co-accused Manju Devi by making necessary entry in General Diary. Before, the information (Ex.Ka.1) given by P.W.1 at concerned Police Station, an

information (Ex.Kha.1) was already given by one Indra Pal Singh, uncle of appellant Bharat Sharan Singh, at 10:15 a.m. on 08.06.1990, regarding death of deceased, alleging that deceased had died due to burn injuries, while she was cooking food. On that information, Station House Officer Gaush Mohd. Khan (P.W.5) proceeded to the place of occurrence, inspected the dead body of the deceased, conducted the inquest proceeding and prepared inquest report (Ex.Ka.4) along with relevant documents (Ex.Ka.5 to Ex.Ka.9), necessary for post mortem examination. P.W.5 also recovered a watch of the deceased, lying near the dead body and prepared recovery memo (Ex.Ka-10). Thereafter, the dead body of the deceased was duly sealed and was sent for post mortem examination along with relevant police papers.

4. Dr. G.K. Srivastava, (P.W.3), Senior Surgeon, District Hospital, Raebareli, conducted post mortem examination on the dead body of the deceased Geeta Devi on 09.06.1990 at 4:30 p.m. and he found following ante-mortem injuries on the body of the deceased:-

"Burn injuries Grade II to Grade VI involving entire body (100% burn). Both legs and feet charred. Skin at places black. Base of vesicles red and inflamed. Singing of scalp hairs."

5. According to P.W.3, at the time of post mortem examination, the deceased was about 24 years and her death was caused due to shock as a result of ante-mortem burn injuries. He (P.W.3) found seven burnt sarees and two petticoats tightened around the waist of deceased which were removed from the body of the deceased after cutting the same. According to him, he prepared post mortem examination report (Ex.Ka.2).

6. The investigation of the case was entrusted to Investigating Officer, Dy. S.P. Shri Bipin Bihari Chaubey, who visited the place of occurrence, prepared site plan (Ex.Ka.11), recorded statement of witnesses and after conclusion of investigation, filed charge sheet (Ex.Ka.12) against the appellants along with co-accused Km.Manju Singh. Cognizance of the offence was taken by the concerned Additional Chief Judicial Magistrate, Raebareli, under Sections 498-A, 304-B IPC and 3/4 D.P. Act and since the offence was exclusively triable by the Court of Sessions, it was committed for trial, after providing the copies of necessary documents, as provided under Section 207 of the Code to the Court of Sessions Judge, Raebareli for trial.

7. Charges for offence under Sections 498-A and 304 B IPC were framed but the appellants and other co-accused pleaded not guilty and claimed for trial.

8. During trial, the prosecution, in order to prove its case, examined five witnesses such as Ram Narain Singh-informant P.W.-1, Ram Murti Singh P.W.-2, Dr. G.K. Srivastava P.W.-3, S.I. Jai Karan Verma P.W.-4 and Gaush Mohd. Khan as P.W.5.

9. The prosecution has also relied upon 12 documentary evidences namely : written report (Ex.Ka.1), Post mortem report (Ex.Ka.2), Chik FIR (Ex.Ka.3), Inquest report (Ex.Ka.4), documents related to post mortem report (Ex.Ka.5 to 9), Recovery memo (Ex.Ka.10), Site plan (Ex.Ka.11), charge sheet (Ex.Ka.12).

10. During trial, co-accused Manju Devi had died and the proceeding against her was abated.

11. After conclusion of the prosecution evidence, the statements of the appellants were recorded under Section 313 of the Code wherein they admitted that the deceased was married with appellant no.2 Bharat Sharan Singh in the year 1986, her Gauna was solemnised after one year of marriage and she had died in their house due to burn injuries but denied the prosecution story as well as the evidence. They further stated that deceased was burnt as she was cooking food at the time of occurrence and thatch (chappar) also caught fire. They further stated that at the time of occurrence, they were not at their home. Seeing the flame of fire and hearing the noise of people, they reached there and put off the fire with help of people, but they were falsely implicated.

12. The appellants did not adduce any evidence in their defence.

13. The trial Court, after considering the evidence available on record in view of the argument of learned counsel for the appellants as well as the prosecution, vide impugned judgment and order convicted and sentenced the appellants, as mentioned above.

14. Aggrieved by the impugned judgment and order, the appellants have preferred this appeal.

15. Heard Shri Piyush Srivastava, learned counsel for the appellants, Shri Tilak Raj Singh, learned AGA for the State and perused the record.

16. Learned counsel for the appellants submitted that appellants are innocent and have been falsely implicated in the present case. Learned counsel further submitted that deceased was mentally weak, she was cooking food in the kitchen but suddenly fire caught her and also to chappar of their house (kitchen). He further submitted that at the time of occurrence, none of the appellants including co-accused were present in the house and on the alarm raised by co-villager, the appellants and co-accused reached there and put off the fire with their help but the deceased had died due to burn injuries.

17. Learned counsel further submitted that because the chik FIR (Ex.Ka.3) was not signed by the informant (P.W.1); copy of FIR was not received by P.W.1; FIR was produced before the concerned Chief Judicial Magistrate on 03.07.1990; and in addition to above, in inquest report, the presence of informant (P.W.1) was not found whereas according to him, he was present, hence, FIR was doubtful and ante-time. Learned counsel further submitted that FIR was lodged by delay and the scriber of the FIR (Ex.Ka.1), brother of P.W.1, was also not examined because if he was produced, he would support the defence story that the FIR was lodged ante-time.

18. Learned counsel further submitted that inquest proceeding was not conducted by any Magistrate; deceased had not died within seven years of her marriage; and the prosecution has also not proved any demand of dowry or any cruelty or harassment with deceased, soon before her death. Learned counsel further submitted that the charge for demand of dowry i.e. Section 3/4 D.P. Act was also not framed and appellants were not convicted for the offence of demand of dowry but the trial Court has convicted the appellants for the

offence of dowry death. Learned counsel further submitted that independent witnesses, including the witnesses of the inquest proceeding and Investigating Officer were also not examined by the prosecution.

19. Learned counsel further submitted that Indrapal Singh, uncle of appellant Bharat Sharan Singh, who had given information to police for the first time regarding the death of deceased was also not examined by the prosecution. Learned counsel further submitted that no complaint regarding demand of dowry or harassment was made by the informant earlier to this occurrence. Learned counsel further submitted that the trial Court, without considering the material available on record in proper manner, has passed the impugned judgment and order in a very cursory manner which is liable to be set aside.

20. Learned counsel for the appellants has placed reliance on the following decisions, rendered by the Hon'ble Apex Court :

(i) Gurnaib Singh vs. State of Punjab 2013 CJ (SC) 2413 ;

(ii) State of Karnataka vs. Dattaraj and others 2016 CJ (SC) 202 ;

(iii) Baijnath and others vs. State of Madhya Pradesh (2017) 1 SCC 101 ;

(iv) Sujit Biswas vs. State of Assam (2013) 12 SCC 406 ;

(v) Sher Singh @ Partapa vs. State of Haryana (2015) 3 SCC 724 ;

(vi) Budhiman Singh vs. State of U.P. 2018 CJ (All.) 274.

21. Per contra, learned AGA vehemently opposed the submissions of learned counsel for appellants and submitted that death of the deceased has been caused by burn injuries within seven years of her marriage, inside the house of the appellants and the deceased was tortured and harassed soon before her death for demand of dowry. Learned AGA further submitted that the fact that the marriage of the deceased was solemnised in the year 1986 and her death was caused in 1990, due to burn injuries, has been admitted by the appellants in their statement under Section 313 of the Code. Learned AGA further submitted that the manner in which the death of the deceased was caused i.e. after wrapping so many clothes (seven sarees and two petticoats), itself is evident that death of the deceased was caused by the appellants. Learned AGA further submitted that the appellants have also failed to lead any evidence to prove that the deceased was mentally weak or any type of evidence in their defence. Learned AGA further submitted that for the offence under Section 304-B IPC., if the essential element of dowry death is proved, the appellants may be convicted for offence under Section 304 B IPC., even if they were not put on trial for offence under Section 3/4 D.P. Act. Learned AGA further submitted that there is neither any illegality in FIR nor in inquest report. Learned AGA further submitted that medical evidence is supported with ocular evidence and the prosecution evidence cannot be disbelieved only for want of independent witnesses. Learned AGA further submitted that the impugned judgment and order is well discussed, well reasoned and requires no interference. The appeal has no force and is liable to be dismissed.

22. I have considered the rival submissions made by learned counsel for the parties and perused the record.

23. In ***Gurnaib Singh (supra)***, the Hon'ble Supreme Court held that where the prosecution had failed to prove demand of

dowry and cruelty and as the letters, written by victim (deceased) to her father regarding the alleged demand of dowry and harassment, was not produced in evidence, modifying the conviction of the appellant for offence under Sections 498-A, 304 B IPC as the deceased did not consume poison accidentally, convicted the appellant for offence punishable under Sections 498-A and 306 IPC and sentenced him for seven years rigorous imprisonment.

24. In ***State of Karnataka vs. Dattaraj (Supra)***, the Hon'ble Apex Court, in peculiar facts and circumstances of that case, found that there was no cruelty or torture to the deceased by the appellant soon before her death and the demand of dowry was also doubtful, hence dismissed the appeal, filed by the State, against acquittal of appellant by the High Court.

25. In ***Baijnath (Supra)***, where the appellant was exonerated by the trial Court but convicted by the High Court and there was evidence that appellant Baijnath was living separately, appellants were sufficiently well-off as stated by defence witnesses in the facts and circumstances of the case, Hon'ble Apex Court held that only the factum of unnatural death of deceased in matrimonial home within seven years of her marriage is not sufficient for the offence under Sections 304-B, 498-A IPC unless other ingredients of dowry death and cruelty are proved by the prosecution.

26. In ***Sujit Biswas (Supra)***, the Hon'ble Supreme Court, where the important fact known to the informant was missing in FIR in prosecution case of rape, based on circumstantial evidence, in the facts and circumstances of the case, set aside the judgment of court below as well as of High Court and allowed the appeal.

27. In ***Sher Singh @ Partapa (Supra)***, the Hon'ble Supreme Court in the facts and circumstances of the case, has held that the initial burden is on the prosecution to prove the ingredients of Section 304-B IPC. Hon'ble Court, where prosecution had failed to prove live link and proximity between cruelty emanating from dowry demand and death of deceased, acquitting the appellant by setting aside the judgment of conviction, allowed the appeal.

28. In ***Budhiman Singh (Supra)***, the Single Bench of this Court has held that mere bald allegation regarding demand of dowry and cruelty or harassment to deceased will not suffice the essential ingredient of the provisions of dowry death and the prosecution is under an obligation to prove the factum of cruelty or harassment due to demand of dowry soon before the death of the deceased.

29. Appellants have been convicted and sentenced for offence under Sections 304-B and 498-A IPC. Before considering the evidence available on record, in the light of arguments advanced by learned counsel for the parties, it is necessary to refer the relevant provision of law relating to the offence in question i.e. Section 304-B, 498-A IPC, Section 113-B of The Indian Evidence Act, 1872 and also Section 2 of D.P. Act, 1961, which reads as under :

304B. Dowry Death.--*(1) Where the death of a woman is caused by any burns or bodily injury or occurs otherwise than under normal circumstances within seven years of her marriage and it is shown that soon before her death she was subjected to cruelty or harassment by her husband or any relative of her husband for, or in connection with, any demand for dowry, such death shall be called "dowry*

death", and such husband or relative shall be deemed to have caused her death. Explanation.--For the purpose of this sub-section, "dowry" shall have the same meaning as in section 2 of the Dowry Prohibition Act, 1961.

(2) Whoever commits dowry death shall be punished with imprisonment for a term which shall not be less than seven years but which may extend to imprisonment for life.

***498A. Husband or relative of husband of a woman subjecting her to cruelty.**--Whoever, being the husband or the relative of the husband of a woman, subjects such woman to cruelty shall be punished with imprisonment for a term which may extend to three years and shall also be liable to fine.*

Explanation.--For the purpose of this section, "cruelty" means--

(a) any wilful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical) of the woman; or

(b) harassment of the woman where such harassment is with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet such demand.

***113B. Presumption as to dowry death.**--When the question is whether a person has committed the dowry death of a woman and it is shown that soon before her death such woman has been subjected by such person to cruelty or harassment for, or in connection with, any demand for dowry, the Court shall presume that such person had caused the dowry death.*

Explanation.--For the purposes of this section, "dowry death" shall have the same meaning as in section 304B, of the Indian Penal Code.

***Section 2 of Dowry Prohibition Act-** Definition of "dowry'. In this Act, "dowry" means any property or valuable security given or agreed to be given either directly or indirectly*

(a) by one party to a marriage to the other party to the marriage; or

(b) by the parent of either party to a marriage or by any other person, to either party to the marriage or to any other person."

30. The above provision, related with dowry death, clearly shows that if the death of any woman is caused within seven years of her marriage by *burn or bodily injury "or otherwise than under normal circumstances"* and it is shown that if soon before the death of such woman, she was subjected to cruelty or harassment by her husband or any relative of her husband, in connection with demand for dowry and if the prosecution succeeds to prove the above ingredient, such death shall be called as dowry death. In addition to above, Section 113-B of Indian Evidence Act, 1872 provides that in such cases, if it is shown that such woman was subjected, soon before her death by the accused, to cruelty or harassment for in or connection with any demand for dowry, the Court shall presume that such accused had caused the dowry death.

31. Ram Narain Singh (P.W.1), brother of the deceased, has stated that the deceased was married in the year 1986 with appellant Bharat Sharan Singh and after marriage, she had gone to matrimonial home and lived with appellant for only two days. He further stated that at the time of marriage, sufficient dowry was given to the appellants. He further stated that after one

year of her marriage, Gauna *(second time departure from paternal house to matrimonial house)* was performed. He further stated that on 08.06.1990, he got information at 10:00 a.m. that the deceased had died due to burn injuries. He further stated that upon that information, he went to matrimonial home of the deceased, saw that the deceased was wrapped in 6-7 sarees and her head and legs were burnt. He further stated that he was sure that due to non-fulfillment of dowry, (she-buffalo and transfer of land) the appellants and Nanad (co-accused Manju Devi) had caused death of the deceased. Stating that when deceased returned from her matrimonial house after Gauna, she had told her father and family members that appellants and co-accused Manju Devi used to torture and beat her for want of *she-buffalo* and transfer of land, he further stated that she (deceased) had returned to her parental house two months prior to her death, and had again told that appellants and co-accused were demanding she-buffalo and landed property and also used to beat her. Stating further that his father and uncle Ram Murti Singh (P.W.2) had also approached the appellants and tried to convince the appellant Phulao but she had told them that unless she-buffalo was not given and land was not transferred in favour of appellant Bharat Sharan Singh, she would not bring the deceased to her house. Stating further that on 24.5.1990, just 15 days prior to the occurrence, appellant Bharat Sharan Singh had returned from Delhi and sent his maternal uncle Rang Bahadur to bring her (deceased), he further stated that the deceased was not ready to go to her matrimonial house due to fear and terror of harassment and torture, caused by appellants and co-accused Manju Devi, but upon being advised by family member and co-villagers, he (P.W.1) and his father had sent the deceased to her matrimonial house but just after 6-7 days, she was killed, due to burn injury, by appellants and co-accused Manju Devi for non-fulfillment of said demand i.e. transfer of land and *she-buffalo*. Stating further that when he reached the matrimonial home of deceased, police was already present there and was conducting inquest proceedings, he further stated that written report, (Ex.Ka.1), got prepared by his brother on his dictation, was submitted by him at concerned Police Station.

32. Ram Murti Singh (P.W.2), uncle of deceased, has stated that his niece (deceased) was married with appellant Bharat Sharan Singh in the year 1986. Stating further that the deceased had gone to her matrimonial home after her marriage and also after Gauna, he further stated that deceased died in the year 1990. He further stated that after Gauna whenever the deceased used to come to her parental home, she used to disclose that due to non-transfer of land and she-buffalo as a dowry, they (appellants and co-accused Manju Devi) used to harassed her. Stating further that he had also tried to convince the appellants and other family members, two months prior to the occurrence but the deceased was killed, due to burn injury, caused by appellants and co-accused, he further stated that he had also seen the dead body of the deceased, lying in kitchen of the appellants.

33. Dr. G.K. Srivastava (P.W.3) has stated that on 09.06.1990, he was posted as Medical Officer at District Hospital, Raebareli and conducted the post mortem of the deceased at 4:30 p.m. and prepared post mortem report (Ex.Ka.2). *(Injuries noted by this witness has been mentioned in paragraph Nos.4 and 5)*. According to this witness, membranes of brain were

congested and liquified. According to him further, stomach and urinary bladder were empty and deceased had died due to shock as a result of 100% ante-mortem burn injuries.

34. S.I. Jai Karan Verma, (P.W.4), Head Moharrir, posted at Police Station Shivratanganj, on 08.06.1990, had stated that he had prepared chik FIR (Ex. Ka.3), on the basis of written information (Ex.Ka.1), filed by Ram Narain Singh (P.W.1). In cross examination, this witness has admitted that before filing of written report (Ex.Ka.1), an information (Ex.Kha.1) was given by Indrapal Singh on 08.06.1990 at about 10:15 a.m. mentioning therein that the deceased had died due to burn injuries while she was cooking food.

35. S.I. Gaush Mohd. Khan (P.W.5) has stated that on 08.06.1990, on an information (Ex.Kha.1), given by one Indrapal Singh, he rushed to the place of occurrence, conducted the inquest proceeding and prepared inquest report (Ex.Ka.4) and also prepared relevant police papers (Ex.Ka.5 to Ex.Ka.9), required for post mortem examination. He further stated that at the time of inquest report, he had also recovered wrist watch and prepared its recovery memo (Ex.Ka.10). He also stated that he had found the body of deceased, wrapped in several sarees. Stating that he was fully acquainted with the handwriting and signature of Investigating Officer, Dy.Sp. Shri Bipin Bihari Chaubey, he proved Site plan (Ex.Ka.11) and charge sheet (Ex.Ka.12) prepared by Investigating Officer. Stating that at the time of inquest proceedings, Ram Narain Singh (P.W.1) and appellant no.2 Bharat Sharan Singh were also present and dead body of deceased was drawn from the house with their help, he further stated that dead body of deceased was sealed in presence of appellant Bharat Sharan Singh and Ram Narain (P.W.1).

36. Offence of Section 304-B IPC is grievous to Section 4 of D.P. Act. For trial of accused under Section 304-B IPC, the trial of accused under Section 4 of D.P. Act is not mandatory because Section 4 of D.P. Act provides punishment for demand of dowry whereas Section 304-B IPC provides punishment for dowry death. The meaning and definition of *'dowry'* in both these sections are common and there are catena of decisions, delivered by Hon'ble Apex Court wherein without framing charge and conviction for offence under Section 4 D.P. Act, the prosecution had succeeded to prove its case against accused/appellant for offence under Section 498-A and 304-B IPC *(See* ***Kashmiri Devi vs. State of Uttarakand AIR 2020 SC 652*** *and* ***Jatinder Kumar vs.The State of Haryana AIR 2020 SC 161.***

37. In ***Shanti vs. State of Haryana 1991 SCC (Cri.) 191***, Hon'ble Apex Court where appellant was convicted only for offence under Section 304-B IPC and not for offence under Section 498-A IPC confirming the conviction of the appellants has held as under :

"6. Now we shall consider the question as to whether the acquittal of the appellants of the offence punishable under Section 498-A makes any difference. The submission of the learned counsel is that the acquittal under Section 498-A IPC would lead to the effect that the cruelty on the part of the accused is not established. We see no force in this submission. The High Court only held that Section 304-B and Section 498-A IPC are mutually exclusive and that when once the cruelty

envisaged in Section 498-A IPC culminates in dowry death of the victim, Section 304-B alone is attracted and in that view of the matter the appellants were acquitted under Section 498-A IPC. It can therefore, be seen that the High Court did not hold that the prosecution has not established cruelty on the part of the appellants but on the other hand the High Court considered the entire evidence and held that the element of cruelty which is also an essential of Section 304-B IPC has been established. Therefore, the mere acquittal of the appellants under Section 498-A IPC in these circumstances makes no difference for the purpose of this case....."

38. Coming to the facts of this case, record shows that in the present case, charge sheet was also filed for offence under Section 3/4 D.P. Act, in addition to Section 304 B IPC and Section 498-A IPC., against the appellants but the trial Court framed charge only under Sections 498-A and 304-B IPC. Thus, it cannot be said that either the appellants were acquitted for offence under Section 4 of D.P. Act or the prosecution was failed to prove the said offence. Thus, in view of the above, submission of learned counsel for appellants that prosecution has failed to prove its case under section 4 D.P.Act hence, it failed to prove the demand of dowry, has no force.

39. So far as submission of learned counsel for the appellants that chik FIR (Ex.Ka.3) was not signed by the informant; copy of FIR was not received by him ; and FIR was produced before Judicial Magistrate on 03.07.1990; is concerned, record shows that Ram Narain (P.W.1) has clearly stated that he reached the place of occurrence on an information given by one Ram Krishna Raidas, co-villager of appellants and saw that his sister had died and inquest proceeding was conducted in his presence. S.I. Gaush Mohd. Khan (P.W.5) has also stated that at the time of inquest proceeding, Ram Narain (P.W.1) was present.

40. Perusal of record further shows that FIR was lodged at 17:10 hours on same day i.e. 08.06.1990, although this witness Ram Narain (P.W.1) has stated that he had not accompanied the dead body of his sister from the place of occurrence but on that very account, it cannot be said that FIR was not lodged at the time shown in Chik FIR (Ex.Ka.-3) and G.D. report (Ex.Ka.5).

41. It is also pertinent to note that on Chik FIR (Ex.Ka.3), Ram Narain (P.W.1) has not put his signature. In this regard, it is relevant to mention Section 154 of the Code and Para 97 of the U.P. Police Regulations, which reads hereasunder :

*"**154. Information in cognizable cases.** - (1) Every information relating to the commission of a cognizable offence, if given orally to an officer in charge of a police station, shall be reduced to writing by him or under his direction, and be read over to the informant ; and every such information, whether given in writing or reduced to writing as aforesaid, shall be signed by the person giving it, and the substance thereof shall be entered in a book to be kept by such officer in such form as the State Government may prescribe in this behalf.*

(2) A copy of the information as recorded under sub-section (1) shall be given forthwith, free of cost, to the informant.

(3) Any person aggrieved by a refusal on the part of an officer in charge

of a police station to record the information referred to in sub-section (1) may send the substance of such information, in writing and by post, to the Superintendent of Police concerned who, if satisfied that such information discloses the commission of a cognizable offence, shall either investigate the case himself or direct an investigation to be made by any police officer subordinate to him, in the manner provided by this Code, and such officer shall have all the powers of an officer in charge of the police station in relation to that offence."

Section 97 of U.P. Police Regulations reads as under :

"97. Whenever information relating to the commission of a cognizable offence is given to an officer-in-charge of a police station the report will immediately be taken down in triplicate in the check receipt book for reports of cognizable offences (Police form No. 341). This step will on no account be delayed to allow time for the true facts to be ascertained by a preliminary investigation. Even if it appears untrue, the report must be recorded at once. If the report is made orally, the exact words of the person who makes it, including his answers to any questions put to him should be taken down and read over to him; he must sign each of the three parts, or if he cannot write, he must make his mark or thumb- impression. If a written report is received an exact copy must be made, but the signature or mark of the messenger need not be taken. In all cases the officer-in-charge of the station must sign each of the three parts and have the seal of the station stamped on each. The triplicate copy will remain in the book : the duplicate copy will be given to the person who makes the oral or brings the written report ; the original will be sent forthwith through the Superintendent of Police to the Magistrate having jurisdiction with the original written report (if any) attached.

The practice of delaying first information reports until they can be sent to headquarters attached to special or general diaries is contrary to the provisions of Criminal Procedure Code and is prohibited.

If there is an Assistant or Deputy Superintendent in charge of the sub-division, and stationed at a place other than the headquarters of the district, the original should be sent through him to the Magistrate." (Emphasis supplied)

42. Thus, from perusal of aforesaid provision, it is clear that if the information, relating to commission of cognizable offence, is given orally to officer-in-charge of Police Station, it shall be reduced into writing, and thereafter be signed by the informant but if written information is given under signature or thumb impression of the informant, and that information is recorded in relevant police papers/diary, signature of informant is not mandatory on police papers/diary.

43. It is settled principle of law that if FIR was lodged promptly and investigation was started without any delay, delay in sending the copy of FIR to the Magistrate is immaterial. Hon'ble Apex Court in ***Anil Rai vs. State of Bihar 2001 SCC (Cri.) 1009,*** while discussing the relevancy and scope of Section 157 of the Code has held as under:

"20. This provision is designed to keep the Magistrate informed of the investigation of such cognizable offence so as to be able to control the investigation and, if necessary, to give appropriate direction under Section 159 of the Code of Criminal Procedure. But where the F.I.R. is shown to have actually been recorded without delay and investigation started on the basis of the F.I.R., the delay in sending

the copy of the report to the Magistrate cannot by itself justify the conclusion that the investigation was tainted and the prosecution insupportable ***Pala Singh and Anr. v. State of Punjab : AIR 1972 SC 2679****. Extraordinary delay in sending the copy of the F.I.R. to the Magistrate can be a circumstance to provide a legitimate basis for suspecting that the first information report was recorded at much later day than the stated day affording sufficient time to the prosecution to introduce improvement and embellishment by setting up a distorted version of the occurrence. The delay contemplated under Section 157 of the Code of Criminal Procedure for doubting the authenticity of the F.I.R. is not every delay but only extraordinary and unexplained delay. However, in the absence of prejudice to the accused the omission by the police to submit the report does not vitiate the trial. This Court in* ***Sarwan Singh and Ors. v. State of Punjab AIR 1976 SC 2304****, held that delay in despatch of first information report by itself is not a circumstance which can throw out the prosecution's case in its entirety, particularly when it is found on facts that the prosecution had given a very cogent and reasonable explanation for the delay in despatch of the F.I.R. "*

44. Coming to the facts of this case again, FIR (Ex.Ka.1) is written information and it was signed by Ram Narain (P.W.1), S.I. Jai Karan Verma (P.W.4) who recorded the information (Ex.Ka.1), given by Ram Narain (P.W.1), in Chik FIR (Ex.Ka.3) and G.D. (Ex.Ka.4), was not cross examined by defence counsel before the trial Court as to why he had not taken the signature of Ram Narain (P.W.1) on Chik FIR (Ex.Ka.3) or had not given copy of FIR to P.W.1. Further, Ram Narain (P.W.1), is real brother of deceased who had seen the deceased, died due to severe burn injury. Thus, if he failed to receive the copy of FIR or could not disclose whether copy of FIR was received by him, it will neither affect his testimony nor the prosecution story. Similarly, the Chik FIR (Ex.Ka.3) was seen by the concerned Magistrate on 03.07.1990 i.e. after 25 days of the occurrence but on that very account, it can also not be said that Chik FIR (Ex.Ka3) was sent to concerned Magistrate by unnecessary delay or on 03.07.1990. There is difference between receiving of FIR by the concerned official of the concerned Magistrate and to put the same before the concerned Magistrate, because perusal of FIR by the concerned Magistrate does not mean that it was received by the official of that Magistrate on the same day. S.I. Jai Karan Verma (P.W.4), who recorded the FIR Chik (Ex.Ka.3), G.D. report (Ex.Ka.5) on 08.06.1990 at 17:10 hours, was not cross examined by the defence counsel as to whether he had sent Chik FIR (Ex.Ka.3) to the concerned Magistrate by any delay. In this case, the deceased had died inside the house of the appellants and death information (Ex.Kha.1) was already given by one Indrapal Singh, uncle of the appellant Bharat Sharan Singh at Police Station at 10:15 a.m. Inquest proceeding was started promptly on same day in presence of appellant Bharat Sharan Singh, Raj Narain Singh (P.W.1) and other people and the defence counsel had also not cross examined any police witness, regrading delay, if any, caused in commencement of investigation. Thus, in view of the above and law laid down by Apex Court in ***Anil Rai (Supra)*** only on the ground that FIR was perused by the concerned Magistrate by delay of 25

days, the prosecution story cannot be held doubtful.

45. So far as submission of learned counsel for the appellants that according to prosecution case, the deceased was being continuously harassed and tortured for a long time after her marriage, but no complaint or FIR was filed by the parents or brother of deceased, the prosecution version regarding harassment and torture due to demand of dowry is doubtful, is concerned, it is often seen that in rural areas either due to illiteracy or due to social stigma or criticism, the bride and her parents do not agitate some problem and issues occurred after her marriage between them with family of bride groom, as they believe that due to lapse of time the problem whether it is related to demand of dowry or otherwise, may be subsided or pacified in future. Parents of bride do not want to interfere in such disputes. The poor and helpless father of the bride used to prefer to remain as a silent spectator in such disputes and avoid to complain to police authorities because he believes that such step may deteriorate the relationship of his daughter with her husband and in-laws. Failure to take any legal step in such disputes against the in-laws of the deceased does not mean that neither dowry was demanded nor harassment or cruelty was committed to the deceased soon before her death.

46. Recently in ***Preet Pal Singh vs. Sate of U.P., AIR 2020 SC 3995***, where Allahabad High Court had suspended the sentence of the appellant, convicted for the offence of dowry death, on the ground that no complaint for demand of dowry was made earlier by the father of the deceased, Hon'ble Supreme Court, setting aside the impugned order passed by this Court, has held as under:

"42. From the evidence of the Prosecution witnesses, it transpires that the Appellant had spent money beyond his financial capacity, at the wedding of the victim and had even gifted an I-10 car. The hapless parents were hoping against hope that there would be an amicable settlement. Even as late as on 17.6.2010 the brother of the victim paid Rs. 2,50,000/- to the Respondent No.2. ***The failure to lodge an FIR complaining of dowry and harassment before the death of the victim, is in our considered view, inconsequential. The parents and other family members of the victim obviously would not want to precipitate a complete break down of the marriage by lodging an FIR against the Respondent No. 2 and his parents, while the victim was alive."*** *(Emphasis supplied)*

47. In the instant case, parents of the deceased were not examined whereas Ram Narain Singh (P.W.1) and Ram Murti Singh (P.W.2) have categorically stated that deceased was being harassed for a long time by her in-laws due to non-transfer of land and for demand of she-buffalo. Ram Narain Singh (P.W.1), in his cross examination, has specifically stated that he had not filed any complaint or application either to Superintendent of Police, District Magistrate or any officer because he had not anticipated that deceased would be killed by the appellants for she-buffalo and a piece of land.

48. Thus, in view of law laid down by the Hon'ble Apex Court in ***Preet Pal Singh (Supra)*** and the facts and circumstances of this case, the prosecution case cannot be disbelieved on the ground that the

prosecution witnesses had failed to file any complaint prior to this occurrence.

49. So far as submission of learned counsel for the appellants that FIR was lodged by delay of more than 10 hours, is concerned, neither in Code nor in Indian Evidence Act, 1872 any time limit has been provided for lodging the FIR. The time taken to lodge the FIR depends on the facts and circumstances of each case, sometimes huge delay, caused in lodging the FIR, is justified and sometimes even a short delay is not justified. Since offfence of dowry death generally, is committed in the house of accused person where no one of parental side of deceased, is presumed to be present and after receiving the sudden death information of deceased, parents or brother of deceased becomes shocked, there may be a chance of some delay in lodging the FIR.

50. The Hon'ble Supreme Court in ***Raj Kumar vs. State of Punjab (2010) 15 SCC 362*** where delay was caused in lodging the FIR in dowry death case, in para 8 held as under :

"We have considered the arguments advanced by learned counsel for the parties. It is true, as contended by Mr. Talwar, that there is some delay in lodging the FIR. To our mind, however, the delay in such like matters cannot be fatal to the prosecution. It has to be borne in mind that matters arising out of a matrimonial dispute are always extremely sensitive and it is after serious consideration and debate amongst the victims' family that the FIR is lodged. It has come in the evidence of Munshi Ram that they too had considered the matter in its entirety and it was only after he had been advised by his relatives, that a formal FIR had been lodged."

(Emphasis supplied)

51. As discussed above, Ram Narain (P.W.1) was present at the time of inquest proceedings. From perusal of inquest report (Ex.Ka.4), it transpires that inquest proceedings were started at 13:30 p.m. and continued thereafter. P.W.1 has also stated that he remained present till the conclusion of inquest proceedings. From perusal of Chik FIR (Ex.Ka.3), it transpires that concerned Police Station is situated at the distance of 8 kms from the place of occurrence. In addition to above, this witness, in cross examination, constantly has stated that he had lodged FIR on same day. Stating that he had stayed at concerned Police Station for one hour and he and his brother had returned together from Police Station, he further stated that light was on when he proceeded from concerned Police Station. Further, S.I. Jai Karan Verma (P.W.4), who registered FIR and prepared Chik FIR (Ex.Ka.3), has specifically stated that FIR was registered on 08.06.1990 at 17:10 hours. In cross examination, neither any question nor suggestion was put to him whereby it can be stated that FIR was lodged at any other day and time. Thus, in view of the above, if FIR was lodged at 17:10 hours, on the day of occurrence, it cannot be said that there was any delay caused in lodging the FIR.

52. So far as submission of learned counsel that inquest proceedings were not conducted by any Magistrate, hence, the prosecution case is doubtful, is concerned, in the present case, the inquest proceeding was conducted by S.I. Gaush Mohd. Khan (S.H.O.) (P.W.5) and not by any Magistrate, as required under Section 174 of the Code. In cross examination, justifying the inquest proceedings conducted by him, he (P.W.5) has stated

that as the information of death was received at 10:15 a.m. at Police Station, he had informed via radio wireless to Circle Officer and concerned Sub-Divisional Magistrate. Stating that he had reached at the place of occurrence between 10:45 a.m. and 11:00 a.m., he further stated that after waiting for his superior Officers, for considerable period and due to their non-arrival at place of occurrence, he started the inquest proceedings at 01:30 p.m.

53. It is settled principle of law that the purpose of inquest proceeding is only to find out the cause of death of the deceased. Hon'ble Supreme Court in ***Radha Mohan Singh @ Lal Saheb vs. State of U.P. (2006) 1 SCC (Cri.) 661***, three-judges Bench of Hon'ble Supreme Court while discussing the true nature and scope has held as under :

*"15. In **Podda Narayana v. State of A.P. AIR 1975 SC 1252** it was held that the proceedings under Section 174 have a very limited scope. The object of the proceedings is merely to ascertain whether a person has died under suspicious circumstances or an unnatural death and if so what is the apparent cause of the death. The question regarding the details as to how the deceased was assaulted or who assaulted him or under what circumstances he was assaulted is foreign to the ambit and scope of the proceedings under S. 174. Neither in practice nor in law was it necessary for the police to mention those details in the inquest report. It is, therefore, not necessary to enter all the details of the overt acts in the inquest report. Their omission is not sufficient to put the prosecution out of Court. In **Shakila Khader v. Nausher Gama AIR 1975 SC 1324** the contention raised that non-mention of a person's name in the inquest report would show that he was not a eye-witness of the incident was repelled on the ground that an inquest under Section 174 Cr.P.C. is concerned with establishing the cause of death and only evidence necessary to establish it need be brought out. The same view was taken in **Eqbal Baig v. State of Andhra Pradesh AIR 1987 SC 923** that the non-mention of name of an eye-witness in the inquest report could not be a ground to reject his testimony. Similarly, the absence of the name of the accused in the inquest report cannot lead to an inference that he was not present at the time of commission of the offence as the inquest report is not the statement of a person wherein all the names (accused and also the eye-witnesses) ought to have been mentioned. The view taken in **Podda Narayana v. State of A.P. (supra)** was approved by a three-Judge Bench in **Khujji @ Surendra Tiwari v. State of Madhya Pradesh AIR 1991 SC 1853** and it was held that the testimony of an eye-witness could not be discarded on the ground that their names did not figure in the inquest report prepared at the earliest point of time. The nature and purpose of inquest held under Section 174 Cr.P.C. was also explained in Amar Singh v. Balwinder Singh 2003 (2) SCC 518. In the said case the High Court had observed that the fact that the details about the occurrence were not mentioned in the inquest report showed that the investigating officer was not sure of the facts when the inquest report was prepared and the said feature of the case carried weight in favour of the accused. After noticing the language used in Section 174 Cr.P.C. and earlier decisions of this Court it was ruled that the High Court was clearly in error in observing as aforesaid or drawing any inference against the prosecution. Thus, it is well settled by a catena of decisions of this Court that the*

purpose of holding an inquest is very limited, viz., to ascertain as to whether a person has committed suicide or has been killed by another or by an animal or by machinery or by an accident or has died under circumstances raising a reasonable suspicion that some other person has committed an offence. There is absolutely no requirement in law of mentioning the details of the FIR, names of the accused or the names of the eye-witnesses or the gist of their statement nor it is required to be signed by any eye-witness. In ***Meharaj Singh v. State of U.P. (supra)*** *the language used by the legislature in Section 174 Cr.P.C. was not taken note of nor the earlier decisions of this Court were referred to and some sweeping observations have been made which are not supported by the statutory provision. We are, therefore, of the opinion that the observations made in paras 11 and 12 of the reports do not represent the correct statement of law and they are hereby over-ruled. The challenge laid to the prosecution case by Shri Jain on the basis of the alleged infirmity or omission in the inquest report has, therefore, no substance and cannot be accepted."*

54. Coming to the facts of this case again, admittedly, the deceased had died due to burn injury inside the house of appellants and death information report (Ex.Kha.1) was also given by one Indrapal Singh, uncle of appellant no.2, at concerned Police Station at 10:15 a.m. that deceased had died due to burn injuries. In view of the above, since the cause of death, identity of deceased, place of occurrence, is not disputed and the said inquest proceedings were conducted by S.I. Gaush Mohd. Khan (P.W.5), after giving due information to concerned Magistrate and his superior Officers and also after waiting for them upto considerable period, in my view, only on the ground that inquest proceeding was not conducted by any Magistrate, the prosecution story cannot be held as doubtful. Therefore, submission of learned counsel for appellants, in this regard, has no substance.

55. In the instant case, the deceased had died, inside the house of appellants, within seven years of her marriage and this fact has also been admitted by the appellants, in their statements recorded under Section 313 of the Code. For the offence under Section 304-B IPC read with Section 113-B Indian Evidence Act, 1872 the prosecution has to prove the demand of dowry and due to failure of fulfillment of such demand, the deceased was harassed and tortured by her husband or relative of her husband, soon before her death. These provisions further shows that if the deceased had died in an unnatural circumstance or by burn injury, due to harassment and torture, committed to her as above, there must be some proximity between the demand of dowry, harassment and death of deceased. Thus, it has also to be seen whether any cruelty or harassment was caused to deceased soon before her death due to demand of dowry or not.

56. The term *"soon before death"* used in Section 304-B I.P.C. and 113-B of Evidence Act has neither been explained nor defined either in I.P.C. or in Indian Evidence Act, 1872 and the term "it is shown" that soon before her death the deceased was subjected to cruelty or harassment by her husband or any relative of her husband for, or in connection with, any demand of dowry, as condition precedent for dowry death, shows that the factum of cruelty or harassment by the appellants with the deceased soon before

her death, is not required to be proved by prosecution beyond reasonable doubt. This fact may be proved by the prosecution by showing the facts and circumstances happened with deceased, soon before death of deceased. In addition to above, the term *"soon before death"* does not mean just before death or immediately before death of deceased, she was subjected to torture, cruelty or harassment by her in-laws due to demand of dowry.

57. Hon'ble Supreme Court while discussing the object and purpose of Section 304-B I.P.C. and the scope of relevancy and meaning of phrase *"soon before death of deceased"* contained therein, in ***Kans Raj vs. State of Punjab (2000) 5 SCC 207*** has held as under :

"15. It is further contended on behalf of the respondents that the statements of the deceased referred to the instances could not be termed to be cruelty or harassment by the husband soon before her death. "Soon before" is a relative term which is required to be considered under specific circumstances of each case and no straitjacket formula can be laid down by fixing any time-limit. This expression is pregnant with the idea of proximity test. The term "soon before" is not synonymous with the term "immediately before" and is opposite of the expression "soon after" as used and understood in Section 114, Illustration (a) of the Evidence Act. These words would imply that the interval should not be too long between the time of making the statement and the death. It contemplates the reasonable time which, as earlier noticed, has to be understood and determined under the peculiar circumstances of each case. In relation to dowry deaths, the circumstances showing the existence of cruelty or harassment to the deceased are not restricted to a particular instance but normally refer to a course of conduct. Such conduct may be spread over a period of time. ***If the cruelty or harassment or demand for dowry is shown to have persisted, it shall be deemed to be "soon before death" if any other intervening circumstance showing the non-existence of such treatment is not brought on record, before such alleged treatment and the date of death. It does not, however, mean that such time can be stretched to any period. Proximate and live link between the effect of cruelty based on dowry demand and the consequential death is required to be proved by the prosecution. The demand of dowry, cruelty or harassment based upon such demand and the date of death should not be too remote in time which, under the circumstances, be treated as having become stale enough.***

16. No presumption under Section 113-B of the Evidence Act would be drawn against the accused if it is shown that after the alleged demand, cruelty or harassment the dispute stood resolved and there was no evidence of cruelty and harassment thereafter. *Mere lapse of some time by itself would not provide to an accused a defence, if the course of conduct relating to cruelty or harassment in connection with the dowry demand is shown to have existed earlier in time not too late and not too stale before the date of death of the woman. The reliance placed by the learned counsel for the respondents on* ***Sham Lal v. State of Haryana [(1997) 9 SCC 759 : 1997 SCC (Cri) 759]*** *is of no help to them, as in that case the evidence was brought on record to show that attempt had been made to patch up between the two sides for which a panchayat was held in which it was resolved that the deceased would go back*

to the nuptial home pursuant to which she was taken by the husband to his house. Such a panchayat was shown to have been held about 10 to 15 days prior to the occurrence of the case. There was nothing on record to show that the deceased was either treated with cruelty or harassed with the demand of dowry during the period between her having taken to the nuptial home and her tragic end. Such is not the position in the instant case as the continuous harassment to the deceased is never shown to have settled or resolved." ***(Emphasis supplied)***

58. In ***Rajindar Singh vs. State of Punjab, AIR 2015 SC 1359***, three Judges Bench of Hon'ble Supreme Court while placing reliance on the law laid down in ***Kans Raj (Supra)***, affirming the law laid down in ***Surindra Singh vs. State of Haryana, 2014 (4) SCC 129*** and ***Sher Singh vs. State of Haryana, (2015) 3 SCC 724*** and partly overruling the law laid down in ***Dinesh vs. State of Haryana, (2014) 12 SCC 532*** has held as under :

".....We, therefore, declare that any money or property or valuable security demanded by any of the persons mentioned in Section 2 of the Dowry Prohibition Act, at or before or at any time after the marriage which is reasonably connected to the death of a married woman, would necessarily be in connection with or in relation to the marriage unless, the facts of a given case clearly and unequivocally point otherwise. Coming now to the other important ingredient of Section 304B- what exactly is meant by "soon before her death"?

21. This Court in ***Surinder Singh v. State of Haryana (2014) 4 SCC 129****, had this to say:*

"17. Thus, the words "soon before" appear in Section 113-B of the Evidence Act, 1872 and also in Section 304-B IPC. For the presumptions contemplated under these sections to spring into action, it is necessary to show that the cruelty or harassment was caused soon before the death. The interpretation of the words "soon before" is, therefore, important. The question is how "soon before"? This would obviously depend on the facts and circumstances of each case. The cruelty or harassment differs from case to case. It relates to the mindset of people which varies from person to person. Cruelty can be mental or it can be physical. Mental cruelty is also of different shades. It can be verbal or emotional like insulting or ridiculing or humiliating a woman. It can be giving threats of injury to her or her near and dear ones. It can be depriving her of economic resources or essential amenities of life. It can be putting restraints on her movements. It can be not allowing her to talk to the outside world. The list is illustrative and not exhaustive. Physical cruelty could be actual beating or causing pain and harm to the person of a woman. Every such instance of cruelty and related harassment has a different impact on the mind of a woman. Some instances may be so grave as to have a lasting impact on a woman. Some instances which degrade her dignity may remain etched in her memory for a long time. Therefore, "soon before" is a relative term. In matters of emotions we cannot have fixed formulae. The time-lag may differ from case to case. This must be kept in mind while examining each case of dowry death.

18. In this connection we may refer to the judgment of this Court in Kans Raj v. State of Punjab [(2000) 5 SCC 207 : 2000 SCC (Cri) 935] where this Court considered the term "soon before". The

relevant observations are as under: (SCC pp. 222- 23, para 15) "15. ... 'Soon before' is a relative term which is required to be considered under specific circumstances of each case and no straitjacket formula can be laid down by fixing any time-limit. This expression is pregnant with the idea of proximity test. The term 'soon before' is not synonymous with the term 'immediately before' and is opposite of the expression 'soon after' as used and understood in Section 114, Illustration (a) of the Evidence Act. These words would imply that the interval should not be too long between the time of making the statement and the death. It contemplates the reasonable time which, as earlier noticed, has to be understood and determined under the peculiar circumstances of each case. In relation to dowry deaths, the circumstances showing the existence of cruelty or harassment to the deceased are not restricted to a particular instance but normally refer to a course of conduct. Such conduct may be spread over a period of time. If the cruelty or harassment or demand for dowry is shown to have persisted, it shall be deemed to be 'soon before death' if any other intervening circumstance showing the non-existence of such treatment is not brought on record, before such alleged treatment and the date of death. It does not, however, mean that such time can be stretched to any period. Proximate and live link between the effect of cruelty based on dowry demand and the consequential death is required to be proved by the prosecution. The demand of dowry, cruelty or harassment based upon such demand and the date of death should not be too remote in time which, under the circumstances, be treated as having become stale enough."

Thus, there must be a nexus between the demand of dowry, cruelty or harassment, based upon such demand and the date of death. The test of proximity will have to be applied. But, it is not a rigid test. It depends on the facts and circumstances of each case and calls for a pragmatic and sensitive approach of the court within the confines of law."

22. In another recent judgment in ***Sher Singh v. State of Haryana, 2015 (1) SCALE 250****, this Court said:*

"We are aware that the word 'soon' finds place in Section 304B; but we would prefer to interpret its use not in terms of days or months or years, but as necessarily indicating that the demand for dowry should not be stale or an aberration of the past, but should be the continuing cause for the death under Section 304 or the suicide under Section 306 of the IPC. Once the presence of these concomitants are established or shown or proved by the prosecution, even by preponderance of possibility, the initial presumption of innocence is replaced by an assumption of guilt of the accused, thereupon transferring the heavy burden of proof upon him and requiring him to produce evidence dislodging his guilt, beyond reasonable doubt." (at page 262).

23. We endorse what has been said by these two decisions. Days or months are not what is to be seen. What must be borne in mind is that the word "soon" does not mean "immediate". A fair and pragmatic construction keeping in mind the great social evil that has led to the enactment of Section 304B would make it clear that the expression is a relative expression. Time lags may differ from case to case. All that is necessary is that the demand for dowry should not be stale but should be the continuing cause for the death of the married woman under Section 304B.

24. At this stage, it is important to notice a recent judgment of this Court in

Dinesh v. State of Haryana, 2014 (5) SCALE 641 *in which the law was stated thus:*

"The expression "soon before" is a relative term as held by this Court, which is required to be considered under the specific circumstances of each case and no straight jacket formula can be laid down by fixing any time of allotment. It can be said that the term "soon before" is synonyms with the term "immediately before". The determination of the period which can come within term "soon before" is left to be determined by courts depending upon the facts and circumstances of each case." (at page 646)

25. We hasten to add that this is not a correct reflection of the law. "Soon before" is not synonymous with "immediately before."*(Emphasis supplied)*

59. In the instant case, Ram Narain Singh (P.W.1.) and Ram Murti (P.W.2) have categorically stated that the deceased was being harassed and tortured by appellants and co-accused Manju Devi for non-fulfillment of their demand i.e. for she-buffalo and transfer of land. Both the witnesses have also specifically stated that father of the deceased and her uncle (P.W.2) had also approached the appellants to pacify the disputes but the appellant no.1 Phulau had stated that unless their demand was not fulfilled they would not bring the deceased. Ram Narain Singh (P.W.1) has also stated on 24.5.1990 (15-20 days prior to the occurrence) appellant Bharat Sharan Singh returned from Delhi and sent his maternal uncle Rang Bahadur Singh to bring the deceased but deceased, due to fear of being tortured and harassed by the appellants and co-accused Manju Devi, was not ready to go to her matrimonial house. He further stated that upon being advised from family members and co-villagers, he and his father had sent the deceased to her matrimonial house but just after 6-7 days, she was killed due to burn injury by the appellants and co-accused Manju Devi for non-fulfillment of aforesaid demand. Thus, it is clear that there was cruelty and harassment with deceased for demand of dowry, soon before her death, as required by Section 304 B IPC and the submission of learned counsel for appellants in this regard has no force.

60. So far as submission of learned counsel for appellants that no independent witness was produced, Ram Narain (P.W.1) and Ram Murti (P.W.2) are related witnesses; scriber of FIR was also not produced and Indrapal Singh, who had given death information report (Ex.Kha.1), at concerned Police Station were not examined by the prosecution hence, the prosecution case is doubtful, is concerned, it is settled principle of law that no specific number of witnesses are required to be produced by the prosecution, to prove its case. The prosecution case, based on solitary evidence of witness which is reliable and trust worthy, cannot be thrown out only on the basis of non-production of independent witness or scriber of FIR, particularly in dowry death cases, because such type of offences are caused inside the house of the accused persons and probable witness of the occurrence either belongs to the family of the accused person or their well wisher or their neighbour.

61. The Hon'ble Supreme Court in ***Om Prakash vs. State of Punjab (1992) 4 SCC 212***, while considering the availability of independent witnesses in dowry death cases has held as under:

"It was then submitted on behalf of the appellants that it appears that Rita

committed suicide and the appellants have been falsely implicated for an offence of murder by the interested witnesses. It is true that sometimes a case of suicide is presented as a case of homicide specially when the death is due to burn injuries. But it need not be pointed out that whenever the victim of torture commits suicide she leaves behind some evidence-may be circumstantial in nature to indicate that it is not a case of homicide but of suicide. It is the duty of the Court, in a case of death because of torture and demand for dowry, to examine the circumstances of each case and evidence adduced on behalf of the parties, for recording a finding on the question as to how the death has taken place. ***While judging the evidence and the circumstances of the case, the Court has to be conscious of the fact that a death connected with dowry takes place inside the house, where outsiders who can be said to be independent witnesses in the traditional sense, are not expected to be present." (Emphasis supplied).***

62. The Apex Court, again in ***Arun Garg vs. State of Punjab (2004) 8 SCC 251***, while considering the requirement of independent witness in dowry death case has held as under :

"There is no substance in the argument of the learned counsel appearing the appellant that the interested evidence of the parents of the deceased has not been supported by independent evidence or witness of the locality while the stand of the defence has been that the deceased Seema was never harassed or tortured by the appellant or by any of his family members for demand of dowry. Likewise, there is no substance in the submission of the learned counsel appearing for the appellant that there is no demand of dowry by the appellant or by any of his family members soon before the death of Seema."

63. Again, coming to the facts of this case, admittedly, no independent witness has been produced by the prosecution. Ram Narain (P.W.1) and Ram Murti (P.W.2) are related with each other. From perusal of written report, (Ex.Ka.1), it transpires that scriber of FIR is one Shiv Singh, who is brother of Ram Narain Singh (P.W.1) and is not the eye witness. According to the prosecution, Ram Narain Singh (P.W.1) and Ram Murti (P.W.2) had reached the place of occurrence after the incident occurred. According to appellants, at the time of incident, neither they nor any other person were present at the place of occurrence where the deceased had received burn injury and died. Upon hearing noise and seeing the flames of fire, the appellants and other persons of locality had reached at the place of occurrence. The appellants had neither disclosed the names of person who had reached the place of occurrence for the first time, nor produced any such person before the trial Court. The appellants had also not produced Indrapal Singh, uncle of appellant no.2 Bharat Sharan Singh, who had given the death information at concerned Police Station for the first time. Thus, in view of the above, as well as the law laid down by the Hon'ble Supreme Court in ***Arun Garg*** *(supra)* and ***Om Prakash*** (supra), the prosecution story cannot be disbelieved for non production of independent witness and scriber of the FIR, therefore, this submission of the learned counsel for the appellants has no force.

64. At this juncture, it is also pertinent to note that in most of the cases, the dowry death of deceased is caused inside the house of the accused persons and all the relevant facts as well as incriminating

evidence are only in the knowledge of the accused persons but they do not come forward to disclose the fact, happened to the deceased soon before her death. Therefore, the prosecution cannot be blamed to produce such evidence which is not in the possession and knowledge of prosecution witnesses.

65. In ***Trimukh Maroti Kirkan vs. State of Maharashtra 2006 (10) SCC 681***, where accused was charged for committing murder of his wife for want of dowry and it was established by the prosecution that shortly before the offence, he was seen with his wife inside his house where he and his wife were normally used to reside. Hon'ble Supreme Court has held as under :

"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 were 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."

(Emphasis supplied)

66. In dowry death, the conduct of the appellants also becomes very important to explain the facts and circumstances especially within their knowledge, as required by Sections 106 and 113-B of Indian Evidence Act, that why and how the deceased had received such a severe burn injury and died and also what efforts were made by the appellants to save the life of the deceased. Hon'ble the Apex Court in the ***State of Karnataka vs. Suvarnamma 2015 (1) SCC 323***, while expressing its opinion on the relevancy of conduct of appellants accused where they had taken plea that they did not know how the deceased had received burn injury and had died, has held :

"15. What is surprising and wholly unacceptable is the stand of the accused who were husband and mother in-law of the deceased, living in the same house and that they had no idea that the deceased received burn injuries. This stand is clearly incompatible with the stand in Exhibit D-7 that the accused mother in-law of the deceased was very much present in the house and she shifted the deceased to the hospital. Even if the dying declaration (Exhibit D-7) was recorded, the fact remains that when it was recorded, even according to the said dying declaration, the deceased was accompanied by her mother in-law who is one of the accused. The deceased could not have made any voluntary and independent dying declaration in such circumstances as the influence of the accused could not be ruled out. According to the said dying declaration, she raised hue and cry when she received burn injuries which attracted her mother in-law and the tenant, while according to the mother in-law as well as the tenant they never heard such cries. ***There is no evidence of struggle or cries and the burn injuries are to the extent of 95%. In the case of an accident, the deceased would have tried to run away or escape. In these circumstances, there is hardly any possibility of accidental burn injuries. Extensive burns and other circumstances support the version of unnatural death. In these circumstances, the dying declaration (Exhibit P-10) is consistent with the circumstances on record while Exhibit D-7 is not."***

(Emphasis supplied)

67. Now coming to the facts of this case, admittedly, the deceased had died inside the house of appellants due to burn injury. According to Dr. G.K. Srivastava (P.W.3), 100% burn injury was caused to the deceased due to which her legs and feet were charred. According to prosecution witness, they had seen and found seven sarees and two petticoats worn/wrapped on the body of the deceased. Gaush Mohd. Khan (P.W.5), has also stated that there were ashes on the body of the deceased. Death information (Ex.Kha.1) of deceased was given to concerned Police Station at 10:15 a.m., by uncle of appellant Bharat Sharan Singh. He (P.W.5) further stated that upon that information, he rushed to the place of occurrence and started inquest proceedings. Thus, P.W.5 was the Police officer, who reached at the place of occurrence at first. He has specifically stated that he did not know regarding the presence of any mud (kichad) at the place where the deceased had received burn injury. Neither Dr. G.K. Srivastava (P.W.3) nor Gaus Mohd. Khan (P.W.5) or any prosecution witness has stated that any half

burnt cloth, found on the body of the deceased, got wet due to water or mud.

68. Further, the deceased had received 100% burn injury but no evidence was found as to whether deceased had made any attempt to save herself. According to learned counsel for appellants, the appellants were not at their home i.e. at the place of occurrence. The appellants, in their statement recorded under Section 313 of the Code have also stated that at the time of occurrence, deceased was cooking food, meanwhile, she caught fire and thatch (chappar) also caught fire. They have also stated that at the time of occurrence, they were not present at their home, seeing the flame of fire and hearing the noise of people, they reached at their home and put off the fire. In their statements, they have not stated specifically as to when and where all the appellants had gone from their house, leaving the deceased alone inside the house. They have also not produced any witness in support of plea taken in their defence, either to prove the plea of alibi or efforts made by them to save the victim. It is not the case of appellants that deceased had committed suicide by bolting the door of the house or kitchen.

69. From perusal of prosecution evidence, it also transpires that at the time of occurrence, none of the door of appellants' house was found bolt by the deceased. Ram Narain (P.W.1), Ram Murti Singh (P.W.2) and Gaush Mohd. Khan (P.W.5), have rejected the suggestion of defence counsel regarding the presence of any mud or water or any attempt made by the appellants to save the life of deceased. It is also pertinent to note at this juncture that according to S.I. Jai Karan Verma (P.W.4) and Gaush Mohd. Khan (P.W.5), death information report of deceased was given to the concerned Police Station at about 10:15 a.m. From perusal of Chik FIR (Ex.Ka.3), it is clear that concerned Police Station is situated 8 kms away from the place of occurrence. Indrapal Singh, uncle of appellant Bharat Sharan Singh who had given information, (Ex.Kha.1), had not been examined to prove as to when he got information regarding the occurrence as well as death of deceased. In view of the above, it can be presumed that death of deceased would have been caused before 8:00-9:00 a.m.

70. In addition to above, Dr. G.K. Srivastava, (P.W.3), in cross examination, as suggested by defence counsel, has admitted that death of deceased would be caused between 8:00 to 8:30 a.m. on 08.06.1990. Since the deceased had 100% burn injury whereby her legs were charred, it can be said that at least one hour would have been taken in the said occurrence wherein such severe burn injury was caused to her and she had died. In view of the above, it can also be said that the said occurrence would have occurred in the early morning on 08.06.1990. Non-presence of appellants at their house, without any justifiable cause in the early morning and appearance of appellant Bharat Sharan Singh (husband of deceased) after the occurrence makes the conduct of appellants highly doubtful, in view of law laid down by Hon'ble Apex Court in the cases of ***Trimukh Maroti (supra)*** *and* ***Suvarnamma's (supra).***

71. So far as submission of learned counsel for appellants that deceased was mentally weak, is concerned, learned counsel for the appellants, in support of this submission, has drawn attention of the Court towards the statement of Ram Narain

(P.W.1), where he had admitted that his elder brother Narvadeshwar was a patient of epilepsy, due to which he died by drowning in canal. Appellants have not placed any evidence regarding any illness or disease to deceased or any treatment given to her in this regard. Ram Narain (P.W.1), in cross examination, has specifically stated that deceased was not mentally weak rather she was sharp minded. He further stated that deceased used to worship but he did not know whether she did it for hours. Thus, in view of the above, submission of learned counsel for the appellants has no force.

72. Now, it is also to be seen whether the death of deceased was unnatural, suicidal or accidental. Submission of learned counsel for appellants in this regard, is that the deceased had died due to fire, caught her accidentally, at the time of cooking food. For offence under dowry death as provided under Section 304 B IPC., the nature of death is required either caused by burn or bodily injury or otherwise than under normal circumstances. Thus, any unnatural death, either homicidal or suicidal, is covered under Section 304 B IPC and if the cause of death of a woman, as required under Section 304 B IPC is proved by the prosecution, the burden of proof shifts on the accused, to prove that the deceased's death was natural or accidental. In the present case, it is clear that seven sarees and two petticoats, wrapped around the waist of deceased, were found in burnt condition and no evidence was found that any attempt was made either by her to resist or save herself from such fire because if it was accident, deceased would have made efforts to save herself, which shows that the death of deceased was neither accidental nor natural. Thus, the submission of learned counsel has no force.

73. Now coming to the next submission of learned counsel for the appellants regarding the effect of non-examination of the Investigating Officer by the prosecution. Now, it is settled principle of law that if the Investigating Officer has not collected any material or important piece of prosecution evidence, during investigation or any material contradiction was not proved by the defence counsel between the statement of prosecution witnesses, recorded during trial, and their statement, recorded under Section 161 of the Code, due to which their statement had become doubtful, non-examination of Investigating Officer is not material. Hon'ble Supreme Court in catena of decisions ***(See : (i) Behari Prasad and others vs. State of Bihar 1996 SCC (Crl.) 271; (ii) Bahadur Naik vs. State of Bihar AIR 2000 SC 1582 ; (iii) Ram Gulam Choudhary vs. State of Bihar AIR 2001 SC 2842; (iv) Krishna Mochi and others vs. State of Bihar AIR 2002 SC 1965; (v) State of Karnataka vs. Bhaskar Kushali Kotharkar and others AIR 2004 SC 4333)*** has also held that non-examination of Investigating Officer is not fatal to the prosecution case unless prejudice is caused to the appellants for his non-examination.

74. In this case, as discussed above, the Investigating Officer, Sri Bipin Bihari Chaubey, Dy. S.P., had not collected any material or important piece of evidence, during investigation. He had prepared only site plan (Ex. Ka.11) recorded statement of witnesses and after investigation, filed charge sheet (Ex. Ka.12). The prosecution case, in peculiar facts and circumstances of this case, has been proved beyond reasonable doubt by the prosecution

witnesses. The appellants had also not produced any evidence either in their defence to rebut the statutory presumption provided under Section 113-B of Evidence Act or to show any prejudice caused to them due to non-examination of the Investigating Officer. Hence, non-examination of Investigating Officer, is not fatal to the prosecution story.

75. In view of the above discussion, in my view the prosecution has succeeded to prove its case that deceased was being harassed and tortured for want of dowry, she had died due to burn injury within seven years of her marriage and she was tortured and harassed due to demand of dowry soon before her death.

76. Now the question arises as to whether both the appellants are liable to be convicted in this case. Admittedly, appellant no.2. Bharat Sharan Singh is husband of the deceased whereas appellant no.1 Smt. Phulau @ Phoolwati is mother-in-law of the deceased. Occurrence had taken place on 08.06.1990, whereas their statements, under Section 313 of the Code, were recorded on 08.06.2001 i.e. 10 years after the occurrence. Appellant no.1-Phulau @ Phoolwati had disclosed her age in aforesaid statement as 50 years, whereas appellant no.2-Bharat Sharan Singh had disclosed his age as 32 years. It means that at the time of occurrence, appellant no.2-Bharat Sharan Singh was young and about 22 years old and his mother appellant no.1-Smt. Phulau @ Phoolwati was about 40 years old. According to Ram Narain Singh (P.W.1), appellant no.2-Bharat Sharan Singh was employed as machine operator in Delhi and he had gone to Delhi with his father but had returned before the occurrence and sent his maternal uncle to bring the deceased. Thus, it is clear that father of appellant no.2- Bharat Sharan Singh, at the time of occurrence, was in Delhi, whereas his mother, appellant no.1.Smt. Phulau @ Phoolwati and his sister, co-accused Manju Devi were residing with him at the time of occurrence. In this case, appellants-Bharat Sharan Singh, Smt. Phulau @ Phoolwati and co-accused Manju Devi i.e. whole family have been implicated. It is also pertinent to mention that general allegations were made by the prosecution witnesses for demand of dowry and harassment against the appellants and co-accused Manju Devi, but the occurrence was happened when the appellant Bharat Sharan Singh returned to his house from Delhi. Further, as discussed above, it has been found in the light of statement of Dr. G.K. Srivastava (P.W.3), the said occurrence would have been started early in the morning which shows that serious disputes/harassment or torture would have been happened between deceased and her husband (appellant-Bharat Sharan Singh) either in the early morning or in the preceeding night. In addition to above, the said demand of dowry i.e. transfer of land as alleged by the prosecution, was made only for appellant no.2-Bharat Sharan Singh.

77. Hon'ble the Supreme Court, discussing the object and reasons of Dowry Prohibition Act, 1961 as well as Dowry Prohibition (Amendment Act), 1984 and taking cognizance of possibility of false implication of some other relatives of husband of the deceased in ***Kans Raj (Supra)***, has held as under :

"A tendency has, however, developed for roping in all relations of the in-laws of the deceased wives in the matters of dowry deaths which, if not discouraged, is likely to affect the case of the prosecution

even against the real culprits. In their over-enthusiasm and anxiety to seek conviction for maximum people, the parents of the deceased have been found to be making efforts for involving other relations which ultimately weaken the case of the prosecution even against the real accused as appears to have happened in the instant case."

78. In ***Naresh Kumar vs. State of Haryana (2015) 1 SCC 797***, in a case where appellant's mother and brother were acquitted but only appellant (husband) was convicted for dowry death of his wife, on plea raised by appellant that his case was at par with his mother and brother, three judges bench Hon'ble Supreme Court, dismissing the appeal, has held as under:-

"As regards the claim for parity of the case of the appellant with his mother and brother who have been acquitted, the High Court has rightly found his case to be distinguishable from the case of his mother and brother. ***The husband is not only primarily responsible for safety of his wife, he is expected to be conversant with her state of mind more than any other relative. If the wife commits suicide by setting herself on fire, proceeded by dissatisfaction of the husband and his family from the dowry, the interference of harassment against the husband may be patent. Responsibility of the husband towards his wife is qualitatively different and higher as against his other relatives."***

(Emphasis supplied)

79. In view of above, looking into the whole facts and circumstances of this case, in the light of the law laid down by the Hon'ble Supreme Court in ***Kans Raj (Supra)*** *and* ***Naresh Kumar (Supra)***, the prosecution evidence is not reliable and trustworthy so far it relates to the appellant no.1-Smt. Phulau @ Phoolwati and consequently, the prosecution has failed to prove its case beyond reasonable doubt against the appellant Smt. Phulau @ Phoolwati and she is liable to be acquitted, whereas it has successfully proved its case beyond reasonable doubt against the appellant no.2-Bharat Sharan Singh (husband of the deceased). The impugned judgment so far as it concerned for appellant no.2-Bharat Sharan Singh, is well discussed, well reasoned, it requires no interference and liable to be affirmed.

80. Now coming to the question of sentence, whether the sentence passed by trial Court, is just and proper or not.

81. The appellant no.2-Bharat Sharan Singh has been convicted for offence under Section-498-A IPC for one year rigorous imprisonment with fine of Rs.500/- and for offence under Section 304-B IPC for seven years rigorous imprisonment with further direction that both the sentences shall run concurrently. Thus, the maximum sentence, awarded against the appellant no.2 Bharat Sharan Singh, is for seven years rigorous imprisonment which is minimum sentence for offence under Section 304-B IPC.

82. In the light of the above discussion, looking into the nature and gravity of the offence, I am of the view that the punishment awarded by the trial Court, against the appellant no.2 Bharat Sharan Singh, is appropriate and requires no interference and so far as the appeal filed by him is concerned, the same is **dismissed** and the impugned judgment and order passed by the trial Court, convicting and

sentencing the appellant no.2 Bharat Sharan Singh, is affirmed.

83. The appellant no.2 Bharat Sharan Singh is on bail. His bail bonds are cancelled. He is directed to surrender before the concerned Court forthwith to serve out the aforesaid sentence.

84. Further, in the light of the aforesaid discussion, the impugned judgment and order, passed by trial Court, so far it relates to the conviction and sentence of appellant no.1 Smt. Phulau @ Phoolwati, is set aside and appeal filed by her is **allowed**. She is acquitted from the charges levelled against her. She is on bail. Her bail bonds are cancelled.

85. The appeal is **partly allowed** and the impugned judgment and order is modified to the extent as above.

86. Keeping in view the provision of Section 437-A of the Code, appellant no.1 Smt. Phulau @ Phoolwati is hereby directed forthwith to furnish a personal bond of a sum of Rs.20,000/- each and two reliable sureties each of the like amount before the trial Court, which shall be effective for a period of six months, along with an undertaking that in the event of filing of Special Leave Petition against this judgment or for grant of leave, she, on receipt of notice thereof, shall appear before Hon'ble Supreme Court.

87. A copy of this judgment along with lower court record be sent to trial Court by FAX for immediate compliance.

(2021)02ILR A421
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 20.01.2021

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE GAUTAM CHOWDHARY, J.

Criminal Appeal No. 1237 of 2013

Sharafat & Anr. ...Appellants (In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellants:
Sri Faraz Kazmi, Sri Noor Mohammad, Ritu Dhaka

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

A. Criminal Lawr-Code of Criminal Procedure, 1973-Section 374(2) & Indian Penal Code, 1860-Sections 302/34 & Arms Act,1959-Section 4/25-challenge to-conviction-deceased wanted to elope with a person other than her husband- there was a heated discussion and during the quarrel one of the accused had tried to see that the deceased remaining in the four corners of the home or go back to her matrimonial home as she wanted to elope with a person though she was a married lady having four children-witnesses turned hostile being a family members-accused brothers had no intention of doing away of their sister but in heat of the moment the incident has occurred-It is homicidal death but not murder-accused guilty for Section 304 of I.P.C. read with Section 34 but not with 302 read with Section 34 I.P.C. -The punishment is reduced to seven-year incarceration. (Para 1 to 22)

The Appeal is partly allowed. (E-5)

List of Cases cited: -

1. Suresh @ Kala Vs St. NCT of Delhi, CRLA No.1284 of 2019

2. Nandlal Vs St. of Mah. (2019) 5 SCC 224

3. Surain Singh Vs St. of Punj. (2017) 5 SCC 796

4. Deepak Vs St. of U.P. (2018) 8 SCC 228

5. Budhi Singh Vs St. of H.P. (2012) 13 SCC 663

6. Atul Thakur Vs St. of H.P. & ors. (2018) 2 SCC 496

(Delivered by Hon'ble Dr. Kaushal Jayendra Thaker, J.
& Hon'ble Gautam Chowdhary, J.)

1. Heard Shri Noor Mohammad, learned counsel for the appellants and learned AGA for the State.

2. This appeal has arisen from the judgement and order dated 22.02.2013 passed by learned Additional Sessions Judge, Saharanpur in S.T. No.2 of 2012, State of U.P. v. Sharafat and another (Crime No.308/11) under Section 304 I.P.C., Police Station Mandi, District Saharanpur and S.T. No.1 of 2012, State v. Sharafat (Crime No.309 of 2011) under Section 25/4 Arms Act, Police Station Mandi, District Saharanpur. The learned Sessions Judge convicted both the accused for life imprisonment under Section 302 read with section 34 of Indian Penal Code with fine of Rs.10,000/- and six months rigorous imprisonment under Section 25/4 of the Arms Act.

3. The factual scenario as it unfurls from the record and the F.I.R are that the accused in unison caused death of the deceased on 26.7.2011 at 3.45 p.m. when Bano and Khursheed had lodged the F.I.R. convening to the Police that her sister Riyashat who was wife of one Sharafat son of Saif Ali residing in Siraj Colony, Police Station Mandi was married before 12 years with Sharafat.

4. It is submitted by Shri Noor Mohammad that the prosecution started against both the accused who are brothers of the deceased for commission of offence under Section 304 of Indian Penal Code and the charge sheet was laid against them for commission of offence under Section 304 read with section 34 of Indian Penal code. The accused were committed to the court of session as the case was triable exclusively by the court of sessions.

5. It is admitted position of fact that both the accused are in jail since 26.7.2011 and might have been in jail even during the period of investigation before they were enlarged on bail.

6. The deceased girl had eloped with one another person. Sharafat-appellant is the brother and other is the husband. Brother is the accused appellant before us. Brother was trying to explain to deceased, Rasheed not to elope, she had a loving husband but she was bent on doing so in hit of the moment both the brothers caused death of their sister.

7. The prosecution examined several witnesses so as to bring home the charge framed against the accused as enumerated:

1.	Deposition of Bano	14.3.12	PW1
2.	Deposition of Khursheed	14.3.12	PW2
3.	Deposition of Gulista	19.3.12	PW3
4.	Deposition of Naseem	20.4.12	PW4
5.	Deposition of Dr. Manoj Kumar	30.4.12	PW5

	Chaturvedi		
6.	Deposition of Veer Singh	1.6.12	PW6
7.	Deposition of Dal Chand	5.6.12	PW7
8.	Deposition of Subhash Chand	6.6.12	PW8

8. In support of ocular version following documents were filed:

1	First Information Report	26.7.11 & 26.7.11	Ex.Ka.17 & Ex. Ka.21
2	Written Report	26.7.11	Ex.Ka.1
3	Recovery Memo of blood stained, knife, plain earth and cloth	26.7.11	Ex. Ka.3, 8 and 12
4	Postmortem Report	27.7.11	Ex. Ka.4
5	Site Plan with Index	26.7.11 and 28.7.11	Ex.Ka.9, 13 and 19

9. Learned counsel for the appellant has contended that if this Court feels that the case is made out against the accused and they are not to be accorded benefit of doubt, he presses into service the provisions of Section 304 of I.P.C. According to learned counsel, the learned Judge could not have framed fresh charge after some of the witnesses had turned hostile. According to the learned Advocate, on the evidence of all the hostile witnesses and Sharafat has been sentenced to six months rigorous imprisonment for commission of the offence under Section 25/4 of the Arms Act (the said period is already over) has convicted the accused under Section 302 I.P.C. which could not have been done.

10. The following judgments of the Supreme Court are cited by the learned counsel so as to contend that offence under Section 302 is not made out would solely applying in the facts of this case:

(i) Suresh @ Kala v. State NCT of Delhi, Criminal Appeal No.1284 of 2019; decided on 27.8.2019.

(ii) Nandlal v. State of Maharashtra, (2019) 5 SCC 224;

(iii) Surain Singh v. State of Punjab, (2017) 5 SCC 796;

(iv) Deepak v. State of Uttar Pradesh, (2018) 8 SCC 228;

(v) Budhi Singh v. State of Himachal Pradesh, (2012) 13 SCC 663;

(vi) Atul Thakur v. State of Himachal Pradesh and others, (2018) 2 SCC 496.

11. Learned counsel for the State has taken us through the record and has contended that the vital part of the body was attacked by the appellant No.1 may be the deceased was sister but he was having knowledge and his intention was also there, otherwise he would not have inflicted blow on the vital part of the body by the instrument which was recovered as his behest.

12. We have not discussed the evidence of each witness in detail as most of them have turned hostile being family members. It was a moral conviction by the learned Session Judge, the informant Bano who is the wife of Khursheed has also not supported the prosecution witness who is the sister of the deceased. The incident occurred about eight months from the date

of she given her deposition on 14.3.2014 nothing much turns on her turning hostile she claims herself to be a illiterate lady.

13. As far as PW-2 is concerned who is resident of the said place and knows the accused he has deposed that deceased Rasheed eloped with one Firoz son of Akbar and the brothers were annoyed and he did not see the incidence. PW-3, Gulista has also turned hostile and not supported the prosecution. Unfortunately, PW-4, Naseem has also turned hostile. The evidence of PW-5, Dr. Manoj Kumar Chaturvedi as in his postmortem report which we have narrated in the beginning and we do not wish to repeat the same.

14. The police authorities who were thereafter examined as it is ocular version stated that he has taken the statement of the witnesses thereafter the 313 statements are also recorded.

15. As such we are convinced that the evidence was very scanty and oral testimony on the record of the trial Judge was not so on which conviction could be returned leave apart under Section 302 I.P.C., but it appears that the learned Judge has convicted the accused on the basis of his own ideology and on the basis of the hostile witnesses PW-1, PW-3 and that finding of knife at the behest of the accused.

16. This is a case of no evidence, however, the accused are in jail since more than ten years. The learned Judge had relied on which could not have been made on the basis for conviction in fact the conviction of the accused should not have been recorded, but as the learned counsel has only for contending that it is not a case under Section 302 but case for lesser sentence we are constrained to decide.

17. This takes us to the issue of whether the offence would be punishable under Section 299 or Section 304 I.P.C.

18. Considering the evidence of these witnesses and also considering the medical evidence including post mortem report, there is no doubt left in our mind about the guilt of the present appellants and admission on part of accused. However, the question which falls for our consideration is whether, on reappraisal of the peculiar facts and circumstances of the case, the conviction of the appellant under Section 302 of the Indian Penal Code should be upheld or the conviction deserves to be converted under Section 304 Part-I or Part-II of the Indian Penal Code. It would be relevant to refer Section 299 of the Indian Penal Code, which read as under:

"299. Culpable homicide*: Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide.*

19. The academic distinction between "murder' and "culpable homicide not amounting to murder' has always vexed the Courts. The confusion is caused, if Courts losing sight of the true scope and meaning of the terms used by the legislature in these sections, allow themselves to be drawn into minute abstractions. The safest way of approach to the interpretation and application of these provisions seems to be to keep in focus the keywords used in the various clauses of Section 299 and 300.

The following comparative table will be helpful in appreciating the points of distinction between the two offences.

Section 299	**Section 300**
A person commits culpable homicide if the act by which the death is caused is done-	Subject to certain exceptions culpable homicide is murder is the act by which the death is caused is done.
	INTENTION
(a) with the intention of causing death; or	(1) with the intention of causing death; or
(b) with the intention of causing such bodily injury as is likely to cause death; or	(2) with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused;
KNOWLEDGE	**KNOWLEDGE**
(c) with the knowledge that the act is likely to cause death.	(4) with the knowledge that the act is so immediately dangerous that it must in all probability cause death or such bodily injury as is likely to cause death, and without any excuse for incurring the risk of causing death or such injury as is mentioned above.

20. It is very clear from the F.I.R. though unsupported by the prosecution and other witnesses of facts that there was a heated discussion and during the quarrel one of the accused had tried to see that the deceased remaining in the four corners of the home or go back to her matrimonial home as she wanted to elope with a person though she was a married lady having four children.

21. The accused are the brothers of deceased, they are in jail for a period of more than 10 years. It is a matter of fact as it is transpires from the F.I.R. and as we have held that it is homicidal death but not murder. We hold the accused guilty for Section 304 of I.P.C. read with Section 34 but not with 302 read with Section 34 I.P.C. The punishment is reduced to seven years incarceration, the fine of Rs.10,000/- is reduced but Rs.1,000/- as the medical evidence as well as the evidence of hostile witnesses permit us to substitute, we are of the confirmed opinion that the punishment of seven years with fine reduced to Rs.1,000/- read with Section 34 if the fine is not paid, the sentence would be default sentence of three months.

22. While going through the record, we are convinced that the accused brothers had no intention of doing away of their sister but in hit of the moment the incident has occurred. Learned Judge instead of writing philosophy, if he did not think it was a case of acquittal but could have punished under Section 304 part I or II of I.P.C. which was attracted in the facts of this case.

23. Record and proceedings be sent back to the trial court.

24. This court is thankful to Shri Noor Mohmmad and learned AGA for ably assisting this Court in getting this old matter disposed off.

(2021)02ILR A426
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 08.02.2021

BEFORE

THE HON'BLE BACHCHOO LAL, J.
THE HON'BLE SUBHASH CHANDRA SHARMA, J.

Criminal Appeal No. 2009 of 2007
&
Criminal Appeal No. 947 of 2007

Guljari & Anr. ...Appellants (In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellants:
Sri Surya Narayan, Sri Ali Hasan, Sri Ishtiyaq Ali

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

A. Criminal Law - Code of Criminal Procedure, 1973-Section 374(2) - Indian Penal Code,1860-Section 302/34-application-rejection-interested witness-reliability of-close relative cannot be characterised as an "interested witness"-however, must be scrutinized carefully-if on such scrutiny, evidence is found to be intrinsically reliable, inherently probable and wholly trustworthy, conviction can be based on the "sole" testimony of such witness-Close relationship of witness with the deceased or victim is no ground to be reject his evidence-on the contrary, close relative of the deceased would normally be most reluctant to spare the real culprit and falsely implicate an innocent person-the trivial contradiction of the statement can not create doubt about the incident.(Para 48 to 51)

B. The relative of deceased disclosed all the facts about the incident-PW-1 and PW-2 were present at the place of occurrence-they were the direct evidence or eye-witness-while statement of DW-1 is not reliable-there was no previous enimity between the accused and deceased and no party-bandi-appellants murdered the deceased with the common intention, it has been proved beyond doubt-accused gets no benefit of defense witness who stated that he did not see the occurrence nor the place of incidence is his place of sitting(baithak)-Hence, the trial court rightly observed the evidence and did no irregularity in passing the order.(Para 52 to 58)

The appeal is rejected. (E-5)

List of Cases cited:-

1. Yogesh Singh Vs Mahaveer Singh & anr., (2017) 11 SCC 195

2. Ramasheesh Rai Vs Jagdeesh Singh,(2005) 10 SCC 498

3. Subodh Nath & anr. Vs St. of Tripura,(2013) CLJ 2308

4. Vipin Kumar Mondal Vs St. of W.B. ,(2010) 12 SCC 91

5. St. of Punj. Vs Jugraj Singh & anr.,(2002) SCC (Cri) 630

6. Amit Vs St. of U.P. (2012) 1 JCRC 703

7. Sudarshan Reddy & anr. Vs St. of A.P.(2006) 2 CAR SC 742

8. Gangadhar Behra & anr. Vs St. of Ori.,(2003) SCC (Cri.)

9. Bhaskar Rao & anr. Vs St. of Mah.,(2018) 6 SCC 591

(Delivered by Hon'ble Bachchoo Lal, J.)

(माननीय न्यायमूर्ति बच्चू लाल, द्वारा प्रदत्त निर्णय)

1. अपीलार्थीगण गुलजारी एवं लक्ष्मी ने **दाण्डिक अपील संख्या 2009 वर्ष 2007** तथा अपीलार्थीगण बच्चू सिंह एवं सुमेर ने **दाण्डिक अपील संख्या 947 वर्ष 2007** विद्वान अपर सत्र न्यायाधीश, (त्वरित न्यायालय), संख्या 2, बदायूँ द्वारा **सत्र परीक्षण संख्या 98 वर्ष 2005** राज्य प्रति गुलजारी एवं अन्य में पारित निर्णय एवं आदेश दिनाँक 22–1–2007 के विरूद्व योजित की है जिसके द्वारा अपीलार्थीगण को धारा 302 सपठित धारा 34 भा0दं0सं0 के अन्तर्गत आजीवन कारावास के दण्ड एवं प्रत्येक को पांच–पांच हजार रूपये के अर्थदण्ड से दण्डित किया गया। अर्थदण्ड अदा न करने की स्थिति में प्रत्येक को एक–एक वर्ष का कठोर कारावास भुगतने का आदेश पारित किया गया है।

2. उपरोक्त दोनों अपीलें एक ही निर्णय एवं आदेश से सम्बन्धित है। अतएव उक्त दोनों अपीलों का निस्तारण एक साथ किया जाता है।

3. दौरान अपील, अपील संख्या 2009 वर्ष 2007 के अपीलार्थी संख्या 2 **लक्ष्मी** एवं अपील संख्या 947 वर्ष 2007 के अपीलार्थी संख्या 2 **सुमेर** की मृत्यु हो जाने के कारण उनके लिए अपील आदेश दिनाँकित 27–5–2019 के द्वारा उपशमित की जा चुकी हैं।

4. अपीलों के निस्तारण हेतु आवश्यक तथ्य संक्षेप में इस प्रकार है कि अभियोजन साक्षी संख्या 1 राजवीर ने एक तहरीर मुकेश से लिखवाकर दिनाँक 5–8–2004 को समय 21–30 बजे थाना बिसौली, जिला बदायूँ में इस आशय के साथ प्रस्तुत किया कि प्रार्थी राजवीर पुत्र थान सिंह ग्राम करखेड़ी का रहने वाला है। प्रार्थी के गाँव के गुलजारी पुत्र सुम्मेर, लक्ष्मी पुत्र साधू, बच्चू सिंह पुत्र श्याम लाल व सुम्मेर पुत्र श्याम लाल गाँव के पास तालाब पर जुंआ खेल रहे थे उसी समय प्रार्थी का छोटा भाई ओमपाल भी वहाँ पहुँच गया उसने पुलिस को सूचना देने की बात कही इसी बात पर उन लोगों से कहासुनी हो गयी उसके भाई के साथ उसके गाँव का राम प्रकाश पुत्र इन्दर व रमेश पुत्र रोहन सिंह भी थे। कहासुनी होने के बाद उसका भाई रमेश व राम प्रकाश के साथ वापस घर आ रहा था उसी समय गुलजारी व उपरोक्त चारों लोग भागकर अपने अपने घर पहुँचे व बन्दूके और तमंचे हाथो में लेकर दौडकर आये और समय करीब सा

5. वादी की उक्त लिखित तहरीर प्रदर्श क–1 के आधार पर अपीलार्थीगण के विरूद्व धारा 302 भा0 दं0 सं0 के अन्तर्गत थाना पर मुकदमा पँजीकृत किया गया। चिक प्रथम सूचना रिपोर्ट प्रदर्श क–13 तथा कायमी मुकदमा से सम्बन्धित जी0 डी0 की प्रति प्रदर्श क– 14 है।

6. मामले की विवेचना अभियोजन साक्षी संख्या 6 ओंकार सिंह (प्रभारी निरीक्षक) द्वारा सम्पन्न की गयी उन्होंने वादी राजवीर तथा गवाहान नन्हू व राम प्रकाश के बयान अंकित किये। घटनास्थल पर जाकर वादी की निशानदेही पर घटनास्थल का निरीक्षण किया। घटनास्थल से बरामद दो खोखा कारतूस 12 बोर तथा मिट्टी खून आलूद व सादी मिट्टी को अलग अलग डिब्बों में रखकर सील मोहर कर उनकी फर्द क्रमशः प्रदर्श क–10 व 11 अपने हमराही एस0 एस0 आई0 राधेश्याम निडर से तैयार करायी। घटनास्थल का निरीक्षण कर नक्शा नजरी प्रदर्श क–15 तैयार किया।

7. अभियोजन साक्षी संख्या 5 राधेश्याम निडर (एस0 एस0 आई0) द्वारा मृतक के शव का पंचायतनामा प्रदर्श क–3, चालान नाश प्रदर्श क–4, फोटो लाश प्रदर्श क–5, नमूना मोहर प्रदर्श क–6, चिट्ठी आर0 आई0 प्रदर्श क–7, प्रपत्र संख्या 33 प्रदर्श क–8 एवं चिट्ठी मुख्य चिकित्साधिकारी प्रदर्श क–9 तैयार किये तथा मृतक के शव को सर्व मोहर हालत में कांस्टेबिल निरंजन सिंह के द्वारा शव परीक्षण हेतु भिजवाया।

8. अभियोजन साक्षी संख्या 6 ओंकार सिंह (प्रभारी निरीक्षक) द्वारा पंचायतनामा के गवाहान तथा घटना के गवाह कुंवरपाल व रमेश के बयान अंकित किये तथा विवेचना सम्बंधी समस्त कार्यवाही पूर्ण कर अपीलार्थीगण के विरूद्व आरोपपत्र प्रदर्श क–12 अन्तर्गत धारा 302 भा0 दं0 सं0 न्यायालय प्रेषित किया।

9. अपीलार्थीगण के मुकदमें को विचारण हेतु तत्कालीन मुख्य न्यायिक मजिस्ट्रेट, बदायूँ ने अपने

आदेश दिनांक 8–2–2005 के द्वारा सत्र न्यायालय के सुपुर्द किया गया।

10. विद्वान विचारण न्यायालय द्वारा अपीलार्थीगण के विरूद्व धारा 302 सपठित धारा 34 भा0 दं0 सं0 के अन्तर्गत आरोप विरचित किया गया। अपीलार्थीगण द्वारा आरोप से इंकार किया गया तथा परीक्षण की मांग की गयी।

11. अभियोजन पक्ष की ओर से अपने कथन के समर्थन में अभियोजन साक्षी संख्या 1 राजवीर सिंह (वादी), अभियोजन साक्षी संख्या 2 नन्हू, अभियोजन साक्षी संख्या 3 कुँवरपाल, अभियोजन साक्षी संख्या 4 डाक्टर आर0 एस0 यादव, अभियोजन साक्षी संख्या 5 वरिष्ठ उपनिरीक्षक, राधेश्याम निडर, अभियोजन साक्षी 6 ओंकार सिंह (प्रभारी निरीक्षक) एवं अभियोजन साक्षी संख्या 7 राज ऋषि शर्मा (कांस्टेबिल/क्लर्क) को परीक्षित कराया गया है।

12. अपीलार्थीगण का बयान धारा 313 दं0प्रं0सं0 के अन्तर्गत अंकित किया गया जिसमें उन्होने गाँव की पार्टीबन्दी के के कारण झूंठा फसाया जाना बताया।

13. अपीलार्थी गुलजारी ने अपने बयान अन्तर्गत धारा 313 दं0 प्र0 सं0 में यह कहा है कि मृतक हिस्ट्रीशीटर बदमाश था। दर्जनों मुकदमें उसके विरूद्व विचाराधीन थे। गाँव की पार्टीबन्दी के कारण उसे गलत फंसा दिया गया है।

14. अपीलार्थीगण की ओर से अपने बचाव में बचाव साक्षी संख्या 1 के रूप में कल्लू को परीक्षित कराया गया है।

15. विद्वान विचारण न्यायालय ने उभय पक्ष को सुनकर तथा पत्रावली पर उपलब्ध समस्त साक्ष्य एवं अभिलेखों पर सम्यक विचार करने के उपरान्त अपीलार्थीगण को प्रश्नगत अपराध में दोषी पाते हुए उपरोक्तानुसार दण्डित किया है जिससे क्षुब्ध होकर अपीलार्थीगण ने उपरोक्त अपीलें इस न्यायालय में योजित की है।

16. अपीलार्थीगण की ओर से उनके विद्वान अधिवक्ता श्री इश्तियाक अली, राज्य की ओर से श्री रतन सिंह विद्वान अपर शासकीय अधिवक्ता को विस्तारपूर्वक सुना तथा पत्रावली एवं प्रश्नगत निर्णय व आदेश का सम्यक परिशीलन किया।

17. अपीलार्थीगण की ओर से मुख्य रूप से यह तर्क प्रस्तुत किया गया कि अपीलार्थीगण निर्दोष है उन्हें गाँव की पार्टीबन्दी के कारण झूंठा फसाया गया है। प्रथम सूचना रिपोर्ट में मृतक को नत्थूलाल के घर के पास गोली मारकर उसकी हत्या करने का उल्लेख किया गया है जब कि अभियोजन साक्षी संख्या 1 राजवीर सिंह, अभियोजन साक्षी संख्या 2 नन्हू तथा अभियोजन साक्षी संख्या 3 कुँवरपाल ने अपने बयानों में सालिग के प्लाट के पास मृतक को गोली मारने का उल्लेख किया है। अभियोजन साक्षी संख्या 1 राजवीर सिंह ने मृतक का शव प्राइमरी स्कूल के पास पाये जाने का उल्लेख किया है। इस तरह घटनास्थल के सम्बंध में प्रथम सूचना रिपोर्ट में अंकित तथ्य व गवाहों के बयानों में भिन्नता है। अभियोजन साक्षी संख्या 2 नन्हू तथा अभियोजन साक्षी संख्या 3 कुँवर पाल ने अभियुक्तों को उत्तर दिशा की ओर से आने और घटना के पश्चात उत्तर दिशा की ओर भागने का उल्लेख किया है जब कि अभियोजन साक्षी संख्या 6 ओंकार सिंह (विवेचनाधिकारी) ने अपने बयान में यह उल्लेख किया है कि नन्हू (गवाह) ने ऐसा कोई बयान नहीं दिया था कि मारने वाले उत्तर दिशा की ओर से आये थे और उत्तर दिशा की ओर ही भाग गये। यह भी कहा है कि कुँवर पाल (गवाह) ने ऐसा बयान नहीं दिया था कि मुलजिम गुलजारी, लक्ष्मी, सुम्मेर व बच्चू सिंह छोटी गंगा यानि उत्तर की दिशा से आ रहे थे बल्कि नक्शा नजरी में उसने मुलजिमान को घटनास्थल पर पश्चिम दिशा से आने और पश्चिम दिशा की ओर ही भाग जाना दर्शाया है। ऐसी दशा में अभियोजन साक्षी संख्या 2 नन्हू व अभियोजन साक्षी संख्या 3 कुँवर पाल की घटनास्थल पर उपस्थिति संदिग्ध हो जाती है। यह भी तर्क रखा गया कि अभियोजन साक्षी संख्या 1 राजवीर सिंह घटना का प्रत्यक्षदर्शी साक्षी नहीं है। अभियोजन साक्षी संख्या 2 नन्हू व अभियोजन साक्षी संख्या 3 कुँवर पाल ने अपने बयानों में यह बताया है कि वे घटना के समय कल्लू के बैठक में बैठे थे जब कि उक्त तथ्य की पुष्टि कल्लू जिसे अपीलार्थीगण की ओर से अपने बचाव में बचाव साक्षी संख्या 1 के रूप में परीक्षित कराया गया है उसने नही की है। इसके विपरीत बचाव साक्षी

संख्या 1 कल्लू ने यह कहा है कि वह कुँवर पाल (गवाह) उसके साथ उसकी दुकान के सामने नहीं बैठा था उसने व कुँवर पाल ने ओमपाल की हत्या करते हुए किसी को नहीं देखा है। यह भी तर्क रखा गया कि अभियोजन साक्षी संख्या 6 ओंकार सिंह (विवेचनाधिकारी) ने नक्शा नजरी में अभियोजन साक्षी संख्या 2 नन्हू के बैठने के स्थान को नहीं दर्शाया है। ऐसी दशा में अभियोजन साक्षी संख्या 2 नन्हू की घटनास्थल पर उपस्थिति संदेह से परे साबित नहीं होती है। यह भी तर्क रखा गया कि प्रथम सूचना रिपोर्ट में जुंआ वाले स्थान से मृतक को रमेश व राम प्रकाश के साथ वापस लौटने का उल्लेख किया गया है और उसी समय मुलजिमान द्वारा मृतक की गोली मारकर हत्या करने का उल्लेख किया गया है परन्तु अभियोजन की ओर से रमेश व राम प्रकाश को साक्ष्य में परीक्षित नहीं कराया गया है। घटना के सम्बंध में किसी स्वतन्त्र एवं निष्पक्ष साक्षी को परीक्षित नहीं कराया गया। अभियोजन साक्षी संख्या 1 राजवीर सिंह तथा अभियोजन साक्षी संख्या 3 कुँवर पाल मृतक के सगे भाई है तथा अभियोजन साक्षी संख्या 2 नन्हू उनका ममेरा भाई है जो हितबद्व साक्षी है उनकी साक्ष्य संदेह से परे विश्वसनीय नहीं है। घटना का कोई हेतुक नहीं था और न ही घटना के हेतुक के सम्बंध में कोई साक्ष्य ही पत्रावली पर उपलब्ध है। प्रथम सूचना रिपोर्ट में यह उल्लेख किया गया है कि मुलजिमान गाँव के पास तालाब पर जुंआ खेल रहे थे उसी समय मृतक वहां पहुंच गया उसने पुलिस को सूचना देने की बात कही इसी बात पर मुलजिमान से उसकी कहासुनी होने का उल्लेख किया गया है परन्तु अभियोजन साक्षी संख्या 1 राजवीर सिंह, अभियोजन साक्षी संख्या 2 नन्हू तथा अभियोजन साक्षी संख्या 3 कुँवर पाल न तो जुंवा वाले स्थान पर गये थे और न ही उन्होंने जुंआ खेलते व वाद विवाद होते हुए देखा है। ऐसी दशा में घटना का हेतुक साबित नहीं है। मृतक एक अपराधिक प्रवृत्ति का व्यक्ति था उसके विरूद्व गुंडा व गैंगस्टर एक्ट के अन्तर्गत मुकदमें पंजीकृत थे तथा उसकी हत्या किन्ही अज्ञात व्यक्तियों द्वारा कारित किये जाने की सम्भावना से इंकार नहीं किया जा सकता है परन्तु विद्वान विचारण न्यायालय ने उक्त सम्बंध में सम्यक विचार नहीं किया है। तथ्य के गवाहों के बयानों में भिन्नता है। अपीलार्थीगण के विरूद्व लगाये गये आरोप संदेह से परे साबित नहीं है। ऐसी दशा में विद्वान विचारण न्यायालय का प्रश्नगत निर्णय एवं आदेश विधि संगत नहीं है एवं निरस्त होने योग्य है।

18. इसके विपरीत विद्वान अपर शासकीय अधिवक्ता द्वारा यह तर्क प्रस्तुत किया गया कि अभियोजन साक्षी संख्या 1 राजवीर सिंह, अभियोजन साक्षी संख्या 2 नन्हू तथा अभियोजन साक्षी संख्या 3 कुँवर पाल ने अपने अपने बयानों में अभियोजन कथानक की भली भाँति पुष्टि की है तथा उनके बयानों में ऐसी कोई विसंगति नही आयी है जिससे की घटना के सम्बंध में कोई संदेह व्यक्त किया जा सके बल्कि उपरोक्त साक्षीगण की साक्ष्य से यह भली भाँति सिद्व है कि कथित घटना अपीलार्थीगण/अभियुक्तगण द्वारा ही कारित की गयी है और उन्होंने एक राय होकर गोली मारकर मृतक की हत्या की है। विद्वान विचारण न्यायालय ने पत्रावली पर उपलब्ध समस्त साक्ष्य एवं अभिलेखों पर सम्यक विचार करने के उपरान्त अपीलार्थीगण को प्रश्नगत अपराध में दोषसिद्व एवं दण्डित किया है जिसमें कोई विधिक त्रुटि अथवा अनियमितता नहीं है।

19. उल्लेखनीय है कि यह घटना दिनाँक 5–8–2004 समय 6–30 बजे शाम की बतायी गयी है और इस घटना की प्रथम सूचना रिपोर्ट उसी दिन दिनाँक 5–8–2004 को समय 21–30 बजे थाने पर दर्ज करायी गयी है। घटनास्थल से थाने की दूरी 11–00 किमी. दर्शायी गयी है। घटनास्थल से थाने की दूरी को दृष्टिगत रखते हुए तथा घटना के समस्त तथ्य एवं परिस्थितियों पर सम्यक विचार करने के उपरान्त हमारे विचार से घटना की प्रथम सूचना रिपोर्ट में कोई अनावश्यक विलम्ब नहीं पाया जाता है। इस घटना की प्रथम सूचना रिपोर्ट अभियोजन साक्षी संख्या 1 राजवीर सिंह द्वारा थाने पर दर्ज करायी गयी थी। इस साक्षी ने अपने बयान में घटना की तहरीर मुकेश कुमार शर्मा से बोल–बोल कर लिखवाने का उल्लेख किया है तथा तहरीर को प्रदर्श क–1 के रूप में साबित किया है।

20. अभियोजन साक्षी संख्या 7 राज ऋषि शर्मा ने अपने बयान में यह उल्लेख किया है कि दिनाँक 5–8–2004 को वह थाना बिसौली में कांस्टेबिल/क्लर्क के पद पर कार्यरत था उस दिन वादी राजवीर पुत्र थान सिंह की तहरीर के आधार पर अपराध संख्या 521 वर्ष 2004, धारा 302 भा0

दं0 सं0 चिक संख्या 117 वर्ष 2004 समय 21–30 पर अंकित की थी तथा इसका खुलासा जी0 डी0 में रपट संख्या 49 सांय 21–30 पर किया था। इस साक्षी ने चिक प्रथम सूचना रिपोर्ट को प्रदर्श क–13 तथा मुकदमा कायमी से सम्बन्धित जी0 डी0 की प्रति प्रदर्श क–14 को अपने लेख एवं हस्ताक्षर में बताते हुए साबित किया है तथा इस साक्षी ने नक्शा नजरी को भी अभियोजन साक्षी संख्या 6 ओंकार सिंह (एस0 एच0 ओ0) के लेख एवं हस्ताक्षर में होना बताते हुए प्रदर्श क–15 के रूप में साबित किया है। इस साक्षी की जिरह में इस तरह की ऐसी कोई बात नहीं आयी है जिससे की प्रथम सूचना रिपोर्ट के सम्बंध में कोई संदेह व्यक्त किया जा सके। बल्कि घटना की प्रथम सूचना रिपोर्ट अभियोजन के कथनानुसार दिनाँक 5–8–2004 को समय 21–30 बजे दर्ज किया जाना सिद्व है।

21. मृतक ओमपाल के शव का शव विच्छेदन अभियोजन साक्षी संख्या 4 डाक्टर आर0 एस0 यादव द्वारा दिनाँक 6–8–2004 समय 3–30 पी0 एम0 पर किया गया था। इस साक्षी ने अपने बयान में यह बताया है कि दिनाँक 6–8–2004 को वह जिला अस्पताल बदायूं में सर्जन के पद पर तैनात था। उस दिन उसने मृतक ओमपाल उम्र लगभग 28 वर्ष पुत्र थान सिंह, निवासी करखेडी, थाना बिसौली जिला बदायूं के शव जिसे सर्व मोहर हालत में एस0 ओ0, थाना बिसौली द्वारा भेजा गया था तथा शव सील बंद हालत में था इसे लाने वाले सी0 पी0 नं0 427 निरंजन सिंह यादव थाना बिसौली के थे। सीले दुरूस्त पायी गयी थी। मृतक के शव का शव परीक्षण किया था।

22. **वाह्य परीक्षणः–**

मृतक औसत कद काठी का था। आँख व मुँह खुला हुआ था। मृत्यु के पश्चात अकडन अपर लिम्ब व लोअर लिम्ब में मौजूद थी। सडन का कोई लक्षण मौजूद नहीं था।

मृतक के शरीर पर निम्नलिखित **मृत्युपूर्व** की चोटें पायी गयीः–

(1) फायर आर्म वुन्ड ऑफ एन्ट्री घाव 3 X 3 सेमी सरकुलर इन सेप छाती पर दाँये भाग पर 6 सेमी नीचे। दाहिने कालर बोन से नीचे। कैविटी डीप ब्लैकेनिंग टैटुइंग प्रजेन्ट थी।

(2) आग्नेयास्त्र के घुसने का निशान 3 X 4 सेमी छाती के बांये भाग पर बाहर की तरफ बांये निपल से 10 सेमी नीचे। कैविटी डीप ब्लैकेनिगं एवं टैटुइंग प्रजेन्ट थी।

(3) आग्नेयास्त्र घुसने का घाव 3 X 2 सेमी पीठ में बांयी तरफ Lumbar रीजन से 2 सेमी दूर ब्लैकेनिंग टैटुइंग प्रजेन्ट थी।

(4) आग्नेयास्त्र के निकास का घाव 2 X 2 सेमी दाहिने चेस्ट के बाहरी तरफ दाहिने निपल के 4 सेमी नीचे मार्जिन एवरटिड था।

23. **आंतरिक परीक्षणः–**

स्केल्प एण्ड स्कल नार्मल था। झिल्लियां नार्मल, मस्तिष्क नार्मल करोटि का आधार नार्मल, रीढ का छलला नार्मल। मेरू रज्जू खोला नहीं गया। अतिरिक्त विशेष विवरण शून्य।

24. **थारेक्सः–**

राइट प्लूरल कैविटी में 13 छर्रे व एक टिकली मिली। बांयी प्लूरल कैविटी में डेढ लीटर ब्लड व 12 छर्रे मिले, लैरिंक्स व ट्रेकिया नार्मल था। दाहिना व बांया फेफडा फटा हुआ। हृदय राइट चेम्बर में जमा खून मौजूद व बांया चैम्बर खाली था।

25. **उदरः–**

भित्तियां कन्जेस्टेड थी। कैविटी में 9 छर्रे थे। दात 16/15 आमाशय व उसकी अंतर वस्तुयें, आमाशय लेसीरेटिड व कंजैस्टिड था। कोई खाना नहीं था व एक टिकली मिली थी। यकृत लेसीरेटिड वजन 11–00 ग्राम मूत्राशय खाली, जनजांग मेल अँग थे।

26. डाक्टर के अनुसार मृत्यु का कारण शाक व हैमरेज मृत्युपूर्व आयी चोटों के कारण था। यह भी कहा है कि शरीर के अन्दर से जितने छर्रे व टिकली मिली वह साथ आये कांस्टेबिल को रिसीव कराया व शरीर से 4 कपडे भी सील करके कांस्टेबिल को प्राप्त कराये थे। यह भी कहा है कि मृतक की मृत्यु लगभग एक दिन पूर्व हुई थी यानि ये चोटें दिनाँक 5–8–2004 को शाम के छः बजे

आना सम्भव है। इस साक्षी ने मृतक की पोस्टमार्टम रिपोर्ट को प्रदर्श क–2 के रूप में साबित किया है।

27. चिकित्सीय साक्ष्य के अवलोकन से यह स्पष्ट है कि मृतक के शरीर पर मृत्युपूर्व की चार चोटें पायी गयी है जिनमें चोट संख्या 1, 2 व 3 आग्नेयास्त्र के प्रवेश घाव के रूप में है तथा चोट संख्या 4 आग्नेयास्त्र के निकास घाव के रूप में है।

28. घटना की प्रथम सूचना रिपोर्ट एवं अभियोजन साक्षी संख्या 1 राजवीर सिंह, अभियोजन साक्षी संख्या 2 नन्हू तथा अभियोजन साक्षी संख्या 3 कुँवर पाल की साक्ष्य में यह आया है कि अपीलार्थीगण गुलजारी, लक्ष्मी, सुम्मेर व बच्चू ने मृतक की गोलियां मारकर हत्या कर दी। मृतक को अपीलार्थीगण द्वारा गोलियां मारकर हत्या करने का उल्लेख किया गया है उक्त तथ्य की पुष्टि चिकित्सीय साक्ष्य से होती है। अतएव पत्रावली पर उपलब्ध साक्ष्य से यह साबित है कि मृतक की हत्या कथित घटना के समय आग्नेयास्त्र से गोलियां मारकर की गयी थी।

29. अब विचारणीय प्रश्न यह है कि क्या मृतक की हत्या अपीलार्थीगण द्वारा की गयी है अथवा नहीं।

30. घटना के सम्बंध में अभियोजन की ओर से अभियोजन साक्षी संख्या 1 राजवीर सिंह, अभियोजन साक्षी संख्या 2 नन्हू तथा अभियोजन साक्षी संख्या 3 कुँवर पाल को परीक्षित कराया गया है।

31. अभियोजन साक्षी संख्या 1 राजवीर सिंह ने अपने बयान में यह कहा है कि करीब एक साल सात महीने पहले की बात है शाम के सो बोलकर सुनाई जो उसने लिखा था फिर उसने उस पर हस्ताक्षर कर दिए और तहरीर थाने में दरोगाजी को ले जाकर दी। उन्होंने मुकदमा कायम कराकर रपट की नकल उसे दिलवाई। इस साक्षी ने तहरीर प्रदर्श क–1 को साबित किया है। यह भी कहा है कि जब वह थाने रिपोर्ट लिखाने गया था तो वह लाश मौके पर ही छोड गया था।

32. अभियोजन साक्षी संख्या 2 नन्हू ने अपने बयान में यह कहा है कि आज से करीब पौने दो साल की बात है। शाम के लगभग छः बजे का समय था वह और कुँवर कल्लू की बैठक में बैठे थे। ओमपाल और रमेश जुंआ मे से आ रहे थे। सालिग के प्लाट के पास जैसे ही ओमपाल और रमेश आये तभी उसके गांव के गुलजारी, लक्ष्मी, बच्चू और सुम्मेर के हाथों में बन्दूक व तमंचे थे। चारों ने ओमपाल को सालिग के प्लाट के पास घेर लिया और फायरिंग करके ओमपाल को गोली मारी, ओमपाल गिर पडा। हम लोगों ने शोर मचाया तभी चारों मुलजिमान भाग गये। तभी गांव के और भी काफी लोग इकट्ठे हो गये। मुलजिमान को उसने और कुँवर पाल दोनो ने ललकारा था तभी मुलजिमान भाग गये थे।

33. अभियोजन साक्षी संख्या 3 कुँवर पाल ने अपने बयान में यह कहा है कि आज से एक साल आठ महीना पहले की बात है। शाम के साढे छः बजे का समय था वह कल्लू की बैठक मे बैठा था जो उसके गाव के हैं उसके साथ उसके गाव का नन्हू भी था। ओमपाल जुंए मे से आ रहा था उसके साथ प्रकाश व ओमपाल था और रमेश भी थे। जुंआ बडी गंगा की तरफ यानि दक्षिण की तरफ हो रहा था। गुलजारी, लक्ष्मी, सुम्मेर व बच्चू सिंह छोटी गंगा यानि उत्तर की तरफ से आ रहे थे। इनके हाथो दो पर बन्दूक व दो पर तमंचे थे। इन लोगो ने एक हवाई फायर किया तभी रमेश व राम प्रकाश भाग गये तभी उपरोक्त चारो मुलजिमान ओमपाल को सालिग के प्लाट के पास घेर लिया वहा उन्हो ने ओमपाल को गोली मार दी। गोलिया लगने के बाद ओमपाल मर गया। उसने ओमपाल के ऊपर मुलजिमान को फायर करते हुए देखा तो उसने मुलजिमान को ललकारा तभी चारो मुलजिमान भाग गये। उपरोक्त तीनो साक्षियो ने अपने अपने बयानो मे अपीलार्थीगण द्वारा गोली मारकर मृतक की हत्या करने की पुष्टि की है।

34. अपीलार्थीगण की ओर से एक तर्क यह रखा गया कि अभियोजन साक्षी संख्या 3 कुँवर पाल ने अपनी जिरह में यह स्वीकार किया है कि उसका भाई राजवीर सिह (अभियोजन साक्षी संख्या 1) घटना के बाद आया था इससे यह जाहिर होता है कि घटना के समय अभियोजन साक्षी संख्या 1

राजवीर सिंह मौके पर मौजूद नहीं था तो उल्लेखनीय है कि अभियोजन साक्षी संख्या 2 नन्हू तथा अभियोजन साक्षी संख्या 3 कुँवर पाल दोनों ने स्वयं को कल्लू के बैठक में मौजूद होने का उल्लेख किया है। नक्शा नजरी में विवेचनाधिकारी ने कल्लू के मकान को अक्षर बी0 एक्स0 से तथा घटनास्थल को अक्षर ए0 एक्स0 से दर्शाया है तथा अक्षर ए0 एक्स0 से अक्षर बी0 एक्स0 की दूरी 25 कदम दर्शायी गयी है। अक्षर ए0 एक्स0 स्थान से अक्षर बी0 एक्स0 स्थान के बीच किसी का मकान होना नहीं दर्शाया गया है बल्कि खाली प्लाट श्री सालिग का दर्शाया गया है और इसी सालिग के प्लाट के पास मृतक की हत्या मुलजिमान द्वारा करने की बात कही गयी है। अक्षर बी0 एक्स0 स्थान से अक्षर ए0 एक्स0 स्थान की दूरी मात्र 25 कदम दिखायी गयी है। अतएव 25 कदम की दूरी से गवाहों द्वारा मुलजिमान को घटना कारित करते हुए देखना व पहचानना स्वाभाविक है।

35. अपीलार्थीगण की ओर से एक तर्क यह रखा गया कि विवेचनाधिकारी ने अक्षर बी0 एक्स0 स्थान पर एक मात्र गवाह अभियोजन साक्षी संख्या 3 कुँवर पाल को बैठने का उल्लेख किया है तथा अभियोजन साक्षी संख्या 2 नन्हू के बैठने के स्थान को मानचित्र में नहीं दर्शाया है तो उल्लेखनीय है कि यदि विवेचनाधिकारी ने अभियोजन साक्षी संख्या 2 नन्हू के बैठने के स्थान को नक्शा नजरी में नहीं दर्शाया है तो मात्र उक्त आधार पर अभियोजन साक्षी संख्या 2 नन्हू की मौके पर उपस्थिति के सम्बंध में संदेह का कोई आधार प्रतीत नहीं होता है बल्कि अभियोजन साक्षी संख्या 2 नन्हू तथा अभियोजन साक्षी संख्या 3 कुँवर पाल की साक्ष्य से यह साबित है कि उनके द्वारा यह घटना देखी गयी है।

36. अपीलार्थीगण की ओर से एक तर्क यह रखा गया कि अभियोजन साक्षी संख्या 2 नन्हू ने अपनी जिरह में यह स्वीकार किया है कि किस मुलजिम के पास बन्दूक व किसके पास तमंचे थे इसकी उसे जानकारी नहीं है। किस मुलजिम ने कितने फायर किये इसकी उसे जानकारी नहीं है। किस मुलजिम का फायर मृतक के लगा इसकी उसे जानकारी नहीं है। करीब दो गज की दूरी से फायर किये गये थे। सबसे पहले किस मुलजिम ने व सबसे बाद में किसने फायर किया इसकी जानकारी उसे नहीं है। इससे यह स्पष्ट होता है कि इस साक्षी ने घटना होते हुए नहीं देखा तो उल्लेखनीय है कि मात्र उक्त आधार पर इस साक्षी की घटनास्थल पर उपस्थिति के सम्बंध में संदेह करने का हम कोई आधार नहीं पाते है। जहाँ पर चार–चार व्यक्ति असलहों से लैस हो और उनके द्वारा फायर करके मृतक की हत्या कारित की गयी हो तो ऐसी स्थिति में सामान्यतः लोग यह गिनने का प्रयास नहीं करते कि किसने कितने फायर किये तथा किसका फायर पहले हुआ और किसका बाद में क्योंकि जहाँ मृतक पर आग्नेयास्त्र से फायर किया जाता है तो मोटे तौर पर गवाह से यही अपेक्षा की जाती है कि उसने मृतक पर फायर होते हुए देखा है अथवा नहीं। उक्त साक्षी ने अपने बयान में घटना के समय चारों अपीलार्थीगण द्वारा मृतक पर फायर करने की बात कही है। इस साक्षी की साक्ष्य से यह तथ्य साबित है कि अपीलार्थीगण द्वारा मृतक पर बन्दूकों एवं तमंचों से फायर किये गये हैं।

37. अपीलार्थीगण की ओर से एक तर्क यह रखा गया कि अभियोजन साक्षी संख्या 3 कुँवर पाल ने अपनी जिरह में यह कहा है कि पहले गुलजारी ने गोली चलाई उसके भाई व गुलजारी में पाँच गज का फासला था। दूसरी गोली लक्ष्मी ने चलाई। चारों मुलजिमान ने एक जगह घेरकर गोली चलाई थी। उसके भाई की सुम्मेर ने कौलिया भरी थी। उसने कौलिया भरने वाली बात दरोगाजी को बतायी थी। पहले गोली गुलजारी ने दूसरी लक्ष्मी ने मारी थी। आगे यह भी कहा है कि किसी मुलजिम ने उस पर, नन्हू व कल्लू पर कोई वार नहीं किया था। कुल चार फायर हुए थे। चारों ने एक–एक फायर किया था। एक हवाई फायर हुआ था, हवाई फायर बच्चू ने किया था जब कि अभियोजन साक्षी संख्या 2 नन्हू ने किसी मुलजिम द्वारा मृतक की कौली भरने का उल्लेख नहीं किया है। ऐसी दशा में उपरोक्त दोनो साक्षियों के कथनों में विरोधाभास है तो उल्लेखनीय है मामूली विसंगति के आधार पर साक्षियों की साक्ष्य को अविश्वसनीय मान लेना न्यायोचित प्रतीत नहीं होता है। जहाँ गोली चल रही हो वहां लोग सर्वप्रथम स्वयं को बचाने का प्रयत्न करते है और मोटें तौर पर यही देखते है कि कितने लोगों ने किस तरह मृतक की हत्या की है। उपरोक्त दोनों साक्षियों ने चारों अपीलार्थीगण के नामों का उल्लेख किया है तथा चारों के पास

हथियार बताया है और घटना के समय चारों के द्वारा फायर करने की बात कही गयी है। ऐसी दशा में इस घटना में अपीलार्थीगण की उपस्थिति अथवा उनकी सहभागिता के सम्बंध में संदेह का कोई आधार नहीं पाया जाता है। बल्कि दोनों साक्षियों की साक्ष्य से यह भली भाँति सिद्व है कि अपीलार्थीगण ने कथित घटना के समय एक राय होकर मृतक की गोली मारकर हत्या कर दी है।

38. ***(2017) 11 एस0 सी0 सी0 195 योगेश सिंह प्रति महाबीर सिंह एवं अन्य*** में माननीय उच्चतम न्यायालय ने यह अवधारित किया है किः–

29. It is well settled in law that the minor discepancies are not to be given undue emphasis and the evidence is to be considered from the point of view of trustworthiness. The test is whether the same inspires confidence in the mind of the court. If the evidence is incredible and cannot be accepted by the test of prudence, then it may create a dent in the prosecution version. If an omission or discrepancy goes to the root of the matter and ushers in incongruities, the defence can take advantage of such inconsistencies. It needs no special emphasis to state that every omission cannot take place of a matertial omission and, therefore, minor contradictions, inconsistencies or insignificant embellishment do not affect the core of the prosecution case and should not be taken to be a ground to reject the prosecution evidence. The omission should create a serious doubt about the truthfulness or creditworthiness of a witness. It is only the serious contradictions and omissions which materially affect the case of the prosecution but not every contradictions or omission. (See Rammi v. State of M.P., Leela Ram v. State of Haryana , Bihari Nath Goswami v. Shiv Kumar Singh, Vijay v. State of M.P., , Sampath Kumar v. Inspector of Police, Shyamal Ghosh v. State of W.B. and Mritunjoy Biswas v. Pranab.)

39. ***माननीय उच्चतम न्यायालय ने 2005 (10) एस0 सी0 सी0 498 रामाशीष राय प्रति जगदीश सिंह*** में यह अवधारित किया है किः–

"Every discrepancy in the prosecution witness cannot be teated as fatal. The discrepancy which does not affect the prosectuion case materially does not create infirmity."

40. ***माननीय उच्चतम न्यायालय ने 2013 क्रिमिनल ला जनरल 2308 सुबोध नाथ एवं अन्य प्रति राज्य त्रिपुरा*** में यह अवधारित किया है किः–

"Unless,the discrepancies are "material discrepancies" so as to create a reasonable doubt about the credibility of the witnesses, the Court will not discard the evidence of the witnesses."

41. उपरोक्त अभियोजन साक्षी 2 नन्हू एवं अभियोजन साक्षी संख्या 3 कुँवर पाल की साक्ष्य में हम ऐसा कोई विरोधाभास नहीं पाते है जिससे की उनकी घटना के समय मौके पर उपस्थिति के सम्बंध में कोई संदेह व्यक्त किया जा सके। अभियोजन साक्षी संख्या 2 नन्हू की साक्ष्य के अवलोकन से यह विदित है कि इस साक्षी से इस तरह का कोई प्रश्न नहीं किया गया कि किस मुलजिम ने मृतक की कौली भरी थी या किसने पकडा था यदि इस तरह का प्रश्न उक्त साक्षी से पूंछा जाता और जब वह किसी मुलजिम द्वारा मृतक को पकडने के तथ्य से इंकार करता तब उन परिस्थितियों में यह कहा जा सकता था कि दोनो साक्षियों के बयानों में विरोधाभास है। उपरोक्त दोनो साक्षियों ने जिस तरह से घटना देखी है उसका वर्णन उन्होनें अपने बयानों में किया है। गवाहों के बयानों में मामूली अन्तर आने से उनकी विश्वसनीयता पर कोई प्रतिकूल प्रभाव नहीं पडता है। यह एक गाँव की घटना है तथा उपरोक्त दोनों गवाह गाँव के ही रहने वाले है और जिस तरह से उन्होंने अपने बयानों में घटना देखने का उल्लेख

किया है उस पर अविश्वास करने का हम कोई आधार नहीं पाते हैं।

42. यह सरेआम दिन की घटना है। प्रथम सूचना रिपोर्ट में अभियोजन साक्षी संख्या 2 नन्हू तथा अभियोजन साक्षी संख्या 3 कुँवर पाल को घटना का प्रत्यक्षदर्शी साक्षी होना दिखाया गया है तथा घटना की प्रथम सूचना रिपोर्ट में भी अपीलार्थीगण द्वारा मृतक पर बन्दूकों व तमंचों से फायर कर उसकी हत्या करने की बात कही गयी है। ऐसी दशा में हम अपीलार्थीगण की ओर से रखे गये उक्त तर्क में कोई बल नहीं पाते हैं।

43. अपीलार्थीगण की ओर से एक तर्क यह रखा गया कि घटना के हेतुक के सम्बंध में कोई साक्ष्य उपलब्ध नहीं है तो यहाँ यह उल्लेखनीय है कि जहाँ घटना की प्रत्यक्षदर्शी साक्ष्य उपलब्ध हो वहाँ घटना के हेतुक का कोई विशेष महत्व नहीं रह जाता है। अभियोजन साक्षी संख्या 1 राजवीर सिंह, अभियोजन साक्षी संख्या 2 नन्हू तथा अभियोजन साक्षी संख्या 3 कुँवर पाल की साक्ष्य में यह आया है कि जहाँ जुंआ हो रहा था वहां वे नहीं गये थे। अतएव साक्षियों की साक्ष्य से यह स्पष्ट है कि जिस स्थान पर जुंआ हो रहा था उस स्थान पर न तो साक्षीगण गये थे और न ही वहाँ मौजूद थे। यह घटना सालिग के प्लाट के पास घटित हुई है। घटनास्थल के पास कल्लू के बैठक में साक्षी नन्हू, व कुँवर पाल ने अपने मौजूद रहने की बात कही है। कल्लू का मकान घटनास्थल के पास ही घटनास्थल से करीब 25 कदम की दूरी पर स्थित होना बताया गया है। ऐसी दशा में इस मामले में घटना के हेतुक का कोई विशेष महत्व नहीं रह जाता है।

44. ***(2010) 12 एस0 सी0 सी0 91 बिपिन कुमार मोण्डल प्रति राज्य वेस्ट बंगाल के मामले में माननीय उच्चतम न्यायालय*** द्वारा यह अवधारित किया गया है किः—

"24- It is settled legal proposition that even if the absence of motive as alleged is accepted that is of no consequence and pales into insignificance when direct evidence establishes the crime. Therefore, in case there is direct trustworthy evidence of witnesses as to commission of an offence, the motive part loses its significance. Therefore, if the genesis of the motive of the occurrence is not proved, the ocular testimony of the witnesses as to the occurrence could not be discarded only by the reason of the absence of motive, if otherwise the evidence is worthy of reliance. (Vide Hari Shankar Vs. State of U.P., (1996) 9 SCC 40; Bikhu Pandey & Ors. Vs. State of Bihar, (2003) 12 SCC 616; and Abu Thakir & Ors. Vs. State of Tamil Nadu, (2010) 5 SCC 91)."

45. इस प्रकरण में घटना की प्रत्यक्षदर्शी साक्ष्य उपलब्ध है। ऐसी दशा में घटना की प्रत्यक्षदर्शी साक्ष्य उपलब्ध होने की स्थिति में हेतुक का कोई विशेष महत्व नहीं रह जाता है।

46. अपीलार्थीगण की ओर से एक तर्क यह रखा गया कि प्रथम सूचना रिपोर्ट में घटनास्थल नत्थू लाल के घर के पास बतायी गयी है जब कि साक्षियों की साक्ष्य में घटनास्थल सालिग के प्लाट के पास की बतायी गयी है तो उल्लेखनीय है कि मृतक का शव सालिग के खाली प्लाट में पाया गया है। पंचायतनामा में भी मृतक का शव सडक के किनारे सालिग की जगह (प्लाट) में पडे होने का उल्लेख किया गया है। नक्शा नजरी में मृतक का शव सालिग के प्लाट में पाये जाने का उल्लेख किया गया है और सालिग के प्लाट में ए0 एक्स0 स्थान पर मृतक की हत्या कारित करने का उल्लेख है। घटनास्थल से विवेचनाधिकारी ने खून आलूद व साटी मिट्टी कब्जा पुलिस में लिया है और घटनास्थल से दो अदद खोखा कारतूस 12 बोर बरामद होने का उल्लेख किया है। फर्द मिट्टी खून आलूदा व सादा मिट्टी तथा फर्द लेने कब्जा पुलिस दो अदद खोखा कारतूस 12 बोर पत्रावली पर उपलब्ध क्रमशः प्रदर्श क—10 व प्रदर्श क—11 है। अभियोजन साक्षी संख्या 1 राजवीर सिंह, अभियोजन साक्षी संख्या 2 नन्हू तथा अभियोजन साक्षी संख्या 3 कुँवर पाल की साक्ष्य में घटनास्थल सालिग के प्लाट के पास बतायी गयी है। अतएव पत्रावली पर उपलब्ध समस्त साक्ष्य से घटनास्थल साबित है। ऐसी दशा में यदि प्रथम सूचना रिपोर्ट में घटना नत्थू लाल के घर के पास होने का उल्लेख किया

गया है तो उससे अभियोजन कथानक पर कोई विपरीत प्रभाव नहीं पडता है और न ही घटना के सम्बंध में संदेह का कोई आधार पाया जाता है। पत्रावली पर उपलब्ध समस्त साक्ष्य से घटनास्थल साबित है और साक्ष्य से यह सिद्व है कि यह घटना सालिग के प्लाट के पास घटित हुई है। ऐसी दशा में उक्त सम्बंध में अपीलार्थीगण की ओर से रखे गये तर्क में हम कोई बल नही पाते हैं।

47. अपीलार्थीगण की ओर से एक तर्क यह रखा गया कि घटना के समय रमेश व राम प्रकाश भी मृतक के साथ मौजूद थे परन्तु उन्हें साक्ष्य में परीक्षित नहीं कराया गया है। तो उल्लेखनीय है कि वर्तमान परिवेश में कोई भी व्यक्ति दूसरे के झगडे में नहीं पडना चाहता है। यदि अभियोजन की ओर से उपरोक्त दोनों व्यक्तियो को साक्ष्य में परीक्षित नहीं कराया गया है तो मात्र उक्त आधार पर घटना के सम्बंध में संदेह का कोई पर्याप्त आधार प्रतीत नहीं होता है। अभियोजन साक्षी संख्या 1 राजवीर सिंह, अभियोजन साक्षी संख्या 2 नन्हू तथा अभियोजन साक्षी संख्या 3 कुँवर पाल ने ने कथित घटना अपीलार्थीगण द्वारा कारित करने की पुष्टि की है। यह बात अवश्य है कि अभियोजन साक्षी संख्या 1 राजवीर तथा अभियोजन साक्षी संख्या 3 कुँवर पाल मृतक के सगे भाई है तथा अभियोजन साक्षी संख्या 2 नन्हू उनका ममेरा भाई है तो मात्र सम्बंध के आधार पर उपरोक्त साक्षियों की साक्ष्य को पूर्णता अविश्वसनीय या गलत मान लेना न्यायोचित प्रतीत नहीं होता है।

48. ***पंजाब राज्य प्रति जुगराज सिंह एवं अन्य 2002 एस0 सी0 सी0 (क्रिमिनल) 630, 2012 (1) जे0 सी0 आर0 सी0 703 अमित बनाम राज्य उत्तर प्रदेश, 2006 (2) सी0 ए0 आर0 सुप्रीम कोर्ट पेज 742 सुदर्शन रेड्डी व अन्य बनाम आन्ध्र प्रदेश तथा 2003 एस0 सी0 सी0 (क्रिमिनल) 32 गंगाधर बेहरा एवं अन्य प्रति राज्य उडीसा*** के मामले में माननीय उच्चतम न्यायालय द्वारा यह मत व्यक्त किया गया है कि किसी भी साक्षी की साक्ष्य को मात्र सम्बंधी होने के आधार पर तिरस्कृत नहीं किया जा सकता है। कोई भी साक्षी केवल सम्बंधी होने मात्र से हितबद्व साक्षी नहीं हो जाता है जब तक साक्षी का झूठा फंसाने में हित सिद्व नहीं किया जाता। यह भी अवधारित किया गया है कि एक सम्बंधी वास्तविक अपराधी को न तो छिपायेगा और न ही किसी निर्दोष व्यक्ति को फंसायेगा। यदि झूठा फंसाये जाने का आधार लिया गया हो ऐसे मामलों में सम्बंधी साक्षियों की साक्ष्य पर सावधानी पूर्वक विचार करने की आवश्यकता होती है।

49. ***(2018) 6 सुप्रीम कोर्ट केसेस 591 भास्कर राव एवं अन्य प्रति राज्य महाराष्ट्र*** के मामले में माननीय उच्चतम न्यायालय द्वारा यह अवधारित किया गया है किः–

"35. The last case we need to concern ourselves is *Namodeo v. State of Maharashtra*, wherein this Court after observing previsous precedents has summarised the law in the following manner: : (SCC P. N164, Para "38. It is clear that a close relative cannot be characterised as an "interested' witness. He is a "natural" witness. His evidence, however, must be scrutinized carefully. If on such scrutiny, his evidence is found to be intrinsically reliable, inherently probable and wholly trustworthy, conviction can be based on the "sole" testimony of such witness. Close relationship of witness with the deceased or victim is no ground to reject his evidence. On the contrary, close relative of the deceased would normally be most reluctant to spare the real culprit and falsely implicate an innocent one."

36....From the study of the aforesaid precedents of this court, we may note that whoever has been a witness before the court of law, having a strong interest in result, if allowed to be weighed in the same scales with those who do not have any interest in the result, would be to open the doors of the court for perverted truth. This sound rule which remains the bulwark of this system, and which determines the value of evidence derived from such sources, needs to be cautiously and carefully obsered and enforced. There is no dispute about the fact that the interest of the witness must affect his testimony is a

universal truth. Moreover, under the influence of bias, a man may not be in a position to judge correctly even if they earnestly desire to do so. Similarly, he may not be in a position to provide evidence in an impartail manner, when it involves his interest. Under such influences, man will, even though not consciously, suppress some facts, soften or modify others, and provide favourable colour. These are most controlling considertions in respect to the credibility of human testimony, and should never be overlooked in applying the rules of evidence and determining its weight in the scale of truth under the facts and circumstances of each case."

50. चूँकि उपरोक्त साक्षीगण मृतक के परिवार एवं सम्बंधी है उन्होंने जिस तरह से घटना घटित होने का उल्लेख किया है उस पर अविश्वास करने का कोई कारण प्रतीत नहीं होता है। अभियोजन साक्षी संख्या 2 नन्हू तथा अभियोजन साक्षी संख्या 3 कुँवर पाल की कथित घटना के समय मौके पर उपस्थिति साबित है। उपरोक्त साक्षीगण की साक्ष्य पर सावधानी पूर्वक विचार करने के उपरान्त हम इसी मत के हैं कि उपरोक्त साक्षियों की साक्ष्य से अपीलार्थीगण द्वारा कथित घटना कारित करना संदेह से परे सिद्व है। उपरोक्त साक्षीगण की जिरह मे इस तरह की कोई विसंगति या विरोधाभास नही आया है जिससे की उपरोक्त साक्षियों की साक्ष्य को अविश्वसनीय या गलत माना जा सके। मामूली विरोधाभास अथवा विसंगति के आधार पर किसी साक्षी की साक्ष्य को तिरस्कृत करना अथवा अविश्वसनीय मान लेना न्यायोचित प्रतीत नहीं होता है। उपरोक्त साक्षियों की साक्ष्य से यह स्पष्ट है कि मृतक तथा अभियुक्तो के मध्य कोई पुरानी रंजिश नहीं थी और न ही उनके मध्य कोई पार्टीबन्दी थी। यह प्रकरण प्रत्यक्षदर्शी साक्ष्य पर आधारित है तथा अभियोजन साक्षी संख्या 2 नन्हू व अभियोजन साक्षी संख्या 3 कुँवर पाल जो घटना के प्रत्यक्षदर्शी साक्षी है उनकी साक्ष्य से यह भली भांति सिद्व है कि यह घटना अपीलार्थीगण द्वारा ही कारित की गयी थी और उन्होंने ही मृतक को गोलियां मारकर उसकी हत्या कर दी। ऐसी दशा में यदि घटना के सम्बंध में अभियोजन की ओर से किसी स्वतन्त्र एवं निष्पक्ष साक्षी को परीक्षित नहीं कराया गया है तो मात्र उक्त आधार पर अभियोजन कथानक किसी भी प्रकार से प्रभावित नहीं होता है।

51. जहाँ तक मृतक के अपराधिक प्रवृत्ति का होने का प्रश्न है तो अभियोजन साक्षी संख्या 1 राजवीर सिंह तथा अभियोजन साक्षी संख्या 3 कुँवर पाल के बयानों में यह आया है कि मृतक के ऊपर गुण्डा व गैंगस्टर एक्ट के प्रकरण चले थे तो मात्र उक्त आधार पर यह उपधारणा कायम नहीं की जा सकती है कि मृतक की हत्या किन्ही अज्ञात व्यक्तियों द्वारा अज्ञात समय में कारित की गयी हो बल्कि पत्रावली पर उपलब्ध समस्त साक्ष्य से यह साबित है कि मृतक की हत्या अपीलार्थीगण द्वारा एक राय होकर आग्नेयास्त्र से चोटें पहुंचाकर की गयी थी उक्त सम्बंध में विद्वान विचारण न्यायालय ने उठाये गये समस्त बिन्दुओं पर सम्यक विचार किया है। विद्वान विचारण न्यायालय के प्रश्नगत निर्णय एवं निष्कर्षों में हम कोई विधिक त्रुटि अथवा अनियमितता नहीं पाते हैं।

52. अपीलार्थीगण की ओर से एक तर्क यह रखा गया कि अभियोजन साक्षी संख्या 2 नन्हू तथा अभियोजन साक्षी संख्या 3 कुँवर पाल ने स्वयं को कल्लू की बैठक में बैठे होने का उल्लेख किया है परन्तु कल्लू जिसे अपीलार्थीगण की ओर से अपने बचाव में बचाव साक्षी संख्या 1 के रूप में परीक्षित कराया गया है उसने अपने बयान में घटना से अनभिज्ञता व्यक्त की है और यह कहा है कि कुंवर पाल उसके साथ उसकी दुकान के सामने नहीं बैठा था और न ही उसने व कुंवर पाल ने ओमपाल की हत्या करते हुए किसी को देखा है।

53. उल्लेखनीय है कि बचाव साक्षी संख्या 1 कल्लू ने अपने बयान में यह कहा है कि उसके गांव के ओमपाल को मरे हुए सवा दो साल हो गया है। इनकी लाश स्कूल के पास में मिली थी। लाश शाम को 8–30 बजे के लगभग मिली थी। लाश देखने वह भी गया था। स्कूल के पास उसकी दुकान है जो खाली रहती है उसमें बगरंन के डाक्टर साहब बैठते है जो सुबह को आते है और शाम को दिन छुपने पर अपने घर चले जाते है। यह उसका बैठक नहीं है। कुंवर पाल उसके साथ उसकी दुकान के सामने नहीं बैठा था न ही उसने व उसके गांव के

कुँवर पाल ने ओम पाल की हत्या करते हुए किसी को देखा है। उसके गाँव के गुलजारी, लक्ष्मी, बच्चू सिंह व सुमेर को उसने हत्या करते नहीं देखा है। इस साक्षी की साक्ष्य से यह स्पष्ट है कि उसने मृतक की लाश प्राइमरी स्कूल के पास मिलने का उल्लेख किया है। नक्शा नजरी में प्राइमरी स्कूल, घटनास्थल के दक्षिण तरफ पप्पू के मकान के बाद दर्शाया गया है।

54. यद्यपि यह साक्षी उसी गांव का रहने वाला है और अभियुक्तों के प्रभाव व दबाव में आकर इस साक्षी द्वारा अभियोजन कथानक का समर्थन न करने की सम्भावना से इंकार नहीं किया जा सकता है। अभियोजन साक्षी संख्या 2 नन्हू तथा अभियोजन साक्षी संख्या 3 कुँवर पाल की साक्ष्य से यह साबित है कि घटना के समय वे कल्लू की बैठक पर बैठे हुए थे और उन्होंने यह घटना देखी है। उपरोक्त दोनों साक्षियों की जिरह में ऐसा कोई तथ्य नहीं आया है जिससे की घटनास्थल पर उनकी उपस्थिति के सम्बंध में कोई संदेह व्यक्त किया जा सके। ऐसी दशा में बचाव साक्षी संख्या 1 कल्लू की साक्ष्य से अपीलार्थीगण को कोई लाभ प्राप्त नहीं होता है उक्त सम्बंध में विद्वान विचारण न्यायालय द्वारा सम्यक विचार किया गया है जिसमें हम कोई विधिक त्रुटि अथवा अनियमितता नहीं पाते हैं।

55. पत्रावली पर उपलब्ध साक्ष्य से यह भली भाँति सिद्व है कि कथित घटना के समय अपीलार्थीगण ने एक राय होकर आग्नेयास्त्र से फायर कर चोटें पहुंचाकर मृतक की हत्या कर दी। ऐसी दशा में हम विद्वान विचारण न्यायालय के प्रश्नगत निर्णय एवं निष्कर्षों में कोई विधिक त्रुटि अथवा अनियमितता नहीं पाते है।

56. जैसा कि ऊपर उल्लेख किया जा चुका है कि अपीलार्थी **लक्ष्मी एवं सुमेर** की मृत्यु हो जाने के कारण उनके लिए अपील उपशमित की जा चुकी है।

57. विद्वान विचारण न्यायालय ने पत्रावली पर उपलब्ध समस्त साक्ष्य एवं अभिलेखों पर सम्यक विचार करने के उपरान्त अपीलार्थीगण को प्रश्नगत अपराध में दोषसिद्व एवं दण्डित किया है जिसमें हम कोई विधिक त्रुटि अथवा अनियमितता नहीं पाते हैं।

58. उपरोक्त विवेचना से हम इसी मत के हैं कि उपरोक्त दोनों अपीलें बलहीन है एवं निरस्त होने योग्य है तदनुसार उपरोक्त दोनों दाण्डिक अपीलें निरस्त की जाती है तथा विद्वान विचारण न्यायालय द्वारा पारित दोषसिद्वि एवं दण्डादेश की **पुष्टि** की जाती है।

59. अपीलार्थी **गुलजारी** जेल में निरूद्व है उसे सजा भुगतने हेतु यथावत निरूद्व रखा जाए।

60. अपीलार्थी **बच्चू सिंह** जमानत पर है उसके जमानतनामें एवं बंधपत्र निरस्त किये जातें हैं। अपीलार्थी बच्चू सिंह को निर्देशित किया जाता है कि वह सजा भुगतने के लिए तुरन्त सम्बन्धित न्यायालय के समक्ष आत्मसर्मपण करें।

61. निर्णय की प्रति एवं अधीनस्थ न्यायालय की पत्रावली अविलम्ब सम्बन्धित न्यायालय को अनुपालनार्थ भेजी जाए।

(2021)02ILR A437
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 05.02.2021

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE GAUTAM CHOWDHARY, J.

Criminal Appeal No. 2135 of 2013

Savir ...Appellant (In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
Sri Gyan Prakash, Sri Neeraj Srivastava, Sri Noor Mohammad, Sri Aftab Ahmad, Sri Vishnu Kumar

Counsel for the Opposite Party:
A.G.A., Sri R.P. Singh

Criminal Law-Extra judicial confession-Death body unearthed from a place not

known to many-accused last seen with the deceased-Extra judicial confession and circumstances mentioned-corroborated by independent evidence. Punishment of life reduced to 14.6 years u/s 302 IPC.

Appeal partly allowed. (E-7)

List of Cases cited: -

1. Laldeep Bhagat Vs St. of Bih.

2. St. of Mah. Vs Arjun, (2008) 17 SCC 53

3. Rambraksh Alias Jalim Vs St. of Chhatt., (2016) 12 SCC 251

4. Aghnu Manjhi Vs St. of Jhar., 2012 LawSuit (Jhar) 1381,

5. Uppala Bixam @ Bixmaiah Vs St. of Andhra Pradesh, (2019) 13 SCC 802

6. St. of Haryana Vs Jagbir Singh & anr., 2003 4 Crimes (SC) 241

7. Saktu & anr. Vs St. of U.P., AIR 1973 SC 760

8. Manoj Giri Vs St. of Chatt., (2013) 5 SCC 798

9. Rakesh & anr. Vs St. of U.P. & anr., (2014) 2 SCC

10. Nayan alias Yogesh Sevantibhai Soni Vs St. of Guj. in Criminal Appeal No.37 of 2010

11.Raja @ Rajinder Vs St. of Haryana, JT 2015 (4) SC 57

12. Pratap Singh Vs Shivram, AIR 2020 SC 1382.

13. Mustaq Vs St. of Guj., AIR 2020 SC 2799

14. Criminal Appeal No.3337 of 2011 (Lokkhar Shukla alias Shiv Shankar Shukla Vs St. of U.P.)

15. Somasundaram Vs St., (2020) 7 SCC 722.

16. Vikas Yadav Vs St. of U.P, 2016 (9) SCC 541

17. Veersen Vs St. of U.P.-Criminal Appeal No. 1839 of 2004

18. G.V. Siddaramesh Vs St. of Karn. - Criminal Appeal No.160 of 2006

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

1. Heard Sri Noor Mohammad, learned counsel for the appellant and learned A.G.A. for the State.

2. The appellant has preferred this appeal against the judgment and order dated 26.4.2013 passed by Additional Sessions Judge, Court No.1, Etah in Sessions Trial No.804 of 2007 convicting and sentencing him under Sections 302 of Indian Penal Code, 1860 (for short 'IPC') for life imprisonment with fine of Rs.2,000/-, Section 364 for rigorous imprisonment for 10 years and under Section 201 of I.P.C. for seven years rigorous imprisonment. All the sentences of imprisonment were directed to run concurrently.

3. The fact is not in dispute that the dead body of the deceased was found in the agricultural field. It is also not in dispute that the original accused was apprehended by the police, it is also not in dispute that during the period when the accused was in the police station, he volunteered to show the place where he had committed the act.

4. Investigating Officer submitted the charge-sheet to the competent court and as the accused was facing charges which were exclusively triable by the Court of Sessions, hence the case was committed to the Court of Sessions. On being summoned, the accused pleaded not guilty and wanted to be tried.

5. The prosecution examined about 9 witnesses which are as follows:

1	Deposition of Kallan Ahmad	PW1
2	Deposition of Shahid	PW2
3	Deposition of Husna	PW3
4	Deposition of Mohd. Aakil	PW4
5	Deposition of Jaivir Singh	PW5
6	Deposition of Dr. Nannumal	PW6
7	Deposition of Ram Kumar Singh	PW7
8	Deposition of Santosh Kumar Singh	PW8
9	Deposition of Sonvir Singh	PW9

6. In support of ocular version following documents were filed:

1	Written Report	Ex.Ka.4
2	F.I.R.	Ex.Ka.1
3	Recovery memo of human skeleton Bone	Ex.Ka.2
4	Recovery memo of blood stained Cloth and sleeper	Ex.Ka.3
5	Postmortem Report	Ex.Ka.9
6	Panchayatnama	Ex.Ka.11
7	Charge-sheet	Ex.Ka.10

7. On the witnesses being examined and the prosecution having concluded its evidence, the accused was put to question under Section 313 Cr.P.C., and hearing arguments on behalf of prosecution and the defence, the learned Sessions Judge convicted the appellants as mentioned aforesaid. Being aggrieved by and dissatisfied with the aforesaid judgement and order passed by the Sessions Court the appellants have preferred the present appeal.

8. Learned counsel for the appellant has submitted that the incident alleged to have taken place on 26.1.2007; neither the Gumshudgi Report nor any information regarding the missing of the victim was lodged against the appellant and only after four months of the occurrence, the appellant and the other co-accused persons were named in the F.I.R only on the basis of suspicion and no plausible reason was given for the delay in lodging the F.I.R.

9. He has contended that the entire conviction has been made by the learned Trial Judge only on the basis of confession and on the theory of last seen together. He has submitted that the skeleton which was recovered at the instance of accused was not sent for D.N.A. profile which can be said to be not of the deceased in absence of D.N.A.

10. He has submitted that the accused though had confessed before the police authority that he has committed the murder of the deceased by means of Gadasa but the recovery of the same was not made at the instance of the accused.

11. It is further submitted by the learned counsel for the appellant that dead body of the deceased though was recovered

at the instance of the accused, it was a case of admission of evidence, hence, conviction only under Section 201 of I.P.C. could have been made. In support of his argument, he has relied on the decision in **Laldeep Bhagat Vs. State of Bihar**, more particularly at paragraph No.10 which is as under:

"10. In a case of circumstantial evidence, it is necessary that the fact 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 and the circumstances should be of a conclusive nature. In the instant case the fact established are not of consistent only with the hypothesis of guilt of the appellant and the circumstances are not conclusive nature. Besides the chain of circumstances has not been established by the prosecution as stated above and hence the facts so established cannot be said to be sufficient for conviction of the appellant under Sections 302 and 376 of the Indian Penal Code save and except Section 201 of the Indian Penal Code."

Learned counsel for the appellant has further relied on the decision in **State of Maharashtra Vs. Arjun, (2008) 17 SCC 53**, more particularly on the following paras:

"The circumstances which were pressed into service to fasten the guilt on the accused are, as follows:

1. Illicit intimacy with accused No.1.

2. The accused No.2 purchased two packets of rat killer poison from the shop of Motichand, PW-5.

3. The accused No.2 purchased gunny bag (article 16), cotton rope (Articles 17, 18 and 19) and nylon rope (article 20) from the shop of Abhay Bhoj, PW-6.

4. Discovery of dead body of Jagnandansingh from Morda Tank at the instance of accused No.2.

5. Dead body of Jagnandansingh was found in a gunny bag that the dead body was tied by means of cotton rope and that two stones were found to have been tied to gunny bag by means of nylon rope.

So far as the purchase of rat killer poison and the gunny bag is concerned, there was no evidence to show that either the rat killer poison or the gunny bag was purchased prior to the date of occurrence. It is to be noted that the body of the deceased was found in a decomposed state. The Doctor who conducted the post mortem categorically stated that in view of the decomposed state of the dead body, it was not possible to say whether any rat killing poison was used. The only other circumstance is purported discovery of the dead body at the instance of the respondent."

The High Court has found that this so-called discovery on the basis of the information given by A-2 has not been established.

Above being the position, we find that the High Court's judgment does not suffer from any infirmity to warrant interference. The appeal is, accordingly, dismissed."

12. Learned counsel for the appellant has also relied on the decisions in **Rambraksh Alias Jalim Vs. State of Chhattishgarh, (2016) 12 SCC 251, Aghnu Manjhi Vs. State of Jharkhand, 2012 LawSuit (Jhar) 1381, Uppala Bixam alias Bixmaiah Vs. State of Andhra Pradesh, (2019) 13 SCC 802** and **State of Haryana Vs. Jagbir Singh and Another, 2003 4 Crimes (SC) 241.**

13. Per contra, learned A.G.A. for the State has submitted that the conviction of the accused is just and proper. He has taken us through the findings of the learned Trial Judge and has contended that it was the accused at whose instance the dead body of the deceased was recovered.

14. In support of his submission, learned A.G.A. has relied on the decisions in **Saktu and Another Vs. State of U.P., AIR 1973 SC 760** and in **Manoj Giri Vs. State of Chattishgarh, (2013) 5 SCC 798.**

15. The accused-appellant even in his statement under Section 313 of Cr.P.C., has not come out with the defence as to how he came to know that the dead body of the deceased was at a particular place. The place could not have been known to any other person but the accused alone. The recovery of the dead body and the instrument used for commission of offence further strengthen the decision of the Trial Court as according to learned A.G.A., the judgment in **Saktu and Another (Supra)** as well as **Manoj Giri** (Supra) once it is established and proved that the accused persons committed that offence the prosecution has successfully proved that the ingredients in **Rakesh and another Vs. State of U.P. and another, (2014) 2 SCC** and the principle laid therein cannot be made applicable to the facts of this case.

16. In the present case, the events complete the chain and, therefore, we are satisfied that the conviction of the accused-appellant requires to be upheld. Reference to the decision penned by His Lordship Justice M.R. Shah (as he then was) in the case of **Nayan alias Yogesh Sevantibhai Soni Vs. State of Gujarat in Criminal Appeal No.37 of 2010** decided on 1.9.2015 where similar situation had arisen, reliance can be easily placed.

17. Reliance can be placed on the decision of the **Apex Court in Raja @ Rajinder Vs. State of Haryana, JT 2015 (4) SC 57**. Relevant pargraph of the aforesaid judgment is as under :

"14. Thus, if an accused person gives a statement that relates to the discovery of a fact in consequence of information received from him is admissible. The rest part of the statement has to be treated as inadmissible. In view of the same, the recovery made at the instance of the accused-appellant has been rightly accepted by the trial Court as well as by the High Court, and we perceive no flaw in it.

15. Another circumstance which has been taken note of by the High Court is that the blood-stained clothes and the weapon, the knife, were sent to the Forensic Science Laboratory. The report obtained from the Laboratory clearly shows that blood stains were found on the clothes and the knife. True it is, there has been no matching of the blood group. However, that would not make a difference in the facts of the present case. The accused has not offered any explanation how the human blood was found on the clothes and the knife. In this regard, a passage from John Pandian v. State[7] is worth reproducing:

"The discovery appears to be credible. It has been accepted by both the courts below and we find no reason to discard it. This is apart [pic]from the fact that this weapon was sent to the forensic science laboratory (FSL) and it has been found stained with human blood. Though the blood group could not be ascertained, as the results were inconclusive, the

accused had to give some explanation as to how the human blood came on this weapon. He gave none. This discovery would very positively further the prosecution case."

In view of the aforesaid, there is no substantial reason not to accept the recovery of the weapon used in the crime. It is also apt to note here that Dr. N.K. Mittal, PW-1, has clearly opined that the injuries on the person of the deceased could be caused by the knife and the said opinion has gone unrebutted."

18. The matter based on presumptive reasoning will go to show that the accused also have motive. In the case in hand, it has come in evidence that the accused-appellant was in friendship with the deceased. The accused is known to have gone with the deceased and after the death of deceased, the accused-appellant in mysteriously came back to the village and doctrine of confession by subsequent event is founded on the fact that seizure was made at the instance of the information obtained from accused-appellant. The information might be not inculpatory in nature but if it results in a discovery of a fact, it becomes reliable information. In our case, the judgment of this High Court relied by learned counsel for the appellant cannot come to the aid him as here the learned Judge has not only relied on all the statements but also on the evidence and antecedents and the judgment is not only based only on last seen theory.

19. We are convinced that the evidence as discussed by the learned trial judge leave no room for us to take a different view then that taken by the learned trial judge for the reasons that the dead body was unearthed from the place which was though not secluded, would not be known to many as the incident occurred much before the death. The story built by the accused who was last seen with the deceased also inspires confidence as principal of ***falsus in uno falsus in omnibus*** will apply to the facts of this case as he conveyed falsely that deceased had eloped with lady to Delhi. The family members of the deceased tried to search fanatically but not able to find the deceased. After subsequent event and after the arrest of the accused, it was he who gave the name of the place where the dead body was and the instrument used for offences.

20. In this case, Sections 3 read with Section 4 and 114 of the Evidence Act, 1872 can also be invoked. The Rules of presumption are deduced from the human knowledge and experience. In this case, relation and coincidence of facts and circumstances as narrated in the case of **Pratap Singh Vs. Shivram, AIR 2020 SC 1382**.

21. We may also go by the judgment of the Trial Court based on the basis of extra judicial confession which has been corroborated by the independent evidence and other circumstances mentioned in the confession has been separately and independently corroborated. The corroboration needs to be the basis of preponderance.

22. Section 27 of the Evidence Act goes to show that submissions made by learned counsel for the appellant cannot be countenanced. The Judgment in **Mustaq Vs. State of Gujarat, AIR 2020 SC 2799** will also have bearing on the factual data of this case. In the said matter, the appellant showed the spot where weapons had been hidden under shed. From the evidence and material on record, it can be said that the

recovery of weapon of offence was from the place which was known to all. Similar is the case in hand. The judgment in **Mustaq (Supra)** will apply to the facts of this case as here in this case also the accused made the description of place. He himself showed the spot which would not be known to many persons. The decision of this Court in **Criminal Appeal No.3337 of 2011 (Lokkhar Shukla alias Shiv Shankar Shukla Vs. State of U.P.)** dated 3.10.2018 will apply to in full force to the facts of this case.

23. Re-appreciation of evidence on record, more particularly, the depositions of the police officers, the original complainant as well as the other aspects are required to be looked into. The prosecution has been successful in proving the presence of the original accused along with the deceased who can be said to have caused injuries to the deceased by instrument which was recovered at the instance of the accused. The prosecution having come to know that the accused was with the deceased, they immediately nabbed him.

24. Relying on the depositions as they emerge before us, we can safely say that the accused is the person to whom the entire circumstantial chain points out. The accused was said to have moved with the deceased from the place of residence of the deceased. His mala fide intention for giving wrong message that the deceased had eloped to Delhi and that recovering the dead body at his instance from the place which would be known to accused and accused alone also reinforces our belief that the judgment of the Trial Court does not require any interference except on the quantum of punishment which requires to be clarified.

25. We are unable to accept the submission of Sri Noor Mohammad that this is a case of no evidence. The chain of circumstances cannot be said to be broken. We have considered the statement about the matter which discovers the dead body which was made by the accused voluntarily. Reliance can be placed on the recent decision of the Apex Court in **Somasundaram Vs. State, (2020) 7 SCC 722.**

26. We are conscious that the statement made before the police authorities is not acceptable but in view of the fact that the place of incidence and the place where the dead body was kept/hidden, the recovery of weapon, it proves that the accused and accused alone was the perpetrator of the crime. It cannot be said that the Trial Court has committed any error in convicting the appellant/original accused.

27. From the depositions of P.W.1, the prosecution is successful in establishing and proving that it was the accused who had moved with the deceased and that the dead body was that of the deceased whose missing report was filed.

28. In the final analysis, the prosecution has been successful in proving the complete chain of events which can lead to the only conclusion that it was the accused alone and alone who had caused the death of the deceased.

29. This takes us to the question of punishment of life in this case mean till the last breath or we can grant what is known as fixed term punishment as discussed by the apex court in the case of **Vikas Yadav Vs. State of U.P, 2016 (9) SCC 541** followed by the undersigned in Criminal

Appeal No. 1839 of 2004 **(Veersen Vs. State of U.P.)** decided on 20.9.2017. We are even fortified in our view by the decision of the Apex Court in Criminal Appeal No.160 of 2006 **(G.V. Siddaramesh Vs. State of Karnataka)** dated 5.2.2010.

30. The accused is in jail since more than 10 years, we give him fixed term conviction for 14.6 years under Section 302 of I.P.C. Fine awarded by the Trial Judge is maintained. Conviction under Section 364 of I.P.C. and 201 of I.P.C. are maintained.

31. In view of the above, this appeal is partly allowed.

(2021)02ILR A444
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 05.02.2021

BEFORE

THE HON'BLE RAMESH SINHA, J.
THE HON'BLE DINESH KUMAR SINGH, J.

Criminal Appeal No. 2484 of 2007
&
Criminal Appeal No. 2548 of 2007

Daya Ram & Anr. ...Appellants
Versus
State of U.P. ...Respondent

Counsel for the Appellants:
Vishal Chaudhary, Ishan Baghel, M.S. Khan

Counsel for the Respondent:
G.A.

A. Criminal Law - Code of Criminal Procedure,1973-Section 374(2) - Indian Penal Code,1860-Section 302/34-application-allowed-appellants /accused blow lathis upon the deceased while the accused were hammering a wooden stake on the land with an intention to forcibly take possession of land belonging to the deceased family-it was a sudden incident over the trivial matter-no prior mediation or meeting of mind between the accused-the fatal lathi blow on head of the deceased was given by only one appellant, while other injuries were simple in nature-trial court erred that the accused with common intention assaulted the deceased-the lathi blow was not with an intention to cause death-all the three accused can not held guilty for same offence but each one be guilty for injury individually caused by him as per section 38 of IPC-where several persons are engaged or concerned in the commission of a criminal act, they may be guilty of different offences by means of that act-accused already undergone sentences more than 14 years-they are directed to be set-free.(Para 2 to 10)

The appeal is allowed. (E-5)

List of Cases cited:-

1. Nathi Lal Vs St. of U.P. (1990) Supp SCC 145

2. St. of M.P. Vs Mishrilal (Dead) & ors. (2003) 9 SCC 426

3. Virsa Singh Vs St. of Punj.(1958) AIR SC 465

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

1. **Appeals**

1.1 The instant criminal appeals under Section 374 (2) CrPC have been preferred by the three accused-appellants, namely Daya Ram, Jay Singh and Mahendra alias Madan against the impugned judgment and order dated 20/21.09.2007 passed by the Additional Sessions Judge/F.T.C.-VIII, Lucknow in Sessions Trial No.0193 of 2003, arising out of Crime No.0149 of 2002 under Sections 307, 302, 504 and 506 IPC lodged at Police

Station Bakshi-Ka-Talab, District Lucknow.

The trial Court did not find charge under Section 504 and 506 IPC read with Section 34 IPC proved against all the appellants beyond reasonable doubt and, therefore, acquitted them from the charges under the said sections. However, the appellants have been convicted under Section 302 IPC read with Section 34 IPC and, sentenced for life with fine of Rs.1,000/- each and, in the event of non-payment of fine, one month's additional simple imprisonment.

2. **Prosecution Case**

2.1 On the basis of written complaint, Exhibit Ka-1, from Murli Prasad, complainant, PW-2, FIR, Exhibit Ka-12, at Case Crime No.0149 of 2002 came to be registered on the same day i.e. 22.07.2002 at 10 a.m. under Sections 307, 504 and 506 IPC at Police Station Bakshi-Ka-Talab, District Lucknow.

2.2 As per the FIR, on 22.07.2020, at 6 a.m., the appellants, Daya Ram and, his two sons Mahendra alias Madan and Jay Singh, with an intention to forcibly take possession of land of Rakesh Kumar, were hammering a wooden stake *(Khoota)* on the land; when Rakesh Kumar objected then all the three appellants attacked Rakesh Kumar with *lathis*; appellant Mahendra hit *lathi* blow on the head of Rakesh, as a result thereof, he sustained serious injury and, fell down; he started vomiting and became unconscious; on raising alarm by Amar Singh, brother of Rakesh, sister Manorama and many villagers came running to the place of incident, then the accused-appellants fled away from the scene of occurrence, extending threat; the accused blocked the road and, therefore, the complainant could reach to the police station with Rakesh Kumar after he found the path clear; injured Rakesh Kumar was sent to the Primary Health Center from-where he was sent to Balrampur Hospital, Lucknow where he died on the same day at 3.50 p.m.; after his death, the offence under section 307 IPC was converted under Section 302 IPC.

2.3 After inquest proceedings, the postmortem of the cadaver of the deceased was conducted on 23.07.2020 at 2 p.m.; as per the postmortem report, Exhibit Ka-4; the following ante-mortem injuries were found on the body of the deceased:-

i. Abraded contusion 3cm x 1cm on the right side forehead, 2cm above right eyebrow:

ii. Contusion 12cm x 8cm on the right side head just above right ear;

iii. Abraded contusion 3cm x 1cm on the front of right shoulder;

iv. Contusion 7cm x 5cm on the front of right knee;

v. Abraded contusion 1cm x 1cm on the back of left elbow;

vi. Abraded contusion 5cm x 2.4cm on the front and mid of left leg;

The cause of death was coma due to antemortem head injury.

3. **Charges**

3.1 The trial Court vide order dated 03.04.2003 framed charges against all three accused-appellants under Sections 302, 504 and 506 read with Section 34 IPC which the accused-appellants denied and claimed trial.

4. **Prosecution Evidence**

4.1 The prosecution, to prove its case, examined Amar Singh as PW-1, Murli Prasad as PW-2, Jaswant Singh as

PW-3, Ram Shanker as PW-4, Dr. H.N. Tripathi as PW-5, S.I. Shyam Bhadur Singh as PW-6, S.I. Suresh Chandra as PW-7, Jeeut Ram as PW-8, Vijay Narain Pandey as PW-9, Dr. Jamshed Nazim as PW-10 and Constable Priy Kumar Tripathi as PW-11.

4.2 Besides oral testimony, documentary evidence i.e. written report as Exhibit Ka-1, inquest report as Exhibit Ka-2, recovery memo of *lathi* as Exhibit Ka-3, postmortem report as Exhibit Ka-4, challan lash as Exhibit Ka-5, photo lash as Exhibit Ka-6, sample sealed as Exhibit Ka-7, site-plan as Exhibit Ka-8, recovery memo of plan and blood stained earth as Exhibit Ka-9, charge-sheet as Exhibit Ka-9, forensic report/injury report as Exhibit Ka-11, F.I.R as Exhibit Ka-12 and general diary as Exhibit Ka-13 were submitted.

4.3 PW-1, Amar Singh stated that he along with his wife and sister, Manorama were inside the house at the time of incident; the accused were hammering the wooden stake on land belonging to his family to forcibly occupy it and, when his brother, Rakesh Kumar objected, all the three accused started assaulting him by *lathis*; hearing the commotion/noise, he with his sister came at the place of incident and, when the witnesses and his sister tried to save the deceased, the accused threatened them also. In his cross-examination, he said that he reached at the place of incident after hearing the noise/commotion; crowd had already got collected; when he reached at the place of incident, the deceased told him about the injuries caused to him but he could not see any injury from his eyes; he also said that Jaswant, PW-3, another brother of the deceased, had reached before him.

4.4 Thus, PW-1 was not present at the time when deceased received injuries allegedly by the accused; he said that he, deceased Rakesh, Jaswant and sister Manorama were unarmed and, they did not assault anyone; he denied the suggestion that they had assaulted Shanti, Neetu and Jay Singh by *lathi* and *danda* and Murli was also involved in assault; he said that Murli Prasad came at the place of incident at 8.a.m; Rakesh and Jaswant were taken home; the deceased could not be taken to any Doctor immediately as the accused had encircled the house of the deceased; after the incident, Murli Prasad came on a motorcycle with Subedar Singh.

4.5 This witness had denied the suggestion that the deceased wanted to take possession of the land of Daya Ram and when Jay Singh, Shanti and Neetu objected, the deceased, this witness and his brother, Jaswant and Murli Prasad assaulted Shanti, Neetu and Jay Singh; and deceased Rakesh received injuries in self-defense. He also denied the suggestion that any case was registered against him and other family members.

4.6 PW-2, Murli Prasad is brother-in-law of the deceased. He said that on the date and time of the incident, he was present at his shop at Rampur Behda Crossing and, his wife was at his in-laws' place; he received information at quarter to 8 that a fight had taken place between Daya Ram, Amar Singh, Rakesh and Jaswant and, he was called for. He reached at the place of incident and, found the condition of Rakesh deteriorating; Rakesh told him that he had received serious injuries on his head and, he was having severe unbearable pain. He further said that Rakesh told him that Daya Ram, Jaswant and Mahendra had assaulted him.

This witness is not an eyewitness, however, he said that when he took Rakesh to the police station, Rakesh was in senses. He proved the complaint and, his signatures

on the inquest. He also said that *lathi* was recovered in his presence on pointing out of accused Mahendra. He said that the investigating officer prepared recovery memo, Exhibit Ka-3. He denied the suggestion that he, Rakesh, Amar Singh, and Jaswant had assaulted Daya Ram's wife, Shanti, his daughter Neetu and son Jay Singh and, after assaulting them, he came to his village.

4.7 PW-3, Jaswant, in his statement, stated that he was present at the time of incident along with his brother Rakesh Kumar; the accused were hammering the wooden stake on land belonging to them and, when they objected, the accused assaulted the deceased by *lathi*; when he tried to save his brother, he was also assaulted; when the deceased and he raised alarm, then his brother Amar Singh, sister Manorama came running and many villagers also got collected; the accused fled away from the scene of occurrence, extending threat.

This witness accepted that he was admitted on bail by the Court in the case registered by Daya Ram etc against them; he along with his brother Amar Singh and Murli Prasad were admitted on bail in N.C.R. No. 099 of 2002. However, he denied the suggestion that he and others named in the said case had assaulted Shanti Devi, Neetu and Jay Singh and, that he did not receive any injury and, his medical examination was not conducted.

4.8 PW-5, Ram Shanker, villager is said to be an independent witness. He said that he witnessed deceased Rakesh, Madan and Daya Ram quarrelling and abusing each other; he said that Rakesh was hammering wooden stake and for this reason quarrel was taking place. Daya Ram was objecting, but Rakesh was not stopping then Daya Ram, Mahendra and Jay Singh assaulted Rakesh by *lathis*. Mahendra gave *lathi* blow on the head of Rakesh; Rakesh fell down, started vomiting and became unconscious; at that time, many villagers came; Amar Singh and his sister Manorama also came; the accused hit Amar Singh and threatened to hit Manorama as well; when this witness tried to save Rakesh, he was also threatened, when Jagdev etc. came then only all the accused fled away from the scene of occurrence. This witness, however, said that when he reached to the shop of Vinod, he heard noise/commotion; he purchased *"Bidi'* from the shop, but the noise increased, and many people started running towards the house of Daya Ram. It was 6 a.m., he also reached running; all the family members of Daya Ram were present so as the family members of deceased Rakesh; when he reached, both the sides were spinning *lathis* and, he could not see whose *lathi* hit whom; when he reached, he could notice that Rakesh had received injuries; he did not see Shanti, Neetu and Jay Singh in injured condition; he did not see Amar, Rakesh, Jaswant and Murli hitting Jay Singh.

4.9 PW-5, Dr. H.N. Tiwari, who conducted the postmortem on the cadaver of the deceased; he proved the postmortem report and, said that ecchymosis was present under all the injuries; there was a linear fracture of right temporal and occipital bone on right extradural hematoma was present underneath fracture and subdural hematoma was present in all over mind.

4.10 PW-6, S.I., Shyam Bahard Singh prepared the inquest report.

4.11 PW-7, Suresh Chandra had recovered *lathi* used by Mahendra on his pointing out.

4.12 PW-8, Jeetut Ram was investigating officer of the offence initially, who prepared the site-plan, Exhibit Ka-8 and, prepared the report of taking sample of

plain and blood-stained earth, Exhibit Ka-9. He said that on 22.07.2002, an N.C.R. No.099 of 2002 came to be registered at police station on the complaint of wife of Daya Ram and, he conducted the investigation of the said N.C.R. as well. The charge-sheet in the said offence was submitted against Amber Lal, Tanna alias Jaswant and Murli after permission from the Court. This was a cross case of the case against accused.

This witness said that he prepared the site-plan on pointing out of the witness, but he did not mention the name of the witness. In his report, he also said that he did not find any wooden stake fixed on the earth at the place of incident. He only prepared one *Parcha* of the case diary. He said that the accused Madan alias Mahendra was employed as home-guard. Shanti, wife of Daya Ram, his daughter Neetu, son Jay Singh had received injuries in the incident.

4.13 PW-9, Vijay Narain Pandey said that initially the investigation of the offence registered at Case Crime No.0149 of 2020 was given to S.I., Jeeut Ram, however, after death of Rakesh, he took over the investigation and submitted the charge-sheet.

After looking at Paper No.7/2 in Sessions Trial No.635 of 2004, this witness said that this report was registered on 22.07.2002 at 8.10 a.m. at the police station and, the referral letter for examining the injured in the case was prepared at the police station, which was filed in Sessions Trial No.635 of 2004.

4.14 PW-10, Dr. Jamshed Nazim examined Jaswant Singh. He said that the injured was brought to him by home-guard, Hanuman Prasad on 24.07.2002 at Community Health Center, Bakshi-Ka-Talab and following injuries were found on his body:-

i. 1.5cm x 0.5cm abrasion on forehead 3.0cm above left eyebrow clot present;

ii. Abrasion 2.5cm x 1.0 cm in size on left side of face, 4.0cm from ingress of left ear clot present;

iii. Abraded contusion 9cm x 4cm on right side of back, 3.0cm medial to left shoulder joint clot present;

Injury nos. 1, 2 and 3 could have been caused by blunt and hard object. No x-ray of Jaswant was received and, therefore, supplementary report was not prepared by him.

4.15 PW-11, Constable Priy Kumar Tripathi said that on 22.07.2020 he was posted as Constable *(Mohrir)* and, he made the entry of the report given by complainant, Murli.

5. **Defense Case**

5.1 The appellants, in their statements recorded under Section 313 CrPC, denied the incident. Appellant, Mahendra said that he did not hit Rakesh Kumar and, a false case was registered against him and other accused; he also denied the recovery of *lathi* on his pointing out and, said that he was on home-guard duty in Traffic Police Line, Sadar, Lucknow on 22.07.2002; he said that he was on duty since 4.30 a.m; when he was coming back after performing his duty, the police of Bakshi-Ka-Talab arrested him.

5.2 Appellant, Daya Ram, in his statement under Section 313 CrPC, said that he was not present at the place of incident, he had been falsely implicated; on 21.07.2020, he went to Manshapurwa, District Barabanki as his grand-son was ill and, after receiving the information regarding the incident, he came back on the next day i.e. 22.07.2002.

5.3 Appellant, Jay Singh had denied the incident and, said that on their land, Murli, Amber, Jaswant and Rakesh were collecting earth; when he objected, these persons attacked him; he squabbled with Rakesh; Murli hit a *lathi* blow, aiming at him, but he could get aside and, this *lathi* hit Rakesh; thereafter, he went to police station to lodge an FIR; he also said that his mother and sister had also received injuries.

6. **Evidence of the Defense**

6.1 The appellants, in their defense examined Ram Naresh as DW-1. He said that on the date of incident, he witnessed that Jay Singh, his sister and mother had received injures; hearing noise/commotion, he reached at the place of incident; Daya Ram's wife told him that Daya Ram had gone to Manshapurwa and, requested him to inform about the incident. He said that Manshapurwa is 30-32 kilometers where Daya Ram's daughter was married and, he went on a motorcycle to give information to him; he reached Manshapurwa at 9 p.m; when he reached at the place of incident, he saw Jay Singh, his sister and mother in injured condition, but he did not take them to the hospital; he denied the suggestion that he was not present at the time and place of the incident.

6.2. DW-2, Gulab Singh deposed that on 22.07.2020, he was posted as general diary writer in Traffic Police Line, Sadar, Cantt., Lucknow; he filled the home-guard duty register and home-guard, Mahendra Pal was also sent for duty for traffic management by the said G.D; he verified his handwriting and signature on the G.D. He said that Mr. Ramdhiraj Singh, Platoon Commander had taken the attendance; Mahendra, home-guard was not physically present before him to mark his presence.

6.3 DW-3, Ram Dhari Singh, Company Commander stated that Mahendra Pal was working as home-guard and, on 22.07.2002, he noted his presence at Report No. 14 at 7.10 a.m. in his handwriting and signature. The relevant page was submitted, which was marked as Exhibit Kha-2. He said that Mahendra Pal was present on duty. He also said that he recognized every home-guard under him, but after allotting duty, he would not go for checking.

7. **Impugned Judgment**

7.1 The trial Court held that the Sessions Trial No.635 of 2004 'State Vs. Amber Lal and others, under Sections 323 and 504 IPC lodged at Police Station Bakshi-Ka-Talab, Lucknow, which is a cross-case, had not been treated to be a cross-case by the prosecution. As the certified copies of the documents of the said case were not been filed in the present case, evidence of the Sessions Trial No.635 of 2004 would not be read in this case under the Evidence Act and, both the cases would be decided independently.

7.2 The trial Court has not believed the defense case that when the deceased, Rakesh, Murli, Jaswant and Amber Lal were hitting Neetu, Shanti and Jay Singh and, Murli tried to hit Jay Singh by Lathi, but Jay Singh could ducked and the *lathi* blow hit Rakesh on the ground that five other injuries on the body of the deceased would prove that more than one person had assaulted the deceased, Rakesh. The trial Court has believed the presence of witness, Jaswant on the ground that the defense case was that Murli, Amber, Jaswant and Rakesh had assaulted Shanti, Neetu, Jay Singh by *lathi* and, therefore, it

could not be said that he was not present at the place of incident. The trial Court, however, has not believed the injuries on this witness as first he went Indaura Hospital on the date of incident, but he got himself examined at the Community Health Center, Bakshi-Ka-Talab on 24.07.2020 and, it appears that the Doctor at Indaura Hospital was not ready to prepare a false medical report and, therefore, on 24.07.2002, he was examined at Community Health Center, Bakshi-Ka-Talab and, the injury report was prepared. The trial Court has also concluded that to give credence to the incident, a false medical report of witness, Jaswant got prepared, but in fact, he did not receive any injury. The trial Court in the impugned judgment has held that since the Sessions Trial No.635 of 2004 is not a cross-case, it is not to be decided that who was the aggressor. Believing in the testimony of the independent witness, Ram Shanker, who said that Rakesh was hammering a wooden stake, trial Court has held that Rakesh had tried to hammer the wooden stake, but the accused had assaulted him by *lathi* as a result thereof he had died. The trial Court has not believed the defense case and, has held that DW-1, Ram Naresh and DW-2 and DW-3 had given false evidence to save their colleagues.

8. **Submissions**

8.1 Heard Mr. I.B. Singh, learned Senior Advocate assisted by Mr. Sujeet Kumar Singh, appearing for the appellants, and Mr. S.P. Singh, learned Additional Government Advocate, appearing for the respondent-State.

8.2 Mr. I. B. Singh learned Senior Advocate has argued that the trial Court had committed a gross error of law and fact in not treating the Sessions Trial No.635 of 2004 as a cross-case. He submits that from the statement of the investigating officer, Jeeut Ram, it is clear that the Sessions Trial No.635 of 2004 was a cross-case and for that reason the trial of both the cases were conducted by the same Court and, if it was not a cross-case then the Sessions Court could not have conducted the trial as the offence is triable by Magistrate. He has submitted that if the trial of both the cases were conducted together, there was no requirement of filing certified copies of evidence of one case in another case inasmuch as the whole evidence would be available before the Court. He has further submitted that when the independent prosecution witness, PW-4 in his statement had said that it was Rakesh, deceased, who was hammering wooden stake then the trial Court was required to determine that which party was aggressor, particularly, when both the parties had assaulted each other, and injuries were on both sides. He has further submitted that this has led to a miscarriage of justice, which has resulted into wrong conviction and sentence of the appellants for offence under Section 302 IPC

8.3 On behalf of the appellants, the second limb of argument of the learned Senior Advocate is that there was only one *lathi* blow on the head of the deceased, which proved fatal. The role of hitting the *lathi* blow on the head of the deceased had been assigned only to appellant, Mahendra alias Madan. The deceased was conscious throughout. As per the prosecution case, he was taken home from the place of incident and brought to the police station from where he was referred for medical examination and, thereafter referred to the Balrampur Hospital where he died in the evening. He has further submitted that there was no intention for causing death of deceased, Rakesh, even if the prosecution

case is believed. The other injuries are on non-vital parts which are allegedly caused by two other appellants, namely, Daya Ram and Jay Singh. It was possible that if the deceased was given timely treatment, he could have been saved, but delay in taking him to the hospital, not providing medical treatment in time had resulted the death of the deceased. He has further submitted that both the sides had assaulted each other. The trial Court itself has not believed the injuries allegedly suffered by witness Jaswant, whereas on the accused side three persons had received injuries.

8.4 The learned Senior Advocate has further submitted that considering the aforesaid facts and the evidence, the trial Court ought not have convicted all the three appellants under Section 302 IPC inasmuch as per prosecution case, only appellant Mahendra had given a *lathi* blow on the head of the deceased. Even against appellant Mahendra the offence under Section 302 IPC is not made out and, at the maximum, it would be an offence under Section 304 Part-II IPC and against two other appellants only the offence under Section 323 IPC is proved if the prosecution case is totally believed. The trial Court has committed a gross error in convicting all the three appellants and sentencing them for life for offence under Section 302 IPC. The learned counsel has further submitted that the appellant Mahendra has already undergone more than 14 years of imprisonment as he was denied bail by this Court and he has remained in jail throughout. Considering injury and evidence, conviction of appellant Mahendera is required to be altered under Section 304 Part-II IPC.

8.5 On the other hand, Mr. S.P. Singh, learned Additional Government Advocate, has supported the impugned judgment of the trial Court and, submitted that the accused had knowledge that the injuries caused by them would result in death of the deceased as the injuries caused to the victim were sufficient in the ordinary course to cause death. The injury on the head of the deceased was fatal one and, was inflicted with an intention and knowledge to cause death of the deceased. The deceased had died on the same day within a few hours and, therefore, it cannot be said that the accused did not know that the injuries caused by them would result death of the deceased. He has further submitted that this was not an accidental injury and, *lathi* blow, on head, was intentionally given by the accused. He has further submitted that the trial Court has rightly convicted and sentenced all the three accused for offence under Section 302 IPC inasmuch as with common intention all the three accused had assaulted the victim and injuries caused by them had resulted in death of the deceased.

9. **Analysis**

9.1 We have considered the evidence on record which has been extracted herein above and arguments advanced on behalf of the appellants as well as the State.

9.2 The first issue in the present appeal is whether Sessions Trial No. 635 of 2004 was a cross-case of the present case. The Supreme Court in the case of ***Nathi Lal Versus State of U.P., 1990 Supp SCC 145*** had laid down the guidelines for trying two cases regarding the same incident as cross-cases. In the present case, the trial Court had assumed the jurisdiction in the case of Sessions Trial No.635 of 2004 only on the ground that it was a cross-case of the present case. Otherwise, offence under Sections 323 and 504 IPC is triable by Magistrate. The charge-sheet was filed in

the said case after taking permission under Section 155(2) CrPC and, the prosecution treated it to be a cross-case, but the trial Court unfortunately has held that the prosecution did not consider the Sessions Trial No.635 of 2004 as a cross-case.

9.3 The Supreme Court in the case of State of ***State of M.P. Versus Mishrilal (Dead) and others (2003) 9 SCC 426*** has held that the cross-cases should be tried together by the same Court irrespective of nature of offence involved to avoid conflicting judgments over the same incident. Paragraph-8 of the aforesaid judgment is extracted herein-blow:-

8. In the instant case, it is undisputed, that the investigating officer submitted the challan on the basis of the complaint lodged by the accused Mishrilal in respect of the same incident. It would have been just, fair and proper to decide both the cases together by the same court in view of the guidelines devised by this Court in Nathilal's case. The cross- cases should be tried together by the same court irrespective of the nature of the offence involved. The rational behind this is to avoid the conflicting judgments over the same incident because if cross cases are allowed to be tried by two courts separately there is likelihood of conflicting judgments. In the instant case, the investigating officer submitted the challan against both the parties. Both the complaints cannot be said to be right. Either one of them must be false. In such a situation, legal obligation is cast upon the investigating officer to make an endeavor to find out the truth and to cull out the truth from the falsehood. Unfortunately, the investigating officer has failed to discharge the obligation, resulting in grave miscarriage of justice.

9.4 It would have been an appropriate course to remand the matter back to the trial Court on this short issue, but considering the long time period and, the fact that the appellant Mahendra alias Madan has already undergone more than 14 years sentence, we are not sending the case back to the trial Court.

9.5 The second issue, which arises for our consideration, is whether the conviction of all the three appellants under Section 302 IPC read with Section 34 IPC would be justified on the facts, circumstances and evidence on record. It was a sudden incident, which took place over a trivial matter. There was no prior mediation or meeting of mind between the accused. As per the prosecution case, the fatal *lathi* blow on head of the deceased was given by appellant, Mahendra. Other injuries found on the body of the deceased were simple in nature. Therefore, the trial Court has erred to conclude that the accused with a common intention of committing murder had assaulted the deceased. There is nothing on record from which it can be pointed that the accused-appellants had arrived at the place of incident with common intention to kill the deceased and, therefore, the conclusion of the trial Court is wholly incorrect and unjustified. The Supreme Court in the case of ***Virsa Singh Versus State of Punjab*, AIR 1958 SC 465** has held that for conviction under Section 302 IPC the injury must have been caused with an intention to cause death and it should be proved that the injury found is sufficient to cause death in ordinary course of nature, but in this connection, it should also be shown that such a injury was intended to be inflicted. For convicting an accused under Section 302 IPC, there should be fatal injury and intention to inflict a particular body injury. Paragraphs 12, 13, 14, 15, 16, 17, 18 and 19 of the said judgment are extracted herein below:-

12. Once that is found, the enquiry shifts to the next clause- "and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death." The first part of this is descriptive of the earlier part of the section, namely, the infliction of bodily injury with the intention to inflict it, that is to say, if the circumstances justify an inference that a man's intention was only to inflict a blow on the lower part of the leg, or some lesser blow, and it can be shown that the blow landed in the region of the heart by accident, then, though an injury to the heart is shown to be present, the intention to inflict an injury in that region, or of that nature, is not proved. In that case, the first part of the clause does not come into play. But once it is proved that there was an intention to inflict the injury that is found to be present, then the earlier part of the clause we are now examining-" and the bodily injury intended to be inflicted" is merely descriptive. All it means is that it is not enough to prove that the injury found to be present is sufficient to cause death in the ordinary course of nature; it must in addition be shown that the injury is of the kind that falls within the earlier clause, namely, that the injury found to be present was the injury that was intended to be inflicted. Whether it was sufficient to cause death in the ordinary course of nature is a matter of inference or deduction from the proved facts about the nature of the injury and has nothing to do with the question of intention.

13. In considering whether the intention was to inflict the injury found to have been inflicted, the enquiry necessarily proceeds on broad lines as, for example, whether there was an intention to strike at a vital or a dangerous spot, and whether with sufficient force to cause the kind of injury found to have been inflicted. It is, of course, not necessary to enquire into every last detail as, for instance, whether the prisoner intended to have the bowels fall out, or whether he intended to penetrate the liver or the kidneys or the heart. Otherwise, a man who has no knowledge of anatomy could never be convicted, for, if he does not know that there is a heart or a kidney or bowels, he cannot be said to have intended to injure them. Of course, that is not the kind of enquiry. It is broad-based and simple and based on commonsense: the kind of enquiry that "twelve good men and true" could readily appreciate and understand.

14. To put it shortly, the prosecution must prove the following facts before it can bring a case under Section 200 "thirdly".

15. First, it must establish, quite objectively, that a bodily injury is present.

16. Secondly, the nature of the injury must be proved; These are purely objective investigations.

17. Thirdly, it must be proved that there was an intention to inflict that particular bodily injury, that is to say, that it was not accidental or unintentional, or that some other kind of injury was intended.

18. Once these three elements are proved to be present, the enquiry proceeds further and.

19. Fourthly, it must be proved that the injury of the type just described made up of the three elements set out above is sufficient to cause death in the ordinary course of nature. This part of the enquiry is purely objective and inferential and has nothing to do with the intention of the offender.

10. **Conclusion**

10.1 Considering the aforesaid aspects, evidence on record and

submissions advanced on behalf of the accused-appellants and by the learned Additional Government Advocate, we are of the view that it cannot be concluded that all the three appellants had common criminal intention to cause death of the deceased. The *lathi* blow on head was allegedly given by appellant, Mahendra, but it was not with an intention to cause death of the deceased. When there was no common intention amongst the accused for causing injuries sustained by the deceased, all the three accused cannot be held guilty for same offence but each one be guilty for injury individually caused by him. Section 38 of the IPC reads as under:-

38. Persons concerned in criminal act may be guilty of different offences.--*Where several persons are engaged or concerned in the commission of a criminal act, they may be guilty of different offences by means of that act.*

Illustration

A attacks Z under such circumstances of grave provocation that his killing of Z would be only culpable homicide not amounting to murder. B, having ill-will towards Z and intending to kill him, and not having been subject to the provocation, assists A in killing Z. Here, though A and B are both engaged in causing Z's death, B is guilty of murder, and A is guilty only of culpable homicide.

10.2 In view of the aforesaid discussions, we set-aside the conviction of the accused-appellants, Daya Ram and Jay Singh, under Sections 302 IPC read with Section 34 IPC and, convict each of them under Section 323 IPC. They are sentenced to the sentence already undergone by them. We also set-aside the conviction of the accused-appellant, Mahendra alias Madan under Section 302 IPC read with Section 34 IPC and, convict him under Section 304 Part-II IPC. Accused-appellant, Mahendra alias Madan is sentenced to the sentence already undergone by him, which is more than 14 years, as he was denied bail by this Court vide order dated 9th April, 2008 after his conviction by the trial Court.

10.3. Thus, both the appeals are **allowed partly.**

10.4 Appellants Daya Ram and Jay Singh are on bail. They need not to surrender. Their bail bonds are cancelled and sureties are discharged.

10.5 Appellant Mahendra alias Madan, who is in jail, is directed to be set-free forthwith unless otherwise wanted in any other case.

10.6 Keeping in view the provisions of Section 437-A CrPC, accused-appellants, Daya Ram and Jay Singh are directed to furnish fresh personal bonds before the trial Court in terms of Form-45 prescribed in CrPC of a sum of Rs.25,000/- each and, two reliable sureties, each in the like amount. Likewise, accused-appellant, Mahendra alias Madan shall furnish a personal bond of Rs.25,000/- and two reliable sureties, each in the like amount within ten days from his release.

10.7. The personal bonds and sureties bonds filed by the accused-appellants shall be effective for a period of six months along with an undertaking that in the event of filing of special leave petition(s) against the instant judgment and/or for grant of leave, the aforesaid accused-appellant(s), on receiving notice(s) thereof, shall appear before the Supreme Court.

10.8 Let a copy of this judgment, along with the trial Court record, be sent to the trial Court forthwith for compliance.

(2021)02ILR A455
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 29.01.2021

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE GAUTAM CHOWDHARY, J.

Criminal Appeal No. 3310 of 2012
&
Criminal Appeal Defective No. 8 of 2013

Bhujveer & Anr. ...Appellants (In Jail)
Versus
The State of U.P. ...Opposite Party

Counsel for the Appellants:
Sri Yogesh Kumar Srivastava, Sri Noor Mohammad, Sri Satish Dwivedi, Sri Mohit Gautam, Sri Rajesh Kumar Dubey, Sri K.S. Tiwari, Sri Vikram Singh

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

A. Criminal Law -Code of Criminal Procedure,1973-Section 374(2) - Indian Penal Code,1860-Sections Section 302/34-challenge to- conviction-modification of sentence-deceased was beaten and set ablazed- role of the appeallants are clear from the dying declaration and other records-However, deceased had survived for around 6 days ultimately died of septicimia- appellants held guilty u/s 304 Part-I IPC not u/s 302/34 IPC as the case attracted the exception 1 of Section 300 IPC-(Para 1 to 27)

B. In the instant case, it appears that the death caused by the accused was not premeditated, accused had no intention to cause death of deceased, the injuries were though sufficient in the ordinary course of nature to have caused death, accused had no intention to do away with deceased, hence, the instant case falls under the exception 1 to Section 300 IPC.(Para 22)

The appeal is partly allowed. (E-5)

List of Cases cited:-

1. R.Rachaiah Vs Home Secretary ,(2016) Supreme (SC) 383

2. Maniben Vs St. of Guj., (2009) LawSuit (SC) 1380

3. Bengai Mandal@ Begai Mandal Vs St. of Bih., (2010) 1 Supreme 49

4. Chirra Shivraj Vs St. of A. P., (2010) 1 LawSuit (SC) 843

5. Smt. Rama Devi @ Ramakanti Vs St. of U.P. Crl. Appl. No. 1438 of 2010

6. Banwari & anr. Vs St. of U.P. Crl. Appl. No. 26 of 2007

7. Pramod Kumar Vs St. of U.P. Crl. Appl. No. 318 of 2015

8. Tukaram & ors. Vs St. of Mah.,(2011) 4 SCC 250

9. B.N. Kavatakar & anr. Vs St. of Kar. (1994) SUPP (1) SCC 304,

10. Veeran & ors. Vs St. of M.P. (2011) 5 SCR 300

11. Gautam Manubhai Makwana Vs St. of Guj., Crl. Appl. No. 83 f 2008

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

1. Heard Sri Yogesh Kumar Srivastava, assisted by Sri Noor Mohammad, learned Advocates for the appellants and learned A.G.A. for the State.

2. Both these appeals challenge the judgment and order dated 26/27.7.2012

passed by Special Judge (D.A.A.) Etah in Sessions Trial No.311 of 2006 convicting and sentencing the appellants in both the appeals under Section 302 read with Section 34 of Indian Penal Code, 1860 (hereinafter referred to as 'I.P. Code') for life imprisonment with fine of Rs.7,000/- and, in case of default of payment of fine, further to undergo imprisonment for six months.

3. Before we go to the facts, we with a burning heart wish to mention that the subsequent judge who convicted all the three accused by invoking Section 302 read with Section 34 of IPC and exonerating them under Sections 498A and Section 304 B can be said to have committed an irregularity as after all the witnesses had turned hostile and the statement of the accused were recorded under section 313 CrPC, the learned Judge, all of a sudden, without any application, either by State or by complainant, thought it fit that accused have committed what he considered to be murder and thereafter charged the accused under Section 302 read with Section 34 of I.P.C. and convicted the accused under the same offence.

4. Reference to a recent decision of the Apex Court in **R. Rachaiah Vs. Home Secretary, 2016 0 Supreme (SC) 383** can be made. The learned judge ought to have followed Section 216 and 217 of Criminal Procedure Code 1973 which has not been done. The Apex Court in **R.Rachaiah (supra)** has considered that the trial to vitiate and has held that conviction under Section 302 I.P.C., would be illegal.

5. In our case, appellants were originally charged with Sections 498A, and 304 B and from 2006 to 2012, they were tried and they were made to understand that they are being tried for commission of offence under Sections 498A, and 304 B of I.P.C. Can change of Judge change the course of punishment? That has exactly what has happened and that has been submitted by the counsel for the appellant.

6. Accused are in jail for more than 14 years. The state of affairs in the state of UP is also alarming. The case was not so grave that the state could not have considered this case for remission under section 433 and 434 of Cr.P.C. after a period of incarceration of 14 years.

7. With this prelude and anguish, we start to threadbare discuss the matter.

8. At the outset, the learned counsel for the appellant conveyed to us that he does not wish to now go to the technicalities in the prosecution as his clients have undergone the agony of incarceration for more than 15 years. The incident occurred on 27.11.2005 and the accused are in jail since 19.12.2005.

9. If we look at any other angle, no case for Section 302, IPC is made out in view of the several authoritative pronouncements which go to show that death of deceased due to septicemia will not take us beyond Section 304 II.

10. Brief facts as culled out from the record are that the deceased was beaten and set ablaze by the appellants on 27.11.2005 at her matrimonial home and she died in the hospital on 3.12.2005 during treatment. A complaint to that effect was lodged which was registered as Case Crime No.0135 of 2005 against the accused-appellants. Dying Declaration of the deceased was recorded in the hospital on the very same day.

11. Investigation was moved into motion and after recording statements of various persons, the Investigating Officer submitted the charge-sheet against Gajendra Singh, Bhujveer Singh, Rajanshree, Bablu, Neeta, Ved Prakash and Suman to the competent court. Ved Prakash and Suman were juvenile hence they were committed to the Juvenile Justice Board.

12. The accused were facing charges which were exclusively triable by the Court of Sessions, hence, the case was committed to the Court of Sessions.

13. On being summoned, the accused pleaded not guilty and wanted to be tried, hence, the trial started and the prosecution examined about 9 witnesses who are as follows:

1	Deposition of Tahsildar Singh	22.1.2007 7.6.2007 1.8.2007	PW1
2	Deposition of Shiv Dhara	15.12.2007 17.3.2008	PW2
3	Deposition of Dr. V.K. Dubey	21.4.2008 17.5.2008	PW3
4	Deposition of S.I. Shyam Babu	28/08/08	PW4
5	Deposition of Tehshildar Ravi Prakash Srivastava	28/08/08	PW5
6	Deposition of S.I. B.L. Yadav	24/09/08	PW6
7	Deposition of Jagveer Singh Tomer	18/10/08	PW7
8	Awadhesh Kumar Singh	18/10/08 20.11.2009	PW8
9	Virendra Singh Yadav	08/03/11	PW9

5. In support of ocular version following documents were filed:

1	Written Report	27/11/05	Ex.Ka.5
2	F.I.R.	27/11/05	Ex.Ka.1
3	Dying Declaration	27/11/05	Ex. Ka. 16
4	Postmortem Report	03/12/05	Ex. Ka. 4
5	Panchayatnama	03/12/05	Ex.Ka.8
6	Charge-sheet	27/11/05	Ex. Ka.13

14. At the end of the trial and after recording the statement of the accused under section 313 of Cr.P.C., and hearing arguments on behalf of prosecution and the defence, the learned Sessions Judge convicted the appellants as mentioned aforesaid. Being aggrieved by and dissatisfied with the aforesaid judgement and order passed by the Sessions Court the appellants have preferred the present appeal.

15. Accused-Gajendra Singh is the husband of deceased, accused-Bhujveer is the elder brother of accused-Gajendra and accused-Rajanshree is the wife of accused-Bhujveer. All the three accused are in jail from the date they are arrested i.e. 19.12.2005 which means that they are in jail for more than 14 years till now without remission. They are alleged to have committed death of wife of Gajendra by setting her ablaze. The accident occurred on 27.11.2005.

16. It is a proved fact that the deceased died out of septicemia. The learned Judge below, very strangely, after recording of evidence, added new charge namely Section 302 read with Section 34 of I.P.C.

17. Learned counsel for the appellants has relied on the decisions in **Maniben Vs. State of Gujarat, 2009 LawSuit (SC) 1380, Bengai Mandal @ Begai Mandal Vs. State of Bihar, 2010 (1) Supreme 49, Chirra Shivraj Vs. State of Andhra Pradesh, 2010 LawSuit (SC) 843**, and the decisions of this High Court in **Criminal Appeal No.1438 of 2010 (Smt. Rama Devi alias Ramakanti Vs. State of U.P.)** decided on 7.10.2017, **Criminal Appeal No.26 of 2007 (Banwari & Another Vs. State of U.P.)** decided on 20.8.2015 and **Criminal Appeal No.318 of 2015 (Pramod Kumar Vs. State of U.P.)** decided on 28.2.2019 so as to contend that life could not be till the last breath and the conviction under Section 302 of I.P.C. is not made out. In alternative, it is submitted that at the most punishment can be under Section 304 II or Section 304 I of I.P.C. If the Court feels, as the accused have been in jail for more than 14 years without remission, they may be granted fixed term punishment of incarceration.

18. It has been vehemently objected by learned A.G.A. for the State. He has taken us through the evidence on record and the manner in which the appellants, husband and his relatives, set ablaze the deceased in the matrimonial home.

19. Considering the evidence of the witnesses and also considering the medical evidence including post mortem report, there is no doubt left in our mind about the guilt of the present appellants. However, the question which falls for our consideration is whether, on reappraisal of the peculiar facts and circumstances of the case, the conviction of the appellant under Section 302 of I.P.C. of the Indian Penal Code should be upheld or the conviction deserves to be converted under Section 304 Part-I or Part-II of the Indian Penal Code. It would be relevant to refer Section 299 of the Indian Penal Code, which read as under:

"299. Culpable homicide: *Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide."*

20. The academic distinction between "murder' and "culpable homicide not amounting to murder' has always vexed the Courts. The confusion is caused, if Courts losing sight of the true scope and meaning of the terms used by the legislature in these sections, allow themselves to be drawn into minute abstractions. The safest way of approach to the interpretation and application of these provisions seems to be to keep in focus the keywords used in the various clauses of Section 299 and 300 of

I.P.Code. The following comparative table will be helpful in appreciating the points of distinction between the two offences.

Section 299	**Section 300**
A person commits culpable homicide if the act by which the death is caused is done-	Subject to certain exceptions culpable homicide is murder is the act by which the death is caused is done.
INTENTION	
(a) with the intention of causing death; or	(1) with the intention of causing death; or
(b) with the intention of causing such bodily injury as is likely to cause death; or	(2) with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused;
KNOWLEDGE	**KNOWLEDGE**
(c) with the knowledge that the act is likely to cause death.	(4) with the knowledge that the act is so immediately dangerous that it must in all probability cause death or such bodily injury as is likely to cause death, and without any excuse for incurring the risk of causing death or such injury as is mentioned above.

21. On overall scrutiny of the facts and circumstances of the present case coupled with the opinion of the Medical Officer and considering the principle laid down by the Apex Court in the Case of **Tukaram and Ors Vs. State of Maharashtra**, reported in **(2011) 4 SCC 250** and in the case of **B.N. Kavatakar and Another Vs. State of Karnataka,** reported in **1994 SUPP (1) SCC 304,** we are of the considered opinion that the offence would be one punishable under Section 304 part-I of the IPC.

22. From the upshot of the aforesaid discussions, it appears that the death caused by the accused was not premeditated, accused had no intention to cause death of deceased, the injuries were though sufficient in the ordinary course of nature to have caused death, accused had no intention to do away with deceased, hence the instant case falls under the Exceptions 1 and 4 to Section 300 of IPC. While considering Section 299 as reproduced herein above offence committed will fall under Section 304 Part-I as per the observations of the Apex Court in **Veeran and others Vs. State of M.P. Decided, (2011) 5 SCR 300** which have to be also kept in mind.

23. We can safely rely upon the decision of the Gujarat High court in **Criminal Appeal No.83 of 2008 (Gautam Manubhai Makwana Vs. State of Gujarat)** decided on 11.9.2013 wherein the Court held as under:

*"12. In fact, in the case of **Krishan vs. State of Haryana reported in (2013) 3 SCC 280**, the Apex Court has held that it is not an absolute principle of law that a dying declaration cannot form the sole basis of conviction of an accused.*

Where the dying declaration is true and correct, the attendant circumstances show it to be reliable and it has been recorded in accordance with law, the deceased made the dying declaration of her own accord and upon due certification by the doctor with regard to the state of mind and body, then it may not be necessary for the court to look for corroboration. In such cases, the dying declaration alone can form the basis for the conviction of the accused. But where the dying declaration itself is attended by suspicious circumstances, has not been recorded in accordance with law and settled procedures and practices, then, it may be necessary for the court to look for corroboration of the same.

13. However, the complaint given by the deceased and the dying declaration recorded by the Executive Magistrate and the history before the doctor is consistent and seems to be trustworthy. The same is also duly corroborated with the evidence of witnesses and the medical reports as well as panchnama and it is clear that the deceased died a homicidal death due to the act of the appellants in pouring kerosene and setting him ablaze. We do find that the dying declaration is trust worthy.

14. However, we have also not lost sight of the fact that the deceased had died after a month of treatment. From the medical reports, it is clear that the deceased suffered from Septicemia which happened due to extensive burns.

15. In the case of the B.N. Kavatakar and another (supra), the Apex Court in a similar case of septicemia where the deceased therein had died in the hospital after five days of the occurrence of the incident in question, converted the conviction under section 302 to under section 326 and modified the sentence accordingly.

15.1 Similarly, in the case of ***Maniben (supra)****, the Apex Court has observed as under:*

"18. The deceased was admitted in the hospital with about 60% burn injuries and during the course of treatment developed septicemia, which was the main cause of death of the deceased. It is, therefore, established that during the aforesaid period of 8 days the injuries aggravated and worsened to the extent that it led to ripening of the injuries and the deceased died due to poisonous effect of the injuries.

19. It is established from the dying declaration of the deceased that she was living separately from her mother-in-law, the appellant herein, for many years and that on the day in question she had a quarrel with the appellant at her house. It is also clear from the evidence on record that immediately after the quarrel she along with her daughter came to fetch water and when she was returning, the appellant came and threw a burning tonsil on the clothes of the deceased. Since the deceased was wearing a terylene cloth at that relevant point of time, it aggravated the fire which caused the burn injuries.

20. There is also evidence on record to prove and establish that the action of the appellant to throw the burning tonsil was preceded by a quarrel between the deceased and the appellant. From the aforesaid evidence on record it cannot be said that the appellant had the intention that such action on her part would cause the death or such bodily injury to the deceased, which was sufficient in the ordinary course of nature to cause the

death of the deceased. Therefore, in our considered opinion, the case cannot be said to be covered under clause (4) of Section 300 of IPC. We are, however, of the considered opinion that the case of the appellant is covered under Section 304 Part II of IPC."

16. In the present case, we have come to the irresistible conclusion that the role of the appellants is clear from the dying declaration and other records. However, the point which has also weighed with this court are that the deceased had survived for around 30 days in the hospital and that his condition worsened after around 5 days and ultimately died of septicemia. In fact he had sustained about 35% burns. In that view of the matter, we are of the opinion that the conviction of the appellants under section 302 of Indian Penal Code is required to be converted to that under section 304(I) of Indian Penal Code and in view of the same appeal is partly allowed.

17. The conviction of the appellants - original accused under Section 302 of Indian Penal Code vide judgment and order dated 19.12.2007 arising from Sessions Case No. 149 of 2007 passed by the Additional Sessions Judge, Fast Track Court No. 6, Ahmedabad is converted to conviction under Section 304 (Part I) of Indian Penal Code. However, the conviction of the appellants - original accused under section 452 of Indian Penal Code is upheld. The appellants - original accused are ordered to undergo rigorous imprisonment for a period of ten years and fine of Rs. 5000/- each in default rigorous imprisonment for six months under section 304 (Part I) of Indian Penal Code instead of life imprisonment and sentence in default of fine as awarded by the trial court under section 302 IPC. The sentence imposed in default of fine under section 452 IPC is also reduced to two months. Accordingly, the appellants are ordered to undergo rigorous imprisonment for a period of ten years and fine of Rs. 5000/-, in default, rigorous imprisonment for six months for offence punishable under section 304(I) of Indian Penal Code and rigorous imprisonment for a period of five years and fine of Rs. 2,000/-, in default, rigorous imprisonment for two months for offence punishable under section 452 of Indian Penal Code. Both sentences shall run concurrently. The judgement and order dated 19.12.2007 is modified accordingly. The period of sentence already undergone shall be considered for remission of sentence qua appellants - original accused. R & P to be sent back to the trial court forthwith."

24. Even if we consider the facts and hold that it was not illegal but irregularity which has crept in, in no circumstances; the accused could have been convicted under Section 302 of I.P.C.

25. In view of the aforementioned discussion, we are of the view that both these appeals have to be partly allowed, hence, are partly allowed.

26. The conviction of the appellants under Section 302 read with Section 34 of I.P.C. of Indian Penal Code is converted to conviction under Section 304 (Part I) of Indian Penal Code and the appellants are sentenced to undergo 10 years of incarceration with fine which is reduced to Rs.1,000/- for each appellant-accused.

27. Appellants-accused are in jail for 14 years, if 10 years of incarceration is over, they shall be released forthwith, if not required in any other case. The judgement and order dated 26/27.7.2012 shall stand modified accordingly.

28. Let a copy of this judgment alongwith the trial court record be sent to the Court and Jail Authorities concerned for compliance.

29. We are really pained and wish to draw the attention of the authorities concerned through Registrar General that where the accused are sentenced to life imprisonment, even if the appeals are pending in the High Court, the government should periodically exercise power under Section 432 & 433 of Cr.P.C. and the committee at each districts be apprised of these provisions.

30. We are really pained that accused are in jail for 20 years and the matters are not even placed before the Court. The Registry to ensure that all matters in which accused are in jail for longer period of incarceration and in which more than half of their tenure is over, those matters be listed periodically before the Court.

(2021)02ILR A462
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 10.02.2021

BEFORE

THE HON'BLE BACHCHOO LAL, J.
THE HON'BLE SUBHASH CHANDRA SHARMA, J.

Criminal Appeal No. 3433 of 2007
with
Criminal Appeal No. 3179 of 2007

Satish Kashyap & Anr.
...Appellants (In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellants:
Sri Kuldeep Johri, Sri A.K. Gaur, Sri M.K. Upadhyay, Sri Manish Tiwary, Sri Prabhat Pandey, Sri Zafar Abbas, Sri Ashwini Kumar Awasthi

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

A. Criminal Law - Code of Criminal Procedure, 1973- Section 374(2) - Indian Penal Code, 1860-Section 302/34-challenge to- conviction-modification of sentence-sudden fight -no pre-meditation or pre-plan –no previous enmity-deceased was drunken at the time of occurrence- all this resulted under influence of intoxication and in the spur of moment-neither appellants had taken undue advantage nor acted in cruel or unusual manner-appellants held guilty u/s 304 Part-I r/w 34 IPC not u/s 302/34 IPC as the case attracted the exception 4 of Section 300 IPC. (Para 1 to 49)

B. The fourth exception of section 300 IPC covers act done in a sudden fight. injuries caused to deceased were not intentional but incident took place under the influence of intoxication of parties. deceased himself started conversation with the appellants who were silent and not having any weapon. there was no premeditation and the appellants did not take undue advantage and had also not acted in cruel manner. In essence it was submitted that section 302 IPC has no application and in this case Fourth Exception of Section 300 IPC applies. (Para 40 to 47)

The appeal is allowed. (E-5)

List of Cases cited:-

1. St.of H. P. Vs Jeet Singh (1999) 38 ACC 550 SC

2. Nathuni Yadav & ors. Vs St. of Bih. & ors. (1997) 34 ACC 576,

3. Thaman Kumar Vs St. of U.T. of Chadigarh (2003) 47 ACC 7

4. Brahm Swaroop & anr. Vs St. of U.P. (2011) 6 SCC 288

5. Dalip & ors. Vs St. of Punj.(1953) AIR SC 364

6. Masalti Vs St. of U.P.(1965) AIR SC 202

7. Rameshwar & ors. Vs St. (2003) 46 ACC 581

8. Pappu Vs St. of M.P.,Crl. Appl. No. 751 of 2006

9. Chhabinath & Ors. Vs St. of U.P.,Crl. Appl. No. 8238 of 2007

(Delivered by Hon'ble Subhash Chandra Sharma, J.)

1. Both criminal appeals emanate from the common judgment and order dated 21.03.2007 passed by learned Additional Sessions Judge, Court No. 3, Pilibhit in Sessions Trial No. 98 of 2003 (State Vs. Harish Kashyap and two others) arising out of Crime No. 414 of 2002 under Section 302/34 IPC, Police Station Barkheda, District Pilibhit by which appellants have been convicted and sentenced under Section 302 read with Section 34 IPC with life imprisonment and fine of Rs. 5,000/- for each, in default of payment of fine to undergo additional imprisonment for a period of six months, therefore these appeals are heard and being decided together.

2. The prosecution case in brief is that on 17.11.2002 deceased Veerpal (brother of informant Harpal Kashyap) was invited by Lalu Kashyap where Veerpal, Gopal and Lalu Kashyap took food in the feast and thereafter Veerpal came back to his house. They were talking on the terrace, meanwhile Harish, Satish s/o Kallu r/o P.S. Barkheda came there and started to talk to Veerpal. Veerpal said to Harish that marriage of daughter of Rampal had been engaged with his brother Satish. Why did he use to stay in the house of Rampal, he would not let it go on. While conversation he went to door of Kalicharan with Harish and Satish. Meanwhile sound of fire was heard by informant and he went there. In the way, he met to Lalu and Gopal who also went with him. They saw that Harish was equipped with *Kasi* Satish with *danda* and Om Prakash with *lathi*. Harish, Om Paraksh and Satish were beating Veerpal. Informant, Lalu and Gopal interfered then accused persons went away towards their house. This incident took place at about 11 p.m. In the night. Injured Veerpal was brought to Government Hospital, Barkheda by informant with the help of Lalu and Gopal, where doctors declared him dead. He lay dead body under *pakad tree* in the compound of hospital and arrived at police station, lodged an F.I.R. by giving *tahreer* as crime no. 414 of 2002 under Section 302 IPC against Harish, Satish and Om Prakash. Entry of which was made in the G.D. Report no. 2. Investigation of the case was handed over to S.I. A.A. Khan who moved to the place of occurrence.

3. Inquest of deceased Veerpal was conducted by S.I. A.A. Khan on 18.11.2002 at 7 a.m. at P.H.C. Barkheda. Inquest report was prepared in presence of witnesses. Dead body was got sealed. Other essential papers were prepared and dead body was handed over to constable Sajjan Saran and V.C. Rajesh for post-mortem.

4. Dr. Prabhat Mishra conducted the autopsy on the dead body of Veerpal on 18.11.2002 at 3 p.m. & prepared report Exhibit Ka-6. Details of post-mortem are as under:

External Examination: Time after death about half day. He was aged about 40

years. Average built body. Rigor mortis was present both upper and lower limbs. Left eye swelling & closed and right eye half opened. Mouth half opened clotted blood present in side. Nostrils (both) no sign of decomposition.

Ante-mortem injuries:(1) Multiple lacerated wound in area 6 cm x 2 cm x bone deep on left side of forehead just above left eyebrow underneath frontal bone fractured. (wound showing depressed are due to fractured skull bone).

(2) Contusion over left upper eye on the lid 6 c.m. x 3 c.m. Left eye closed due to swelling.

(3) Abraded contusion 4 c.m. X 2 c.m. On left side of cheek, 5 c.m. From left eye lateral ankle.

(4) Incised wound 5 c.m. X 2 c.m. X bone deep on left side of skull, 7 c.m. Above left ear underneath left parietal bone cut & fractured.

(5) Multiple abraded contusion 7 c.m. X 1 c.m., 4 c.m. Below right elbow joint on posterior side.

(6) Abrasion 3 cm x 1 cm on posterior (dorsal) aspect of right palm.

(7) abrasion 1 cm x 1 cm on front of chest, 11 cm below right nipple.

On Deeper Dissection found: 1. Left side frontal bone fractured, membranes lacerated, brain were found lacerated (injury no. 1), large hemeolema present over nostrils and brain matters. 2. Left side parietal bone cut and fractured. Membranes & brain lacerated. Large hoemolema present over membranes and brain matter (injury no. 4).

Internal examination: Scalp left side frontal and parietal bone-fractured. Membranes-lacerated left side. Brain-lacerated with haemolema. Base-NAD. Vertebrae-NAD. Spinal card not exposed. Thorax, wall, ribs and cartilages-NAD. Pleura-NAD. Larynx trachea and bronchi-NAD. Both lungs-NAD. Paricardium-NAD. Both chambers empty. Vessels-NAD. Paritoneum-NAD. Cavity-NAD. Teeth 15/16-NAD. Oesophagus-NAD. Contents of stomach-200 ml. semi digested food material was present, fecal matter and gases were present in small and large intestine, Liver-NAD 100gm, gallbladder-one half full. Pancreas-NAD. Spleen-NAD, 160 gm, both kidneys-200 gm-NAD. Urinary bladder-empty. Generation organs-NAD. Cause of death coma due to antemortem injuries.

5. Investigating Officer visited the place of occurrence from where he collected blood stained and plain soil putting it into separate boxes sealed them and prepared *fard* Ext. Ka-3 on 18.11.2002. On 19.11.2002 on the instance of accused Om Prakash Kashyap one *lathi* was recovered from his house which was fitted with iron on its top, it was taken into custody and recovery memo was prepared in presence of witnesses. On 23.11.2002 accused Harish and Satish were arrested at about 11.30 o'clock and examined by Investigating Officer, they told him about *Kasi* and *danda* used in causing injuries to deceased Veerpal. On their instance *kasi* and *danda* with blood stains were recovered from their house. Recovery memo was prepared in presence of witnesses. These articles along with cloths of deceased found on his body were sent to Forensic Science Laboratory, Agra for examination.

6. After inspection of place of occurrence, Investigating Officer prepared the site plan on 18.11.2002 and recorded the statements of witnesses conversant to the facts of case, thereafter concluded the investigation and found a case, *prima facie* made out under Section 304 IPC. After

preparing the charge sheet, he submitted it to the court concerned.

7. The cognizance of the offence was taken by learned Additional Chief Judicial Magistrate-I who provided copies of prosecution papers to accused persons in compliance of Section 207 Cr.P.C. and committed the case to the court of session for trial.

8. Learned trial court framed the charge under Section 302 read with Section 34 IPC on the basis of material on record and after giving opportunity of hearing to appellants. Charge was read-over and explained to them. They did not plead guilty but denied it and claimed for trial. Consequently, case was fixed for prosecution evidence.

9. The prosecution examined P.W.1 Harpal, P.W.2 Gopal as witnesses of fact. P.W.3 constable Om Prakash who prepared F.I.R. on the basis of *Tahreer*. P.W.4 Raja Ram @ Rajan who is witness of fard recory of *lathi*. P.W. 5 Dr. Prabhat Mishra who conducted post-mortem of deceased Veerpal and prepared the post-mortem report. P.W.6 Kaderam witness of *fard recovery relating to danda*. P.W.7 S.I. Ashif Ali Khan who conducted investigation of the case.

10. After conclusion of prosecution evidence statement of appellants were recorded under Section 313 Cr.P.C. in which they negated the statements made by witnesses before the court and said that witnesses had stated falsely due to enmity. Satish and Harish also said that they used to go to the house of Rampal which enraged deceased and his brother as a result, they had been implicated falsely. Likewise, appellant Om Prakash said that he is relative of Satish, therefore implicated falsely.

11. Appellants were given an opportunity for defence but they did not adduce any evidence in their support.

12. Learned trial Court heard the argument for prosecution as well as appellants, passed the judgment and order dated 21.03.2007 in which he found all of the appellants guilty under Section 302 read with Section 34 IPC and sentenced to them for rigorous imprisonment for life with a fine of Rs. 5,000/- each and in default of payment of fine to undergo six months additional imprisonment. Against this judgment and order, these appeals have been preferred.

13. We heard Sri Prabhat Pandey, learned counsel for the appellants as well as Sri Rajesh Mishra, learned A.G.A. for the State and perused the record.

14. Learned counsel for the appellants submits that the judgment and order passed by the learned trial court is against evidence available on record which is bad in the eyes of law and based on the testimony of interested witnesses those are relatives of deceased. No any independent witness has been examined, though, occurrence took place in residential area. Even the person in front of whose door occurrence took place has not been examined. Prosecution has failed to establish the motive of crime, therefore, no offence is made out against the appellants under Section 302 IPC. In spite of this it has come in the evidence of prosecution witnesses that deceased and appellants were under influence of intoxication of wine and there was altercation between them relating to the matter of appellants'

(Satish and Harish) staying in the house of Rampal. There was no pre-meditation or plan in the minds of appellants to murder the deceased. If, it is found that prosecution has proved its case then it only goes to the extent of exception no. 4 of Section 300 which brings the case within the purview of culpable of homicide not amounting to murder and punishable under Section 304 IPC. In this way, appeals deserves to be allowed.

15. Learned A.G.A. opposed the submissions made by learned counsel for the appellants and urged that in this case, appellants caused injuries to the deceased with *lathi, danda and kassi*. The injuries inflicted were sufficient in the ordinary course of nature to cause the death of deceased. The case does not fall within the ambit of exception 4 to Section 300 in any way. Prosecution witnesses are relatives of deceased, it is true but on account of relation they cannot be said to be unreliable. They are eye witnesses of the case and they have named the appellants without any enmity. Such relative witnesses cannot conceal the truth and also the real culprits. On account of village *(mohalla)* rivalry, no person dares to become a witness in a case like murder. In such circumstances, the submissions made by learned counsel about non-examination of independent witness is not tenable. The evidence on record is sufficient on the basis of which learned trial judge has concluded the conviction of appellants which is right in the eye of law. There is no illegality or impropriety. The appeals are force less and liable to be dismissed.

16. From the submissions and perusal of record the following questions emerge for consideration of this Court as to whether motive is absent, witnesses are relatives and no independent witnesses have been examined. The injuries caused to deceased are not intentional but incident took place under the influence of intoxication of parties during altercation which brings the case under exception 4 of Section 300.

17. Before we deal with the contentions raised by learned counsel for the appellants, it will be convenient to take note of the evidence as adduced by the prosecution.

18. P.W.1 Harpal is the informant who deposed that on the day of incident, there was baptism ceremony of the son of Lalu Kashyap at his home. Veerpal was invited to the feast in the evening when Veerpal came back from the feast and on the terrace of Gopal, Lalu Kashyap and Veerpal were talking. He was present in his hut situated beside it. Meanwhile Harish and his brother Satish came there from the house of Rampal in the neighbor-hood and started talking to Gopal, Veerpal and Lalu. His brother Veerpal told Harish that the marriage of daughter of Rampal had been engaged with his brother Satish why did he stay in the house of Rampal and telling this bad, he forbade him from coming to the house of Rampal. After this Harish, Satish and Veerpal went towards the north direction while talking. After a while he heard the sound of fire and went towards that side with Lalu and Gopal. Where he saw that in-front of door of Kalicharan; Harish, Satish and Omprakash were beating to his brother Veerpal with *kasi, lathi* and *danda.* Harish was equipped with *Kasi*, Satish with *danda* and Om Prakash with *lathi*. It was about to 11 o'clock in the night, at that time electric bulb was lightening outside the house of Ram Charan. In the light of that bulb, he

identified the accused persons when he along with two others went there and scolded to accused persons, they fled away. Injured Veerpal was brought to Government Hospital, Barkheda where doctor told them that Veerpal had died. Meanwhile, members of his family came there and leaving them with the dead body, he went to the police station and lodged an F.I.R. after getting *tahreer* scribed by Lalaram Tailor.

This witness was subjected to gruel cross-examination by the learned counsel for the appellants in which the witness has not disclosed any such fact which weakens his testimony. He has affirmed the fact of beating by the appellants-Satish, Harish and Omprakash.

19. P.W.2-Gopal deposed that there was baptism ceremony of son of Lalu Kashyap in his town in which Veerpal and he were invited in the feast. Veerpal and he came back after taking food in the feast and started talking on his terrace in presence of Lalu Kashyap, meanwhile Harish, Satish came there from the house of Rampal. Veerpal said to Harish & Satish that Satish had been engaged to be married in the house of Rampal and before marriage they (both) used to stay in his house which should not go on. At this conversation started among Harish, Satish and Veerpal, thereafter, all the three persons while talking went to the north direction, he (Gopal) and Lalu remained sitting on the terrace after a while sound of fire was heard and Harpal came out from his hut and asked about fire, thereafter they went towards the direction sound of fire was heard. As they reached to the house of Kalicharan, they saw Harish, Satish and Omprakash beating to Veerpal. Harish was equipped with *Kasi*, Satish with *danda* and Om Prakash with *lathi*. It was at about 11 o'clock in the night. There was an electric bulb light outside the house of Kalicharan. He identified the accused persons in that light. On scolding by them, accused persons fled away. Veerpal sustained so many injuries. He was brought to Government Hospital, Barkbheda where doctor declared him to have died.

This witness has also faced gruel cross-examination on behalf of learned counsel for appellants. During cross-examination, he has again stated that he along with Harpal and Lalu reached to the house of Kalicharan. He further stated that he saw Veerpal and appellants while standing there, meanwhile, *marpeet* began. No such statement has been made as to indicate his absence on the place of occurrence.

20. Both these witnesses remained intact during cross-examination. No such contradictions are visible in their statements which can make their testimony unreliable and unnatural. Minor contradictions are there but they are of cosmetic nature and not likely to affect the credibility of their testimony.

21. In the instant case, there is no enmity between the parties. They belong to near relation. There is no dispute about identification of appellants. Appellants have also not disclosed any enmity with the informant as well as with prosecution witnesses which might adversely affect their reliability and become an excuse for implicating them falsely while absolving real culprits.

22. There is not even an iota of evidence on record which may even remotely suggest that PW-1 and PW-2 had

any grouse against the appellants for any cause to implicate them falsely.

23. Injuries on the person of deceased Veerpal were caused by *kasi, lathi* and *danda* as stated by P.Ws. 1& 2. Ext. Ka-6 is the post-mortem report in which multiple lacerated wound, contusion abraded contusion, incised wound were found on the body of deceased Veerpal and P.W.5 Dr. Prabhat Mishra has proved the injuries and told that injury no. 4 was caused with sharp object like *kasi* and injuries no. 1, 2, 3, 5 and 7 were likely to be caused with *lathi* and *danda*. All the injuries were caused at about 11 o'clock in the night on 17.11.2002. He opined that cause of death was coma due to ante-mortem injuries.

24. In this way injuries found on the body of deceased Veerpal are proved to have been caused with *kasi, lathi* and *danda* at about 11 o'clock in the night on 17.11.2002 and it corroborates the manner of causing injuries resulting into death as stated by P.W.1 & P.W.2. Thus, the eye witnesses account finds complete corroboration from the medical evidence on record.

25. There is no any inordinate delay in lodging the F.I.R. Occurrence took place at 11 o'clock in the night on 17.11.2002 and F.I.R. was lodged at 0.10 a.m. on 18.11.2002, after one hour and ten minutes. It cannot be said inordinate delay.

26. P.W.7 Sub-Inspector Ashif Ali Khan has proved the investigation of the case. Exhibit Ka-14 and Ka-15 are *farad* (recovery memo) of weapons *lathi* and *kasi* used in the commission of crime. He has also proved the bundles containing boxes of blood stained and plain soil. Ext. Ka-17 is report from Forensic Science Laboratory where *kasi, lathi & danda*, blood stained and plain soil were sent for analysis in which blood stains were also found on them. It proves that *kasi, lathi, danda* were used in commission of crime and place of occurrence was the same as stated by PW-1 and PW-2.

27. Learned counsel has also drawn attention of this Court towards the absence of motive to commit murder. He urged that the prosecution has failed to prove any motive on the part of the appellants to commit the crime.

28. It is true that there is no mention of motive in F.I.R. about the commission of crime. Even PW-1 and PW-2 have also not disclosed anything that became the root cause of committing murder by the appellants except conversation started on the part of Veerpal with the appellants in relation to their stay in the house of Rampal whereas marriage of daughter of Rampal was engaged with brother of Harish but there is no such principle or rule of law that where the prosecution fails to prove motive for commission of the crime, it must necessarily result in acquittal of the accused. Where ocular evidence is found to be trustworthy and reliable and finds corroboration from the medical evidence, a finding of guilt can safely be recorded even if the motive for the commission of crime has not been proved.

29. In ***State of Himachal Pradesh Vs. Jeet Singh 1999 (38) ACC 550 SC***, it was held that no doubt it is a sound principle to remember that every criminal act was done with a motive but it's corollary is not that no offence was committed if the prosecution failed to prove the precise motive of the accused to commit it as it is almost an impossibility for the prosecution

to unravel full dimension of the mental deposition of an offender towards the person whom he offended.

30. In ***Nathuni Yadav and others vs. State of Bihar and others 1997 (34) ACC 576***, it was held that motive for committing a criminal act, is generally a difficult area for prosecution as one cannot normally see into the mind of another. Motive is the emotion which impels a man to do a particular act and such impelling cause unnecessarily need not be proportionately grave to grave crimes. It was further held that many a murders have been committed without any known or prominent motive and it is quite possible that the aforesaid impelling factor would remain undiscoverable.

31. In our opinion, in the facts and circumstances of the case the absence of an evidence on the point of motive cannot have any such impact so as to discard the other reliable evidence available on record which certainly establishes the guilt of the accused. In the case of ***Thaman Kumar vs. State of Union Territory of Chandigarh 2003 (47) ACC 7*** the Hon'ble Apex Court has reiterated the same view after taking into consideration the aforementioned cases.

32. The next limb of argument of learned counsel for the appellants is that the prosecution had examined highly interested and relative witnesses and they have not produced any independent witness in support of its case. No doubt the witnesses of fact examined in the case are real brother and nephew and both of them are clearly related to the deceased. Relationship itself is not a ground to reject the testimony of witness, rather he would be last person to leave the real culprit and falsely implicate any other person.

33. In the case of ***Brahm Swaroop and another vs. State of U.P. (2011) 6 SCC 288*** the Hon'ble Apex Court in Para No.21 has observed as under

"merely because the witnesses were related to the deceased persons, their testimonies cannot be discarded. Their relationship to one of the parties is not a factor that affects the credibility of a witness, more so, a relation would not conceal the real culprit and make allegations against an innocent person. A party has to lay down a factual foundation and prove by leading impeccable evidence in respect of its false implication. However, in such cases the Court has to adopt a careful approach and analyse the evidence to find out whether it is cogent and credible evidence."

34. The Court also referred cases of ***Dalip and others vs. State of Punjab A.I.R. (1953) SC 364; Masalti vs. State of U.P. (A.I.R.) 1965 SC 202.***

35. In ***Masalti vs. State of U.P. (A.I.R.) 1965 SC 202***, the Hon'ble Apex Court observed in Para No.14

"but it would, we think, be unreasonably to contend that evidence given by witnesses should be discarded only on the ground that it is evidence of partisan or interested witnesses. The mechanical rejection of such evidence on sole ground that it's partisan would inveriably lead to failure of justice. No hard and fast rule can be laid down as to how much evidence should be appreciated. Judicial approach has to be cautious in dealing with such evidence; but the plea

that such evidence should be rejected because it's partisan cannot be accepted as correct.

36. It is common knowledge that village *(mohalla)* life is faction ridden and involvement of one or the other in the incidents is not unusual. One has also to be cautious about the fact that **wholly** independent witnesses are seldom available or are otherwise not inclined to comeforth. Lest they may invite trouble for themselves for future. Therefore, relationship of eye-witnesses inter se, cannot be a ground to discard their testimony. There is no reason to suppose the false implication of the appellants at the instance of the eye-witnesses. It would also be illogical to think that witnesses would screen the real culprits and substitute the appellants for them.

37. This Court has also made such observations in Para No.14 of ***Rameshwar and others vs. State 2003 (46) ACC 581.***

38. In the instant case, P.W.1 is brother of deceased and P.W.2 is also relative of deceased and P.W.2 has disclosed in his cross-examination that deceased Veerpal was his uncle in relation. Being relative is not sufficient to discard their testimony. They are natural witnesses. They were present at the time of incident even on the terrace where all of them were talking in the village *(mohalla)* and also they went to the place where incident took place between the deceased and the accused-appellants. They have also identified the accused persons in the light of electric bulb in the night and also they are of the same town. So there is no any confusion in identification. Being relative, it can not be said that they would falsely implicated the appellants in the case, while leaving the real culprits free. There is no enmity between appellants and witnesses, therefore, no reason to implicate them falsely. In this way, these witnesses are wholly reliable & credible. Their testimony cannot be discarded only on the ground that they are relatives of the deceased. In this regard, the argument placed by learned counsel for the appellants cannot be accepted.

39. In our opinion the evidence on record clearly establishes the case of prosecution against the appellants beyond any shadow of doubt.

40. The next argument of learned counsel for the appellants is that the injuries caused to deceased were not intentional but incident took place under the influence of intoxication of parties. Deceased himself started conversation with the appellants who were silent and not having any weapon. During altercation assault was made in the course of a sudden quarrel. There was no pre-meditation and the appellants did not take undue advantage and had also not acted in cruel manner. In essence it was submitted that Section 302 IPC has no application and in this case Fourth Exception of Section 300 IPC applies.

41. In support of his argument he has relied the case of **Pappu Vs. State of Madhya Pradesh** Appeal (Crl.) 751 of 2006 decided on 11.07.2006 by Hon'ble Supreme Court and **Chhabinath and others Vs. State of U.P.** Criminal Appeal No. 8238 of 2007 decided on 22.5.2019 by this Court.

42. The Fourth Exception of Section 300 IPC covers acts done in a sudden fight. The said exception deals with a case of

prosecution not covered by the first exception, after which its place would have been more appropriate. The exception is founded upon the same principle, for in both there is absence of premeditation. But, while in the case of Exception 1 there is total deprivation of self-control, in case of Exception 4, there is only that heat of passion which clouds men's sober reason and urges them to deeds which they would not otherwise do. There is provocation in Exception 4 as in Exception 1; but the injury done is not the direct consequence of that provocation. In fact Exception 4 deals with cases in which notwithstanding that a blow may have been struck, or some provocation given in the origin of the dispute or in whatever way the quarrel may have originated, yet subsequent conduct of both parties puts them in respect of guilt upon equal footing. A 'sudden fight' implies mutual provocation and blows on each side. The homicide committed is then clearly not traceable to unilateral provocation, nor in such cases could the whole blame be placed on one side. For if it were so, the Exception more appropriately applicable would be Exception 1. There is no previous deliberation or determination to fight. A fight suddenly takes place, for which both parties are more or less to be blamed. It may be that one of them starts it, but if the other had not aggravated it by his own conduct it would not have taken the serious turn it did. There is then mutual provocation and aggravation, and it is difficult to apportion the share of blame which attaches to each fighter. The help of Exception 4 can be invoked if death is caused (a) without premeditation, (b) in a sudden fight; (c) without the offender's having taken undue advantage or acted in a cruel or unusual manner; and (d) the fight must have been with the person killed. To bring a case within Exception 4 all the ingredients mentioned in it must be found. It is to be noted that the 'fight' occurring in Exception 4 to Section 300 IPC is not defined in the IPC. It takes two to make a fight. Heat of passion requires that there must be no time for the passions to cool down and in this case, the parties have worked themselves into a fury on account of the verbal altercation in the beginning. A fight is a combat between two and more persons whether with or without weapons. It is not possible to enunciate any general rule as to what shall be deemed to be a sudden quarrel. It is a question of fact and whether a quarrel is sudden or not must necessarily depend upon the proved facts of each case. For the application of Exception 4, it is not sufficient to show that there was a sudden quarrel and there was no premeditation. It must further be shown that the offender has not taken undue advantage or acted in cruel or unusual manner. The expression 'undue advantage' as used in the provision means 'unfair advantage'.

43. In the light of above noted legal position, it would be expedient to examine the evidence on record.

44. P.W.1 Harpal stated that accused Harish and Satish came from house of one Rampal Kashyap and started talking to Veerpal, Gopal and Lalu. Deceased Veerpal asked Harish that the marriage of daughter of Rampal had to be engaged with Satish, why he used to go and stay in the house of Rampal. This was not good and he would not come to the house of Rampal. After this Harish, Satish and deceased Veerpal went to north direction while talking. Thereafter incident took place. On page 19 of paper-book, this witness has stated that deceased had drunk wine in small quantity and he told it to

Investigating Officer. He has further stated on page 20 that there was altercation between Harish, Satish & Veerpal for 5-7 minutes. P.W.2 Gopal has stated that when Veerpal, Lalu Kashyap and he were talking on the terrace, Harish and Satish came out of house of Rampal. Veerpal said to them that the marriage of Satish had to be engaged in the house of Rampal and before marriage both of them stay there which was not good. On this there was altercation between Harish, Satish and Veerpal and all these persons went towards north direction while talking. He has further stated on page 23 of paper-book that he had disclosed it before the Investigating Officer that they had drunk wine in small quantity. On page 46 this witness had stated that Satish & Harish did not start any talk but Veerpal started to say that marriage was to be done with Satish why did Harish use to stay there. Meanwhile matter became worse. P.W.7 Ashif Ali Khan, Investigating Officer, has also stated that witness Gopal told him in his statement that incident took place under the effect of intoxication of wine.

45. So far as the injuries caused to the deceased resulting into his death are concerned, there are contusions and abrasions except injury no. 4 which is incised wound on the skull.

46. From the testimony as deposed by P.Ws. 1 & 2 it becomes clear that there was no previous enmity between the deceased and appellants. The incident took place suddenly. Deceased Veerpal was drunken at the time of occurrence. It was he who gave start to the incident. Appellants did not start talking. They were silent and having no any weapon. Deceased himself asked appellants that the marriage of daughter of Rampal was to be engaged with Satish but Harish also used to stay in the house of Rampal which was bad. He would not let it go further. On this there was altercation among them for 5-7 minutes which resulted in *marpeet* before the house of Kalicharan and causing bodily injuries to Veerpal who succumbed to injuries. All this resulted under influence of intoxication and in the spur of moment. There was sudden fight though no pre-meditation or pre-plan was in the minds of appellants to cause murder of deceased Veerpal. Neither appellants seem to have taken undue advantage nor acted in cruel or unusual manner. It appears that on the spot, the matter became so aggravated, passions ran so high that appellants became very aggressive and it resulted causing death of deceased. Thus, this case would fall in the purview of exception 4 to Section 300 IPC which brings the case under the category of culpable homicide not amounting to murder and punishable under Section 304 Part-I IPC with life imprisonment or imprisonment of either description for a term which may extend to 10 years and with fine.

47. We held the appellants guilty under Section 304 Part-I read with Section 34 IPC and would like to reduce sentence of the appellants, to meet the ends of justice, to ten years rigorous imprisonment and fine of Rs. 5000/- each and in default of payment of fine, to undergo six months additional imprisonment.

48. In case, the appellants have already served out the said period, they would be released forthwith, if not wanted in any other case.

49. These appeals are ***allowed*** to the aforesaid extent.

50. Copy of this judgment alongwith original record of Court below be

transmitted to the Court concerned for necessary compliance. A compliance report be sent to this Court within one month. Office is directed to keep the compliance report on record.

(2021)02ILR A473
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 29.01.2021

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE GAUTAM CHOWDHARY, J.

Criminal Appeal No. 3660 of 2013

Sanjay Maurya ...Appellant (In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellants:
Sri Satya Dheer Singh Jadaun, Sri Sudist, Sri Babu Lal Ram, Sri Ram Prakash Singh, Sri Ravi Prakash Singh Kushwaha, Sri Vishal Kumar Shukla, Sri Arvind Singh

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

Criminal Law-Charge was formed u/s304 B, 498A and 3/4 D.P. Act-later charge reframed u/s302 IPC even after about 11 witnesses were recorded and 2 witnesses were left and accused was partly examined u/s313 Cr.P.C.-Dying declaration does not speak about any dowry demand-no motive-conviction u/s 302 IPC converted into 304 -part II.

List of Cases cited: -

1. R. Rachaiah Vs Home Secretary, Bangalore, 2016 0 Supreme (SC) 383

2.Surendra Singh Vs St. of U.P., 2018 0 Supreme (All) 2467

3.Karuppasamy Vs St., 2001 Cri.L.J. NOC 70 (Madras).

(Delivered by Hon'ble Dr. Kaushal Jayendra Thaker, J.
& Hon'ble Gautam Chowdhary, J.)

1. Heard Sri S.D. Singh Jadaun for the sole appellant and learned A.G.A. for the respondent.

2. This appeal challenges the judgment dated 3.8.2013 passed by Shri Krishan Pratap Singh, Additional Session Judge, Court No.1, Varanasi, in Sessions Trial No.717 of 2010, under Sections 498A/302/304B of IPC and ¾ D.P. Act, Police Station - Shivpur, District - Varanasi, convicting and sentencing the appellant under Section 302 IPC for life imprisonment and fine of Rs. 25,000/- failing in payment of fine two years additional rigorous imprisonment.

3. Before we begin to pen down the reasons, we are shocked that the charge was framed on 12.1.2011 which was for commission of offence under Section 304B/498A and also under Section ¾ of D.P. Act. This charge came to be framed against the accused on 12.1.2011. The charge was framed by one Sri D.K. Srivastava, learned Addl. District & Sessions Judge, Varanasi.

4. After his transfer, very strangely the new incumbent Sri Krishna Pratap Singh altered the charge and charged the accused for commission of offence under Section 302 I.P.C. Unfortunately, the wordings of the charge were the same. We would not have discussed this but the learned Judge reframed the charge after about evidence of 11 witnesses were recorded and evidence of Umesh Narain

Pandey and Dr. Jayesh Mishra were to be recorded. The accused was also partly examined under Section 313 on 19.2.2013 but very strangely the learned Judge again examined him on 4.4.2013 and went on to examine 2 witnesses namely PW-13 and PW-14 and again put him to further statement under Section 313 Cr.P.C. and convicted the accused for 302 IPC acquitting him under other charges and imposed Rs. 25,000/- as a fine. The judgment, as such, will lost sanctity but as the accused is in Jail since long, we are constraint to pen down our judgment as the learned Counsel for the appellant has though made his submissions but has contended that 302 is not made out and looking to the period of incarceration does not call for full hearing of the matter.

5. Learned Counsel for the appellant has made three fold submissions; that perversity has crept in after the learned new Additional Sessions Judge was allotted the matter and after the learned Judge realised that the charge which was framed,no case was made out even from the dying declaration. He unilaterally without following the contours for alteration of charge framed the charge under Section 302 I.P.C. which has vitiated the entire proceedings and has heavily relied on the case of ***R. Rachaiah Vs. Home Secretary, Bangalore, 2016 0 Supreme (SC) 383***. He has taken us through the judgment of this High Court in the case of ***Surendra Singh Vs. State of U.P., 2018 0 Supreme (All) 2467***, so as to contend that the allegations made are not proved and the dying declaration, as such, was not supported by any other independent witness and has contended that the judgments on which reliance is placed by the learned Judge to hold that the dying declaration is acceptable would not apply in the facts of this case.

6. The learned Advocate further has submitted that if this Court is satisfied that the trial is not vitiated and that the dying declaration is believable, the deceased did not die on the same day. The evidence on the record goes to show that it was the husband, who out of sheer anger, had done the act and it was he, who had taken his wife to the hospital. These circumstances have been totally ignored by the learned Judge in his overzeal to convict the accused. It is submitted by the Counsel that in this case the learned Judge has given a decision but has failed to do justice and has contended that life sentence was not necessary or what was the punishment awardable. It is submitted that the learned Judge has only with an overseal to punish the accused altered the charge as from the evidence even on the dying declaration, it was clear that in no case under Sections 498-A/304B or ¾ D.P. Act, the accused can be convicted. We are, at this stage, not going into the genesis of alteration of the charges and/or whether alteration if proper or not and whether the dying declaration was vulnerable or not.

7. The fact that the accused in Jail for more than a decade and jail report shows that has has shown remorse for his act, we go by third alternative suggested by Sri Jadaun and we are convinced that from the post-mortem and from the evidence on the record, it was the case of he who took his wife to the hospital. Even in the statement of PW1, he has mentioned that it was the accused, who had informed them about untoward incident of his wife. This seems to have waived with the learned Additional Sessions Judge to punish the accused for

untimely death of his wife which has occurred in a short span of their marriage.

8. This takes us to the issue of whether the offence would be punishable under Section 299 or Section 304 I.P.C.

9. Considering the evidence of these witnesses and also considering the medical evidence including post mortem report, there is no doubt left in our mind about the guilt of the present appellants. However, the question which falls for our consideration is whether, on reappraisal of the peculiar facts and circumstances of the case, the conviction of the appellant under Section 302 of the Indian Penal Code should be upheld or the conviction deserves to be converted under Section 304 Part-I or Part-II of the Indian Penal Code. It would be relevant to refer Section 299 of the Indian Penal Code, which read as under:

"299. Culpable homicide: *Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide.*

10. The academic distinction between "murder' and "culpable homicide not amounting to murder' has always vexed the Courts. The confusion is caused, if Courts losing sight of the true scope and meaning of the terms used by the legislature in these sections, allow themselves to be drawn into minute abstractions. The safest way of approach to the interpretation and application of these provisions seems to be to keep in focus the keywords used in the various clauses of Section 299 and 300. The following comparative table will be helpful in appreciating the points of distinction between the two offences.

Section 299	**Section 300**
A person commits culpable homicide if the act by which the death is caused is done-	Subject to certain exceptions culpable homicide is murder is the act by which the death is caused is done.
	INTENTION
(a) with the intention of causing death; or	(1) with the intention of causing death; or
(b) with the intention of causing such bodily injury as is likely to cause death; or	(2) with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused;
KNOWLEDGE	**KNOWLEDGE**
(c) with the knowledge that the act is likely to cause death.	(4) with the knowledge that the act is so immediately dangerous that it must in all probability cause death or such bodily injury as is likely to cause death, and without any excuse for incurring the risk of causing death or such injury as is mentioned above.

11. We have not discussed the testimony of the witnesses, who have

turned hostile but it is now well established that evidence of hostile witnesses if it brings out some facts, which are helpful to the prosecution, their evidence may be relied on likewise if to the certain extent if the Court feels that the evidence is not tainted only with a view to save the accused, the same can also be looked into with the circumscription by the Court. The factual data which emerges is that the learned Judge has lost sight of the fact that it was an accused, who had taken the deceased to the hospital. He has relied on the decisions cited before him and has distinguished the same but unfortunately the said decision applies in all contours here on all floor (Karuppasamy Vs. State, 2001 Cri.L.J. NOC 70 (Madras).

12. The prosecution examined about 11 witnesses and produced the following documents:

Sl. No.	DESCRIPTION	DATE	EXHIBIT
1.	F.I.R.	1.9.2010	Ex.Ka.8
2.	F.I.R.	1.9.2010	
3.	Written Report	1.9.2010	Ex.Ka.1
4.	Dying Declaration	1.9.2010	Ex.Ka.15
5.	Recovery memo of burnt and Plain Earth	2.9.2010	Ex.Ka.4
6.	Recovery memo if Kerosene oil "Dibba'	2.9.2010	Ex.Ka.5
7.	Recovery memo of burn Cloth	2.9.2010	Ex.Ka.6
8.	Recovery memo of burn Cloth	2.9.2010	Ex.Ka.7
9.	P.M. Report	2.9.2010	Ex.Ka.2
10.	"Panchayatnama'	2.9.2010	Ex.Ka.12
11.	Charge-Sheet "Mool'	28.9.2010	Ex.Ka.3

13. The witnesses of fact have not supported the prosecution. The evidence of Doctor and dying-declaration being the sole reason for convicting the accused and the change of charge.

14. Sri Jadan has submitted that once the learned Judge after recording the evidence of some of the witnesses and when it was found out that charge under Section 304 Part-B could not be sustained. He of his own under Section 216 read with Section 217 of the Cr.P.C. framed new charge under Section 302 IPC and under which he has convicted the accused with his perverse eye of law.

15. He has further submitted that once the learned Judge held that Section 304-B was not attracted, he could not have punished the accused under Section 302 of I.P. Code. Learned Counsel has placed reliance on the judgment of Division Bench of this High Court in ***Surendra Singh Vs. State of U.P., 2018 0 Supreme (All) 2467***, and has submitted that no fresh charge could have been framed and if it has to be framed, the proceedings be started which has not been done for which he has placed reliance in the case of ***R. Rachaiah Vs. Home Secretary, Bangalore, 2016 0 Supreme (SC) 383.***

16. In the alternative, he has submitted that the accused is in Jail since

10 years. From the evidence, it is clear that even if the Court believes the dying declaration which is very doubtful, his client could not have been convicted under Section 302 of I.P.C. It was the accused, who has taken the deceased to the hospital and he has requested for lesser punishment looking to the young age of the accused.

17. As against this, learned Counsel for the State has contended that by declaration is proper as per Section 32 of the Evidence Act, 1872 and has been rightly relied upon the learned Judge.

18. Learned Counsel for the State has taken us to Section 216 of Cr.P.C. and has submitted that there is no illegality in re-charging the accused and it is further submitted that the way the accused has ablaze, his wife within one year of the marital life, the conviction was just and proper.

19. Even if we hold that there is no illegality in re-framing the charge, justice would demand us to see that reasoning of the learned Judge, which are perverse. The dying-declaration which has been made the basis of the punishment does not speak about any demand for dowry. The death of the deceased was caused on the spur of moment as the accused was alleged to have disliked the practice of the deceased in serving the parent of the accused also and it was he, as it appears from the evidence, who had taken the deceased to the hospital. He has no motive nor any intention of doing away with his wife.

20. In view of the aforementioned discussion, we are of the view that this appeal has to be partly allowed, hence, is partly allowed.

21. The conviction of the appellant under Section 302 I.P.C. is converted to conviction under Section 304-Part-II of IPC. We reduce the sentence to 7 years and the fine has been reduced to Rs. 5,000/- and, in default of payment of fine, 6 months additional rigorous imprisonment.

22. The appellant is in Jail for 10 years, if his period of incarceration as held above is over, he shall be released forthwith, if not required in any other case. The judgment and order impugned shall stand modified accordingly.

23. Let a copy of the judgment along with the trial court record be sent to the court below and jail authorities for compliance.

(2021)02ILR A477
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 25.01.2021

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE GAUTAM CHOWDHARY, J.

Criminal Appeal No. 3686 of 2014

Tarun ...Appellant (In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
Sri Shishir Tandon, Sri Amitabh Agarwal, Sri Apul Misra, Sri Sikandar Khan, Sri Sunil Singh

Counsel for the Opposite Party:
A.G.A., Sri Rajeev Tiwari

(A) Criminal Law - Indian Penal Code, 1860 - section 304-B - Dowry death, section 498-A - Husband or relative of a

husband of a woman subjectiong her to cruelty , Dowry Prohibition Act, 1961 - section 4 - penalty for demanding dowry - quantum of punishment - death was not so gruesome that the accused be sentenced till his last breath - suicidal note proved by examining D.W. 2 - not been converted by prosecution - sentence of imprisonment is substituted by ten years of imprisonment with remissions allowable. (Para - 16,17)

Marriage of deceased was solemnized on 25.06.2011 - nearly about 8 lakhs incurred in marriage - family members of Husband were not satisfied - harassing the deceased time to time - Family members and appellant were demanding 2 lakhs more as dowry - father of the deceased was not in a position to fulfill the same - Deceased informed her mother on telephone that the demand has not been fulfilled - unknown person informed on telephone that his daughter has been done to death - on reaching they saw that his daughter was lying dead - there were many injuries on her body.(Para -3)

HELD:- The totality of the evidence of all the witnesses who are independent witnesses as well as the family members of the deceased and the evidence of the police personnel and the documentary evidence conclusively prove that the death occurred, it was a suicide death she was harassed . The documentary evidence by which it can be said that the dying declaration was searched after he was released on bail. Deceased had died during seven years of her marriage. The FIR and the evidence of P.W. 1, 2 and 3 point out to one fact that the deceased was wedded to the appellant. The evidence of P.W. 4 also goes to show that there were ligature marks and panchayatnama was also prepared. All these facts go to show that it was a suicide and the demand was immediately before she committed or took her life. (Para - 14)

Criminal appeal partly allowed. (E - 6)

List of Cases cited:-

1. Hem Chand Vs St. of Har. , 1994 0 Supreme (SC) 1014

2. G.V. Siddaramesh Vs St. of Karn. , 2010 0 Supreme (SC) 136

3. Hari Om Vs St. of Har. & anr. , 2014 0 Supreme(SC) 73

4. Raju @ Rajeev Vs St. of U.P. , Criminal Appeal No. 4701 of 2013

5. Vivek Vs St. of U.P. , Criminal Appeal No. 5047 of 2019

6. St. of Raj.n Vs S. Bahadur & anr. , 2005 SCC (crl.) 228

7. Kansraj Vs St.of Punj. , 2020 Cr.L.J. 2993

8. Satyaver Singh & anr. Vs St. of Pun. , 2001 (43) ACC 1083

(Delivered by Hon'ble Dr. Kaushal Jayendra Thaker, J.
& Hon'ble Gautam Chowdhary, J.)

1. Heard learned counsel for the appellant, learned A.G.A. for the State and perused the record.

2. The present criminal appeal has been filed against the judgement and order dated 20.08.2014 passed by Additional Sessions Judge, Court No.1 Bulandshahr in Sessions Trial No. 106 of 2012, "State of U.P. Vs. Tarun and others", arising out of Case Crime No. 807 of 2011, under section 304-B & 498-A of IPC and section 4 of the Dowry Prohibition Act, 1961, Police Station Kotwali Nagar, District Bulandshahr, whereby the appellant has been convicted and sentenced under Section 304-B IPC with rigorous imprisonment of life, under section 498-A IPC with simple imprisonment of 3 years and a fine of Rs. 10,000/-, in default of payment of fine to further undergo 3 month imprisonment and under section 4 of the Dowry Prohibition Act, 1961 one year imprisonment and a fine of Rs. 5,000/- in

default of payment of fine to further undergo 3 month imprisonment.

3. The brief facts which led to the litigation and whereby the State had to start investigation are that the marriage of deceased Seema, daughter of Ram Sewak Paliwal resident of Futa Kuwan Wali Gali, Devi Pura-II, Bulandshahr was solemnized with Tarun Paliwal on 25.06.2011. In this marriage nearly about 8 lakhs was incurred but the family members of Tarun Paliwal were not satisfied and they were harassing the deceased time to time. Family members and appellant were demanding 2 lakhs more as dowry but father of the deceased Seema was not in a position to fulfill the same. On 15.10.2011 deceased Seema informed her mother on telephone that the demand has not been fulfilled. On 16.10.2011 a unknown person informed on telephone that his daughter has been done to death and they should reach at Bulandshahr, on reaching there they saw that his daughter was lying dead and there were many injuries on her body.

4. The trial was to be conducted by the court of Sessions as it was Sessions triable case, hence the case was committed to the court of sessions.

5. The court of sessions framed charges against accused who pleaded not guilty.

6. The prosecution examined the following witnesses :-

1.	Ram Sewak	P.W.1
2.	Smt. Krishna Paliwal	P.W.2
3.	Sandeep Paliwal	P.W.3
4.	Vijay Paliwal	P.W.4
5.	Indraveer Singh	P.W.5
6.	Dr. Naresh Viz	P.W.6
7.	Bhan Singh	P.W.7
8.	Satish Chandra	P.W. 8

7. In order to substantiate the oral testimony of the witnesses and their medical evidence, documentary evidence were also produced which are as follows :-

1.	Written report	Ext. Ka-1
2.	F.I.R.	Ext. Ka-3
3.	Recovery & Superdi of ornaments	Ext. Ka-10
4.	Recovery memo of Plastic rope)	Ext. Ka-11
5.	P.M. Report.	Ext. Ka-5
6.	Panchayatname	Ext. Ka-2
7.	Chargesheet (Mool)	Ext. Ka-13
8.	Challan Lash	Ext. Ka-8

8. The prosecution placed reliance on the following documentary evidence so as to bring home the charges levelled against the accused.

9. The accused was examined under section 313 Cr.P.C. also for evidences being led an over and the submissions of the counsels were heard.

10. Learned counsel for the appellant has submitted that on the evidence which has led the accused can not be said to have committed any office which would fall within the perview of section section 304-B read with section 498-A IPC. It is further submitted that the presumption that the death occurred within seven years of marriage is rebutable preposition if no allegation of any dowry was there. In the case on hand it is that the suicide note can not be the sole basis of conviction of the accused, yet on the basis of conclusion that the deceased was subjected to death. In the alternative he has submitted that if this court comes to the conclusion that the accused is guilty of section 304-B, he has submitted that the punishment imposed by the court that of life imprisonment is not warranted and the accused who is in jail be likewise convicted

11. learned counsel for the appellant has contended that even if this court is not with him on the argument which he has advanced so as to contend that this was not dowry death, it is submitted that even if this court relied on the suicide note and comes to the conclusion that the death was within the period of seven years of the marriage, the punishment imposed by the court for life imprisonment is not warranted on the facts of the case. The suicidal note is not a conclusive evidence according to the learned counsel for the appellant. Learned counsel for the appellant has relied on the following decisions. **(1)1994 0 Supreme (SC) 1014 Hem Chand Vs. State of Haryana decided on 6.10.1994; (2) 2010 0 Supreme (SC) 136 G.V. Siddaramesh Vs. State of Karnataka decided on 5.02.2010 in Criminal Appeal No. 160 of 2006; (3) 2014 0 Supreme(SC) 73 Hari Om Vs. State of Haryana & another decided on 31.10.2014 in Criminal Appeal No. 1167 of 2011; (4) Criminal Appeal No. 4701 of 2013 Raju @ Rajeev Vs. State of U.P. decided on 25.01.2019 in Criminal Appeal No. 4701 of 2013 and (5) Criminal Appeal No. 5047 of 2019 Vivek Vs. State of U.P. decided on 23.09.1019 in Criminal Appeal No. 5047 of 2019.**

12. As far as 498-A of I.P. Code and the conviction under section 4 of dowry prohibition Act against the accused is concerned, it is submitted that he has already completed the period of incarceration of three years and one year respectively. Learned counsel is not aware that the fine has been deposited or not yet, as accused is in jail. As against this the learned A.G.A. contends that all the witnesses and evidence on record would justify the fact that the accused was the person who had hastened the death of the deceased. All the evidence proves that the deceased was done to death or she has committed suicide. Death has occurred according to learned counsel for the State and he contends that even if this Court comes to the conclusion that it was not a murder but she had committed suicide it was just within five months of the marriage. The consistent version of all the prosecution witnesses go to show that there was a prolonged demand of two lakhs from the side of accused and his family members. It is further submitted by learned counsel for the State that it is not a case where judgements relied by the counsel for appellant would be applicable.

13. Learned counsel for the State even opposes the alternative prayer of Sri Apul Mishra appearing for the appellant, in view of the gruesomeness and time during which a young lady has met with her fate it is submitted that even if this court comes to

the conclusion that it was suicide then also no leniency or sympathy should be shown to such a person. Several judgements and the findings of learned Judge who has convicted the accused are relied. Section 304(B) of IPC reads as follows:-

***304B. Dowry death**.- (1) Where the death of a woman is caused by any burns or bodily injury or occurs otherwise than under normal circumstances within seven years of her marriage and it is shown that soon before her death she was subjected to cruelty or harassment by her husband or any relative of her husband for, or in connection with, any demand for dowry, such death shall be called "dowry death", and such husband or relative shall be deemed to have caused her death.*

Explanation.- For the purpose of this sub-section, "dowry' shall have the same meaning as in section 2 of the Dowry Prohibition Act, 1961(28 of 1961).

(2) Whoever commits dowry death shall be punished with imprisonment for a term which shall not be less than seven years but which may extend to imprisonment for life.

14. The totality of the evidence of all the witnesses who are independent witnesses as well as the family members of the deceased and the evidence of the police personnel and the documentary evidence conclusively prove that the death occurred, it was a suicide death she was harassed and now it is an admitted position which is emerged on the record and we are concur with the learned Sessions Judge who has proved has convicted the accused and has dis believed the theory that the deceased was at depression due to she being post graduate whereas the accused-husband was not even cleared his 12th standard examination. The evidence of the witnesses can not be burst aside prayed that the minor discrepancy which has been pointed out by the accused. The documentary evidence by which it can be said that the dying declaration was searched after he was released on bail. All these may leave to one conclusion that deceased had died during seven years of her marriage. The suicide note at 82 is rood that view of the matter in view of decision **Kansraj Vs. State of Punjab 2020 Cr.L.J. 2993** and **Satyaver Singh and another Vs. State of Punjab 2001 (43) ACC 1083** are judgements which have made withthe learned Judge. The Apex Court in **State of Rajsthan Vs. S. Bahadur and another 2005 SCC (crl.) 228** has been relied by the learned Judge. We do not find any reason to defer with the same. The FIR and the evidence of P.W. 1, 2 and 3 point out to one fact that the deceased was wedded to the appellant. The evidence of P.W. 4 also goes to show that there were ligature marks and panchayatnama was also prepared. All these facts go to show that it was a suicide and the demand was immediately before she committed or took her life. The witnesses who have testified against the accused cannot be said to be such witnesses whose testimony has taken, they were put to cross examination also. We concur with the learned trial judge.

15. What was the cause of death was mentioned in the suicidal note that she was being belittled time and again, despite she not being at any fault and that led to her leaving for the heavenly abode. We are not going into the cause of death as that fact is appreciated by the learned trial Judge, we concur with the learned trial Judge and we are unable to accept the submissions of Sri Apul Mishra that it is not a case of conviction.

16. The nexus to the quantum of punishment the most unfortunate part is

that the deceased died out during the short span of her marriage. The learned counsel for the appellant has relied on the decision of **G.V. Siddharamesh (Supra)** and has requested this Court that while confirming conviction this court may sentence him for 10 years. The said decision would apply to the facts of this case. Further relied on **Hari Om (Supra)** will also permit us to vary the sentence and reduce the same to ten years. A recent decision of our High Court in Criminal Appeal No. 4701 of 2013 dated 11.04.2019 in the case of Raju @ Rajiv Vs. State of U.P. will also permit us to reduce the sentence and the judgement of Lordship Justice Pritinkar Diwakar in the case of **Raju @ Rajiv** will permit us to reduce the sentence for the following reasons.

(i) The death was not so gruesome that the accused be sentenced till his last breath though the period during which the deceased had given up her life was during a short span of her marriage.

(ii) In the suicidal note which has been sought to be proved by examining D.W. 2 has not been converted by prosecution even before the trial Judge which also raise with us in lessening with period of incarceration of the accused.

17. The sentence of imprisonment is substituted by ten years of imprisonment with remissions allowable. As far as 498-A I.P.C. is concerned the period of incarceration is already over, he shall deposit fine of Rs. 10,000/- failing which the default sentence would stand to run from date of incarceration is over and as far as Dowry prohibition case is concerned, the period of one year is already over, he shall deposit Rs. 5,000/- failing which the default sentence would run from the date of incarceration.

19. The appeal is partly allowed. The record of this case be sent back to the trial court.

18. We are thankful to the counsels for assisting this court.

(2021)02ILR A482
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 20.01.2021

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE GAUTAM CHOWDHARY, J.

Criminal Appeal No. 4159 of 2012

Nand Kishore @ Nagpal
...Appellant (In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
Sri Radhey Shyam Shukla, Sri Ashutosh

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

(A) Criminal Law - Indian Penal Code, 1860 - Sections 307 - Attempt to murder , Sections 326 - Voluntarily causing grievous hurt by dangerous weapons or means - Arms Act, 1959 - Sections 25/27 - conclusively proved that it is the accused, who was involved in the incident - firearm injuries in the eye - no witness has mentioned - how P.W. 2 received injuries in the eye - inflicted maximum of punishment - requires modification. (Para - 22,23,27)

Informant gave a written complaint - his son injured on the date of incident - going to ply van on the *kanta* after having his meal - met Lekhpal who was having illicit relation with one woman of easy virtue had altercation with son of the complainant - with a view to do away the

injured, the accused fired one gun shot from country made pistol which injured his son - On hearing hue and cry, informant, converged to the place of occurrence on which accused fled with the country made pistol .(Para -2)

HELD:- Section 326 though is made out, the nature of injuries, part of the body chosen by the accused and weapon used are important facts, which are to be considered. Medical evidence go to show that the injuries were not so grave so that the accused has to suffer incarceration for life. Thus, punishment under Section 326 I.P.C. is reduced from life imprisonment to the period already undergone. While seeing blow on the vital part of the body, i.e., on the neck, we hold him guilty under Section 307. As far as Section 25/27 of Arms Act is concerned, we do not delve into as period of incarceration and default sentence therein is also over. (Para - 28)

Criminal appeal partly allowed. (E- 6)

List of Cases Cited:-

1. Mustak alias Kanio Ahmed Shaikh Vs St. of Guj. , AIR 2020 Supreme Court 2799

2. Sattan Sahani case, 2002 7 SCC 604
3. Hasoraj Singh case, AIR 1993 Supreme Court 1256

4. Modi Ram case, AIR 1972 SC 2438

(Delivered by Hon'ble Dr. Kaushal Jayendra Thaker, J.
& Hon'ble Gautam Chowdhary, J.)

1. By way of this appeal, the appellant has challenged the Judgment and order 24.9.2012 passed by court of Additional Sessions Judge (Ex-Cadre), Rampur in Sessions Trial No. 304 of 2011, State Vs. Nand Kishore @ Nagpal arising out of Case Crime No. 332 of 2011 under Sections 307, 326 I.P.C. heard with Sessions Trial No. 305 of 2011, State Vs. Nand Kishore @ Nagpal, arising out of Case Crime No. 362 of 2011 under Sections 25/27 Arms Act, Police Station Shahjad Nagar, District Rampur.

2. The brief facts which led to the litigation and whereby the State had to start investigation are that on 19.3.2011, informant Dal Chand gave a written complaint to the Station House Officer, Police Station Shahjad Nagar stating therin that his son Rameshwar injured on the date of incident, i.e., 19.3.2011 was going to ply van on the *kanta* of one Buddhi Lal after having his meal. When he reached at the shopping place known as Kamora Bazar, he met Lekhpal @ Sapera who was having illicit relation with one woman of easy virtue, namely, Savitri had altercation with son of the complainant, at 7 pm, with a view to do away the injured, the accused fired one gun shot from country made pistol which injured Rameshwar. On hearing hue and cry, informant, Natthu Lal and Ram Kishore converged to the place of occurrence on which accused fled with the country made pistol. This gave rise to the investigation by the police for the commission of offence and for using and having arms which was prohibited under the Arms Act. The police registered aforementioned case crime numbers under the relevant sections of I.P.C. and also under Arms Act after recovery of 12 bore country made pistol.

3. After the investigation was over, charge sheet was filed against the accused. The case being exclusively triable by the court of sessions, the same was committed to the Sessions court. The accused was read over the charges, who pleaded not guilty and wanted to be tried.

4. The injured was taken to the hospital, who had suffered two major injuries, which were as follows:-

Injury No.1:- Contused wound 2cmx 1.05 cm on left side of neck below 5 cm from ear towards behind.

Injury No.2:- Contused wound 1.05x 1.00 cm above the left eye.

5. These two injuries were certified by the doctor P.W.4 Sri Mohd. Ahmad who opined that they appeared to be caused by firearms and testified that they were caused by way of firing by a country made pistol recovered from appellant.

6. The prosecution so as to bring home the charges examined eight witnesses, who are as under:-

1	Dalchandra	P.W.1
2.	Rameshwar	P.W.2
3.	Ram Kishore	P.W.3
4.	Dr. Mohd. Ahmad	P.W. 4
5.	Constable Mohd. Taukir	P.W. 5
6.	Dr. Vipul Kumar	P.W. 6
7.	Dr. Nishant Gupta	P.W.7
8.	Dr. Akhil Agrawal	P.W.8

7. In support of the ocular version of the witnesses, following documents were produced and contents were proved by leading evidence:

1	Written Report	Ext. Ka-1
2.	Medical Report	Ext. Ka-2
3.	Chik	Ext. Ka-3
4.	Nakal Rapat	Ext. Ka-4
5.	Chik F.I.R.	Ext. Ka-5
6.	Nakal Rapat	Ext. Ka-6
7.	Report of injured	Ext. Ka-7
8.	Operation Note	Ext. Ka-8
9.	Information at Police Station Prem Nagar	Ext. Ka-9
10.	Reference Slip	Ext. Ka-10
11.	X-ray Slip	Ext. Ka-11
12.	Prescription Receipt	Ext. Ka-12
13.	Blood Bank Receipt	Ext. Ka-13
14.	Discharge Slip	Ext. Ka-14
15.	Pathology Report	Ext. Ka-15
16.	Report of Patient	Ext. Ka-16
17.	Consent letter	Ext.Ka-17
18.	Statement of Patient	Ext. Ka-18
19.	Prescription	Ext. Ka-19
20.	High Risk Consent	Ext. Ka-20
21.	Consent letter for	Ext. Ka-21

	rendering unconscious	
22.	Site plan	Ext. Ka-22
23.	Fard bramdagi	Ext. Ka-23
24.	Charge sheet	Ext. Ka-24
25.	Site Plan under Section 25 Arms Act	Ext. Ka-25
26.	D.M. Permission	Ext. Ka-26
27.	Charge sheet under Section 25 Arms Act	Ext. Ka-27

8. P.W. 1 Dalchandra in his statement recorded on 1.12.2011 stated that about eight months ago, his son Rameshwar, after having meal, was going to kanta of one Buddhilal for plying the van. When his son entered the Kamora Bazar, accused present in court, namely, Nand Kishore met him. Accused asked his son as to where he was going and why was he complaining about his relations with Savitri. This witness stated that there was illicit relations between Savitri and accused which was opposed by his son and due to this acrimony, the accused fired at his son Rameshwar with a countrymade pistol. Rameshwar fell down on the ground. This witness proved written report as Ext. Ka-1.

9. P.W. 2 Rameshwar (injured) in his statement dated 3.1.2012 stated that the incident took place on 19.3.2011. He after having his meal was going to kanta of one Buddhi Lal for plying the van. When he reached Kamora Bazar at about 7 p.m., the accused met him. The accused was having illicit relations with a village woman named Savitri on account of which accused was nurturing acrimony with him and he opened fire with an intent to kill him which hit him on the left side of his neck near ear. On being hit by gun-shot, he fell down on the ground and the accused ran away. This witness in his cross-examination stated that he was hit by single shot which was fired at from behind.

10. P.W. 3., who is eye witness, in his statement recorded on 31.1.2012 stated that incident relates to about ten and half years back. When he was going to his house, he heard sound of gun shot at about 7 p.m. and also the hue and cry. He saw that villager Lekhpal @ Sapera with an intent to kill, fired at Rameshwar. This offence was committed on account of woman of the village, namely, Savitri.

11. Pws 4, 6, 7 & 8 who are doctors, have proved the injuries sustained by the injured Rameshwar.

12. After hearing the prosecution and defence and also considering the evidences available on record, the learned Additional Sessions Judge by the impugned Judgment convicted the appellant under Sections 307 I.P.C. and sentenced to him to undergo rigorous incarceration for ten years with fine of Rs. 10,000/- and in default of payment of fine, to undergo further one year incarceration. He further convicted and sentenced the appellant under Section 326 I.P.C. to under to rigourous incarceration for life with fine of Rs.20,000/- and in default of payment of fine, to undergo eighteen months further incarceration. For offences under Section 25/27 of Arms Act, the learned Judge convicted and sentenced the accused-

appellant to undergo five years rigorous incarceration with fine of Rs. 5,000/- and in default of payment of fine, to undergo further six months rigorous incarceration.

13. Feeling aggrieved and dissatisfied with impugned Judgment and order passed in Sessions Trials No. 304 of 2011 and 305 of 2011, the accused-appellant is before this Court.

14. Heard learned counsel for the appellant and learned counsel for the State and perused the record.

15. At the outset, it is required to be mentioned that the appellant accused is in jail for more than nine years. Learned counsel for the appellant had filed his second bail application but we had perused the first bail application and the facts and, therefore, without paper book, we passed the following order on 11.1.2021:-

"Learned counsel for the appellant submits that the appellant is in jail since more than 9 years. Court below has convicted the appellant under Section 307 IPC for ten years imprisonment with fine of Rs.10,000/-.

We have requested for arguing the main matter, learned counsel for appellant has shown his agreement. Hence even without paper book as the evidence available with him, list this matter tomorrow i.e. 12.1.2021 at 2:00 p.m."

16. Learned counsel for the appellant made an alternative prayer that no offence under Section 326 IPC is made out against the accused as the injured has not stated in his statement as to how his eye was hit and in the alternative, he has submitted that the offence is not so grave that the appellant is required to be given incarcration for life.

17. Learned counsel for the appellant submitted that the trial court did not appreciate that the incident occurred in broad day light. It is submitted that P.W. 2 did not mention as to how he suffered the injuries in his eye.

18. After going through the testimony of the witnesses, we conveyed to the counsel about our non agreement to the fact that the accused was required to be acquitted.

19. It is submitted by counsel for appellant that according to the prosecution case, the occurrence took place at 7 p.m. The submission of the counsel is that in the informant's version and the version of P.W. 1 and P.W. 2, there are certain contradictions. They are very minor contradictions. It is submitted that Nand Kishor did not fire at the injured. It is unknown who had fired on the injured and injured his eye. Arrest of the appeallant was on 30.3.2011.

20. It is submitted that the accused was not named in the F.I.R. despite that he had been charge sheeted and he had been convicted. It is further submitted that neither the prosecution witnesses nor Rameshwar stated in his oral statement on oath as to how he sustained injury on his left eye. We are not aware that the accused is also known as Lekhpal @ Sapera who had injured the P.W.2. The oral statement of PW 3 Ram Kishore and that of doctor who examined the injured Rameshwar had also opined that it was a fire arm injury. It is submitted that only single fire arm shot was heard and the accused had been roped in falsely. It is further submitted that the evidence on record goes to show that the trial court has committed an error, which is apparent on the face of the record.

21. As against this, learned counsel for the State has contended that the punishment is just and proper as PW 2 was injured and he has highly damaged eye as per the medical evidence. Dr. Akhil Agrawal, according to the counsel for the State, had examined the injured on 20.3.2011 who has opined that he was injured by gun shot injury. This gun shot injury, according to the counsel for the State, was caused by the gun which was recovered from the accused.

22. Having deeply gone into oral testimony of all the witnesses, three things emerge , i.e., the incident occurred on 19.3.2011 at 7 pm; the presence of the accused is proved; and the injuries of the injured are proved by the evidence of PWs 2 and 3, who were present at the place of the occurrence . It is evident from the evidence of PW 2 that he received gun shot injury from behind which went from his neck and went through near the ear. The dispute arose on account of illicit relations between the accused and one Savitri for which the injured went to advise him. PW 3 heard the noise of firing and reached there and, according to him, the incident occurred due to illicit relations with Savitri. A confusion was sought to be created that Lekhpal alias Sapera and Nand Kishore are two different persons but the accused Nandkishore @ Nagpal @ Lekhpal @ Sapera are the same person. Thus, it is conclusively proved that it is the accused, who was involved in the incident and he is a named accused. We are not delving into the further facts as we are convinced that it was the accused who was involved in the commission of the offence.

23. As far as the firearm injuries in the eye is concerned, no witness has mentioned that as to how P.W. 2 received injuries in the eye. The learned Judge has not assigned any reason as to why the accused is sentenced for life imprisonment under Section 326 I.P.C. The learned Judge even without considering the evidence of PW 8 the doctor, comes to the conclusion that injuries were as such that injured would have died. We have perused the evidence of the doctors. It cannot be said that injuries of the accused were so grave that he should be sentenced to be life imprisonment under Sections 307 and 326, which read as follows:

"307. Atempt to murder.- Whoever does any act with such intention or knowledge, and under such circumstances that, if the by that act caused death, he would be guilty of murder, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; and if hurt is caused to any person by such act, the offender shall be laible either to [imprisonment for life], or to such punishment as is hereinbefore mentioned.

Attempt by life convicts.*-[When any person offending under this section is under sentence of [imprisonment for life], he may, if hurt is caused, be punished with death.]*

326. Voluntarily causing grievous hurt by dangerous weapons or means.- Whoever, except in the case provided for by Section 335, voluntarily causes grievous hurt by means of any instrument for shooting, stabbing or cutting or any instrument which used as a weapon of offence, is likely to cause death , or by means of fire or any heated substance, or by means of any poison or any corrosive substance, or by means of any explosive substance, or by means of any substance which it is deleterious to the human body to inhale, to swallow, or to receive into the

blood, or by means of any animal, shall be punished with [imprisonment for life], or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine."

24. Recently, in the case of **Mustak alias Kanio Ahmed Shaikh Vs. State of Gurarat, repored in AIR 2020 Supreme Court 2799**, the Apex Court, while enhancing punishment under Section 307 of the Indian Penal code, has sentenced the accused to seven years.

25. The Apex Court in the case of **Sattan Sahani 2002 7 SCC 604** has held that where the accused faced trauma of criminal proceedings for more than two decades, the sentence of imprisonment was reduced to the period already undergone. In the case of **Hasoraj Singh** reported in **AIR 1993 Supreme Court 1256**, the accused was ordered to undergo three years as the sentence of imprisonment was reduced to period already undergone. In our case, accused has remained in jail during trial and again during the pendency of appeal before this Court. The sentence has to commensurate with the injuries which the injured has sustained. The Court commands the first class Magistrate to try such cases as it was coupled with 307 I.P.C. We hold that as there was sudden quarrel where only two injuries were found and the accused has been in jail for more than nine years, we hold that eight years would be sufficient period for incarceration looking to the weapon used looking to the young age of injured also. Fight took place betwen the accused and injured which arose out of exchange of abuses due to alleged relations with some lady. The proseuction has proved that the assault was by the appellant. Even in a case where the nose was cut, the court shall not give life sentence.

26. In the case of **Modi Ram, AIR 1972 SC 2438** also, where there are serious allegation, the Apex Court held that the accused should be adequately dealt with. The Apex Court in a case, where a person whose penis and nose were cut, held that eight years of imprisonment were too harsh and reduced the period to three years. The punishment should commensurate with the injuries caused. There should not be any undue sympathy also. But, in our case, we find that there were doubt regarding who injured PW 2 in his eye and as even in his testimony he did not say that the accused had fired in his eye.

27. The learned Judge has gone on the bare reading of Section 307 and 326 I.P.C. and has inflicted maximum of punishment which, in our opinion, requires modification.

28. In that view of the matter, as far as Section 326 I.P.C. is concerned, we hold that Section 326 though is made out, the nature of injuries, part of the body chosen by the accused and weapon used are important facts, which are to be considered. Medical evidence go to show that the injuries were not so grave so that the accused has to suffer incarceration for life. Thus, punishment under Section 326 I.P.C. is reduced from life imprisonment to the period already undergone, i.e., eight years with reduced fine of Rs.10,000/-, and default sentence is also reduced to six months. While seeing blow on the vital part of the body, i.e., on the neck, we hold him guilty under Section 307 and sentence is reduced to eight years, fine is reduced to Rs.10,000/- and default sentence is also reduced to three months which by now he must have undergone. As far as Section 25/27 of Arms Act is concerned, we do not delve into as period of incarceration and default sentence therein is also over.

29. The appeals stands partly allowed.

30. Records are not before this Court. The accused, who is in jail, be released if he is not required in any other case.

31. Let a copy of this judgment be sent to the Jail Authorities concerned and District Magistrate for compliance.

(2021)02ILR A489
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 20.01.2021

BEFORE

THE HON'BLE BACHCHOO LAL, J.
THE HON'BLE SUBHASH CHANDRA SHARMA, J.

Criminal Appeal No. 4212 of 2009
&
Criminal Appeal No. 3967 of 2009

Amit Sharma ...Appellant (In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
Sri Paritosh Shukla, Sri Gaurav Kakkar, Sri R.B. Gaur, Sri S.K. Upadhyay, Sri Yogesh Kumar Srivastava

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

Criminal Law-Indian Penal Code (45 of 1860), S.304B - Evidence Act (1 of 1872) , S.113B - Dowry death - Held - Various cut wounds were found on the body of the deceased in which except the injury number 13, all the other injuries were on delicate organ, head, neck and abdomen, which shows that the injuries to the deceased were inflicted in the most brutal and ruthless manner - Appellants harassed the deceased for demand of dowry and treated her with cruelty - death of the deceased occurred within 7 years of marriage as a result of injuries found on her body otherwise than under normal circumstances - no legal error or irregularity in the judgments and findings of the trial - Life imprisonment of husband and seven years sentence to mother in law maintained. (Para 41)

Writ Petition dismissed. (E-4)

List of Cases cited:-

1. Kailash Vs St. of M. P AIR 2007 SC 107

2. Hari Om Vs St. of Har. 2014 AIR SCW 6416

3. St. of Karnataka Vs M. V. Manjunath Gowda & anr. AIR 2003 SUPREME COURT 809, 2003(1) SC 133,

4. Hem Chand Vs St. of Har. AIR 1995 SUPREME COURT 120; 1994 Supreme (SC)1014

5. G. V. Siddaramesh Vs St. of Karnataka 2010 AIR SCW 1387

(Delivered by Hon'ble Bachchoo Lal, J.)

(माननीय न्यायमूर्ति बच्चू लाल, द्वारा प्रदत्त निर्णय)

1. अपीलार्थी अमित शर्मा ने **दाण्डिक अपील संख्या 4212 वर्ष 2009** तथा अपीलार्थी श्रमती कुसुम लता ने **दाण्डिक अपील संख्या 3967 वर्ष 2009**, तत्कालीन विद्वान अपर सत्र न्यायाधीश, (त्वरित न्यायालय), न्यायकक्ष संख्या 17, बुलन्दशहर श्री पी0 एन0 राय द्वारा **सत्र परीक्षण संख्या 305 वर्ष 2005** राज्य प्रति अमित शर्मा एवं अन्य में पारित निर्णय एवं आदेश दिनांक 2–7–2009 के विरूद्व योजित की है। जिसके द्वारा अपीलार्थीगण को धारा 304ख, 498क भा0दं0सं0 एवं धारा 3 व 4 दहेज प्रतिषेध अधिनियम के अन्तर्गत दोषी पाते हुए अपीलार्थी अमित शर्मा को धारा 304ख भा0दं0सं0 के अन्तर्गत आजीवन कारावास के दण्ड से एवं अपीलार्थी श्रीमती कुसुम लता को धारा 304ख भा0दं0सं0 के अन्तर्गत सात वर्ष के कारावास के दण्ड से तथा अपीलार्थीगण को धारा 3 दहेज प्रतिषेध अधिनियम के अन्तर्गत दोषी पाते हुए प्रत्येक को पांच–पांच वर्ष के कारावास व पन्द्रह–पन्द्रह हजार रूपये के

अर्थदण्ड से दण्डित किया गया। अर्थदण्ड अदा न करने की स्थिति में प्रत्येक को 3–3 माह का अतिरिक्त कारावास के दण्ड से एवं अपीलार्थीगण को धारा 4 दहेज प्रतिषेध अधिनियम के अन्तर्गत दोषी पाते हुए 2–2 वर्ष के कारावास व एक–एक हजार रूपये के अर्थदण्ड से दण्डित किया गया। अर्थदण्ड अदा न करने की स्थिति में प्रत्येक को एक–एक माह का अतिरिक्त कारावास भुगतने का आदेश पारित किया गया तथा यह भी आदेशित किया गया कि उपरोक्त सभी सजायें साथ–साथ चलेगीं।

2. उपरोक्त दोनों अपीलें एक ही निर्णय एवं आदेश से सम्बन्धित है। अतएव उक्त दोनों अपीलों का निस्तारण एक साथ किया जाता ळें

3. अपीलों के निस्तारण हेतु आवश्यक तथ्य संक्षेप में इस प्रकार है कि वादी मुकदमा विश्वेश्वर शर्मा द्वारा दिनांक 12–8–2004 को एक लिखित तहरीर थाना कोतवाली देहात, जिला बुलन्दशहर में इस आशय के साथ दाखिल की गयी कि उसकी माता श्रीमती कुसुमलता शिव कालोनी, थाना कोतवाली देहात, जिला बुलन्दशहर में अपने मकान में अकेली रहती है। आठ दस दिन से उसकी भाभी पूनम पत्नी अमित शर्मा उसकी माता के घर आई हुई थी । बीती आज रात को उसकी माता व पूनम घर में मौजूद थी । रात के करीब 11–00 बजे चार अज्ञात बदमाश दरवाजा खोलकर घर में घुस आये और घर के सेफ से तीन अंगूठी सोने के, एक अंगूठी अमित की, सोने की, चार चूडी, सोने की पूनम की एक कालर, एक गले की चैन एक तोली की तथा एक सूटकेस मय लेडीज साडी तथा उसके भाई अमित के तीन चार जोडी कपडे नये पुराने लूट लिए । जब उसकी माता तथा उसके भाई की पत्नी पूनम ने लूटपाट का विरोध किया तो बदमाशों ने उसकी माता तथा पूनम के साथ मारपीट की, जिससे उसकी माता घायल हो गयी तथा पूनम के शरीर में चोटें आने से मृत्यु हो गयी । चारों बदमाश पूनम की हत्या करके तथा उसकी माता को घायल करके लूटा हुआ सामान लेकर भाग गये । बदमाशों को उसकी माता ने घर में जली रोशनी में देखा है, सामने आने पर पहचान सकती है । इस घटना की सूचना उसे राधानगर में मिली तो वह अपनी माता के घर आया, उसकी माता ने सारी घटना बतायी । वह रिपोर्ट लिखकर थाने आया है, उसकी रिपोर्ट दर्ज कर कानूनी कार्यवाही करने की कृपा की जाए।

4. वादी विश्वेश्वर शर्मा की उक्त लिखित तहरीर के आधार पर दिनांक 12–8–2004 को समय 1–45 ए0 एम0 पर थाने पर मुकदमा अपराध संख्या 395 वर्ष 2004 धारा 394/302 भा0 दं0 सं0 के अन्तर्गत अज्ञात के विरूद्व पंजीकृत किया गया।

5. मामले की विवेचना अभियोजन साक्षी संख्या 8 एस0 एस0 आई0 बृजमोहन सिंह के सुपुर्द की गयी। इस साक्षी ने अपने बयान में यह बताया है कि दिनांक 12–8–2004 को वह थाना कोतवाली देहात पर बतौर एस0 एस0 आई0 तैनात था। उस दिन 1–45 ए0 एम0 पर यह मुकदमा थाने पर अन्तर्गत धारा 394, 302 भा0 दं0 सं0 में पंजीकृत हुआ और इसकी विवेचना उसे प्राप्त हुई। नकल चिक व नकल रपट की नकल केस डायरी में की और थाने पर मौजूद वादी विशेषवर शर्मा व लेखक एफ0 आई0 आर0, एच0 एम0 वेद प्रकाश के बयान लिए। इसके पश्चात वह थाने से रवाना होकर घटनास्थल पहुंचा और वहां श्रीमती कुसुमलता का बयान लिया तथा उसके हमराह एस0 आई0 रामपाल सिंह को मृतका पूनम के शव का पंचायतनामा एवं सम्बन्धित कागजात तैयार करने का निर्देश दिया और श्रीमती कुसुमला की निशानदेही पर घटनास्थल का निरीक्षण किया और नक्शा नजरी तैयार किया। इस साक्षी ने नक्शा नजरी को प्रदर्श क–10 के रूप में साबित किया है। यह भी कहा है कि मौके से मिट्टी सादा व मिट्टी खून आलूदा व खून आलूदा चूडियों के टुकडे व खून आलूदा चादर और मृतका के शव के पास पडे हुए व मुट्ठी में लम्बे बाल मौके पर गवाहान के समक्ष कब्जे में लिए और उसकी फर्द तैयार की। इस पर उसके व हमराही कर्मचारीगण व अन्य लोगों के हस्ताक्षर है जिस पर प्रदर्श क–11 डाला गया। इसके पश्चात उसने हमराही कर्मचारीगण व गवाहान की उपस्थिति में घर में घटनास्थल पर कमरे से ज्वैलरी व अन्य सामान जहां से लूटना बताया था को कब्जे में लिया तथा उसकी फर्द बनाने के पश्चात श्रीमती कुसुमलता व उसके लडके विशेश्वर की सुपुर्दगी में मौजूदा लोगों के समक्ष दिया जिसमें एक कलर टी0 वी0, इमरजेंसी लाइट,

एक कैमरा, एक वाकमैन, एक बनारसी साडी, चार अटैची, आठ साडियां पूनम की, चार साडियां इस्तेमाली थी जिसकी फर्द प्रदर्श क–12 को इस साक्षी ने साबित किया है। यह भी कहा है कि फर्द के गवाहन जो पंचायतनामा के गवाह भी है और मृतका के पडोसी भी है के बयान लिए तथा पंचायतनामा व सम्बन्धित कागजात तैयार होने के पश्चात लाश को सील मोहर हालत में मय कागजात के शव परीक्षण के लिए भेजा गया और मुलजिमान की तालाश की गयी। दिनांक 13–8–2004 को मृतका पूनम का पंचायतनामा व शव परीक्षण रिपोर्ट प्राप्त हुई और उनकी नकल केस डायरी में की व गवाह सुखवीर, विशेषवर व अशोक कुमार के बयान लिए। दिनांक 14–8–2004 को मृतका पूनम के पिता रूप किशोर का लिखित प्रार्थना पत्र प्राप्त हुआ और उसकी नकल केस डायरी में की तथा उस प्रार्थना पत्र को संलग्न सी0 डी0 किया तथा रूप किशोर का बयान लिया जिसमें रूप किशोर द्वारा अपनी पुत्री पूनम की हत्या उसके पति व उसकी सास द्वारा करने का आरोप लगाया। दिनांक 17–8–2004 को वह थाने से रवाना होकर शिव कालोनी, यमुनापुरम आया जहां मृतका पूनम का पति अमित कुमार मिला जहां उससे पूछतांछ की। दिनांक 27–8–2004 को मृतका के पति अमित कुमार व सास कुसुमलता के शपथपत्र प्राप्त हुए और उनकी नकल केस डायरी में की तथा उन्हें संलग्न सी0 डी0 किया। दिनांक 2–9–2004 को घटनास्थल के निरीक्षण सम्बंधी फील्ड यूनिट के आधार पर फिगंर प्रिन्ट व फोटोग्राफ प्राप्त हुए और उनका उल्लेख केस डायरी में किया। दिनांक 9–9–2004 को कुसुमलता के बालों व मृतका के हाथ से प्राप्त बालों के परीक्षण हेतु रिपोर्ट न्यायालय में प्रेषित की। दिनांक 12–9–2004 को वह थाने से रवाना होकर मय हमराही कर्मचारीगण के ग्राम रजवसा पहुंचा जहां रूप किशोर के घर पर रूप किशोर नही मिले व उनका लडका संजय शर्मा (भाई मृतका) घर पर मिला। संजय शर्मा की पत्नी मंजू मिली तथा दोनो के बयान लिए। दिनांक 29–9–2004 को वह मय हमराही कर्मचारीगण के साथ रवाना होकर मोहल्ला यमुनापुरम पहंचा जहां श्रीमती कुसुमलता घर पर नहीं मिली। जहां ताला लगा पाया गया उनके आसपास के लोगों अनिल कुमार, अरविन्द कुमार, बृजेश कुमार , शरणवीर सिंह, अशोक आदि के बयान लिए। दिनांक 2–10–2004 को वह मय हमराही कर्मचारीगण के साथ थाने से रवाना होकर दरियापुर पहुंचा और संदिग्ध लोगो से पूछतांछ की। दिनांक 17–10–2004 को वह हमराही कर्मचारीगण के साथ कस्बा पुंवाया शाहजहांपुर पहुंचा और वहां पर अमित के मकान मोहल्ला स्थित पुरगंज पर पहुंचा और मकान मालिक महेश कुमार शुक्ला व साखन गुप्ता से पूछतांछ की। दिनांक 30–10–2004 को वरिष्ठ पुलिस अधीक्षक के आदेश दिनांक 29–10–2004 के द्वारा यह मुकदमा तत्कालीन क्षेत्राधिकारी नगर श्री पवन कुमार यादव को स्थानान्तरित हो गया और इसकी अग्रिम विवेचना उन्होनें की।

6. उलेखनीय है कि मृतका के पिता रूप किशोर शर्मा द्वारा एक प्रार्थना पत्र अन्तर्गत धारा 156 (3) दं0 प्र0 सं0 प्रस्तुत किया गया जिस पर मुख्य न्यायिक मजिस्ट्रेट, बुलन्दशहर के आदेश दिनांक 11–10–2004 के क्रम में वरिष्ठ पुलिस अधीक्षक के द्वारा इस मामले की विवेचना पवन कुमार यादव, क्षेत्राधिकारी अभियोजन साक्षी संख्या 7 के सुपुर्द की गयी। इस साक्षी ने अपने बयान में यह कहा है कि दिनांक 30–10–2004 को वह पुलिस क्षेत्राधिकारी नगर बुलन्दशहर के रूप में कार्यरत था उससे पूर्व इस घटना की विवेचना एस0 एस0 आई0 कोतवाली नगर, बी0 एम0 सिंह द्वारा धारा 394, 302 भा0 दं0 सं0 के अन्तर्गत की जा रही थी। तत्तकालीन एस0 एस0 पी0 के आदेश पंत्रांक आर0 एस0 एस0 पी0 19/04 दिनांक 29–10–2004 के द्वारा यह विवेचना दहेज हत्या से सम्बन्धित होने के कारण उसे प्रदान की गयी उसने पूर्व विवेचक द्वारा लिखी गयी केस डायरी का अवलोकन किया। दिनांक 6–11–2004 को व 10–11–2004 को मुलजिमान की तालाश की लेकिन उपलब्ध नहीं हुए। दिनांक 11–11–2004 को वह अपने कार्यालय से चालक एवं हमराही कर्मचारीगण को साथ लेकर घटनास्थल मोहल्ला शिव कालोनी, यमुनापुरम बुलन्दशहर पहुंचा वहां श्रीमती कुसुम व उसकी पुत्री आरती मौजूद मिले और उनके बयान अपने पेशकार से अपनी मौजूदगी में बोलकर लिखाए। दिनांक 14–11–2004 को मृतका के पिता का प्रार्थना पत्र प्राप्त हुआ उसका उल्लेख केस डायरी में किया। दिनांक 16–11–2004 को पडोस के दो गवाह (अभियुक्तगण के पडोसी) कुंवरपाल व डाक्टर बृजेश के बयान लिए। श्रीमती नेमवती के भी बयान केस डायरी में अंकित कराये। दिनांक 20–12–2004 को

उसके कार्यालय में तलविदा गवाहान रूप किशोर उपस्थित आया जो मृतका का पिता है उसका बयान केस डायरी में अंकित कराया और मृतका के पिता ने शादी का एक कार्ड दिया और उसका उल्लेख केस डायरी में किया। शादी के कार्ड को इस साक्षी ने वस्तु प्रदर्श–1 के रूप में साबित किया है। दिनांक 30–12–2004 को वादी विशेषवर उसके कार्यालय में उपस्थित आया उसका बयान लिया। विशेषवर के साथ आये राजेश कुमार सोलंकी, कैलाश चन्द्र के बयान केस डायरी में अंकित कराये। दिनांक 2–1–2005 को मृतका पूनम का भाई संजय शर्मा व उसकी पत्नी मंजू व उसका चचेरा भाई मनोज शर्मा व उसकी पत्नी गीता देवी, मृतका की मां भगवती व मृतका व अभियुक्त की शादी का बिचौलिया जुगेन्द्र गुजर व मृतका की चाची किरन देवी, प्रकाश सिंह, रूप किशोर के साथी अध्यापक देवेन्द्र सिंह व रवीन्द्र कुमार तलविदा उसके कार्यालय में उपस्थित आये और उनके बयान अंकित कराये। दिनांक 3–1–2005 को मृतका के पिता रूप किशोर के साथ उसके कार्यालय में आये विष्णुदत्त शर्मा व सतपाल व दीन मोहम्मद के बयान अंकित कराये। दिनांक 5–1–2005 को अभियुक्तगण अमित व श्रीमती कुसुम के विरूद्व पर्याप्त साक्ष्य के आधार पर ये प्रकाश में आये। दिनांक 6–1–2005 व 8–1–2005 को अभियुक्तगण को तलाश किया लेकिन नहीं मिले। दिनांक 9–1–2005 को मृतका के पिता रूप किशोर के साथ उसके कार्यालय में आये बाबू, रमेश, व रामवीर के बयान अंकित कराये। दिनांक 11–1–2005 को अभियुक्त अमित गिरफतार हुआ और उसका बयान लिया। दिनांक 15–1–2005 को मृतका का पंचायतनामा भरने वाले एस0 आई0 रामपाल सिंह व पी0एम0 करने वाले डाक्टर सर्वोदय कुमार के बयान अंकित कराये। यह भी कहा कि पर्याप्त साक्ष्य के आधार पर अभियुक्तगण अमित शर्मा व कुसुम के विरूद्व आरोप पत्र अन्तर्गत धारा 498ए, 304बी0 भा0 दं0 सं0 व 3 एवं 4 दहेज प्रतिशेध अधिनियम के अन्तर्गत आरोप पत्र प्रेषित किया गया। आरोप पत्र को इस साक्षी ने प्रदर्श क–9 के रूप में साबित किया ळें

7. मृतका पूनम के शव का पंचायतनामा अभियोजन साक्षी संख्या 6 एस0 आई0 रामपाल सिंह द्वारा तैयार किया गया था उन्होनें मृतका का पंचायतनामा, पुलिस फार्म संख्या 13, चिट्ठी सी0 एम0 ओ0, चिट्ठी आर0 आई0, फोटो नाश को प्रदर्श क–4 लगायत प्रदर्श क–8 के रूप में साबित किया है। इस साक्षी ने यह कहा है कि उसने पंचायतनामा के पश्चात शव को सील मोहर कर मय कागजात के का0 हवा सिंह व सुखपाल सिंह के सुपुर्द कर मृतका पूनम के शव का शव परीक्षण कराने का निर्देश दिया।

8. मृतका पूनम के शव का शव परीक्षण अभियोजन साक्षी संख्या 4 डाक्टर सर्वोदय कुमार द्वारा किया गया था। इस साक्षी ने अपने बयान में यह बताया है कि दिनांक 12–8–2004 को वह बतौर मेडिकल आफिसर जिला अस्पताल बुलन्दशहर में तैनात था। उस दिन उसने 2–30 पी0 एम0 पर श्रीमती पूनम शर्मा पत्नी अमित शर्मा निवासी शिव कालोनी, थाना कोतवाली देहात बुलन्दशहर के शव का जिसे सर्व मोहर हालत में एस0 ओ0 थाना कोतवाली देहात द्वारा भेजा गया था तथा सी0 पी0 नं0 1338 हवा सिंह राणा व सी0 पी0 30 सुखपाल सिंह थाना कोतवाली देहात द्वारा लाया गया था के शव का शव परीक्षण किया था।

9. डाक्टर के अनुसार, मृतका की उम्र लगभग 23 वर्ष थी तथा उसके शव पर पूरे शरीर पर मृत्यु उपरान्त की जकडन मौजूद थी। शव सामान्य कद काठी का था। मृतका के शरीर पर निम्नलिखित मृत्युपूर्व की चोटें पायी गयीः–

(1) कटा हुआ घाव 12 X 4 सेमी दिमाग तक गहरा, खोपडी पर बाईं ओर, बांए कान के 8 सेमी ऊपर।

(2) कटा हुआ घाव 5 सेमी X 0.5 सेमी हड्डी तक गहरा बांयी भौ के ऊपर माथे पर बायीं ओर।

(3) कटा हुआ घाव 5 सेमी X 0.5 सेमी हड्डी तक गहरा चोट नं0 2 के 1 सेमी ऊपर।

(4) कटा हुआ घाव 4 सेमी X 0.5 सेमी हड्डी तक गहरा चोट नं0 3 के 1 सेमी ऊपर।

(5) कटा हुआ घाव 6 सेमी X 1 सेमी हड्डी तक गहरा चोट नं0 4 के डेढ सेमी ऊपर।

(6) कटा हुआ घाव 3 सेमी X 1 सेमी मांस तक गहरा, ऊपरी होठ पर बांयी ओर।

(7) कटा हुआ घाव 2 सेमी X 0.5 सेमी मांस तक गहरा, मुंह के दांए किनारे पर।

(8) कटा हुआ घाव 4 सेमी X 0.8 सेमी मांस तक गहरा, निचले होठ के बिल्कुल नीचे ठोडी पर।

(9) कटा हुआ घाव 6 सेमी X 1.5 सेमी कैवेटी तक गहरा, चोट नं0 8 के 1 सेमी नीचे। चोट नं0 2 से 9 तक सभी चोटे Trans versly अवस्था में थी।

(10) कटा हुआ घाव 3 सेमी X 0.5 सेमी मांस तक गहरा, गर्दन पर बायी तरफ बीच में टेडी स्थिति में।

(11) कटा हुआ व घोपा हुआ घाव 2.5 सेमी X 1 सेमी कैवेटी तक गहरा, नाभी के 5 सेमी ऊपर पेट में 12 बजे की अवस्था में।

(12) कटा हुआ घाव 2 सेमी X 0.8 सेमी कैवैटी तक गहरा। चोट नं0 11 के बांयी तरफ 1 सेमी बाहर की ओर।

(13) कटा हुआ घाव 5 सेमी X 11 सेमी मांस तक गहरा, बांये हाथ पर बीच में पीछे की ओर।

10. मृतका के अन्तः परीक्षण में पाया कि चोट संख्या 1 के नीचे खोपडी की हड्डियां, मास्तिष्क मय झिल्ली के कटा हुआ था। हृदय रक्त से खाली था। चोट संख्या 11 व 12 के नीचे छोटी आंत जगह जगह से कटी हुई थी। खाने की थैली खाली थी तथा पेट में रक्त भरा था, बच्चेदानी खाली थी।

11. डाक्टर के अनुसार, मृतका की मृत्यु लगभग आधा दिन पूर्व, मृत्युपूर्व आयी चोटों के कारण हुए सदमें, रक्तस्राव व बेहोशी के कारण हुई थी।

12. शव परीक्षण के पश्चात मृतका के शरीर से निम्नलिखित कपडे व वस्तु जिनमें एक कुर्ती, एक सलवार, एक ब्रा, चार चूडी पीली धातु की, चार बिछुए सफेद धातु के एक कपडे में सील करके मय पुलिस पेपर के शव लाने वाले सिपाहियों के सुपुर्द किया। इस साक्षी ने पोस्टमार्टम रिपोर्ट को अपने लेख एवं हस्ताक्षर में होना बताते हुए प्रदर्श क–1 के रूप में साबित किया है। यह भी कहा कि मृतका की मृत्यु 11/12–8–2004 की मध्य रात्रि को रात 11–00 बजे से प्रातः 4 बजे के मध्य होना सम्भव है। उपरोक्त सभी चोटें मृत्यु कारित करने के लिए पर्याप्त थी।

13. आरोप पत्र प्राप्त होने के पश्चात दिनांक 16–3–2005 को मुख्य न्यायिक दण्डाधिकारी, बुलन्दशहर द्वारा अपीलार्थीगण के मुकदमें को विचारण हेतु सत्र न्यायालय के सुपुर्द किया गया।

14. विद्वान विचारण न्यायालय द्वारा अपीलार्थीगण के विरूद्व धारा 304ख, 498ए भा0 दं0 सं0 तथा धारा 3 व 4 दहेज प्रतिषेध अधिनियम के अन्तर्गत आरोप विरचित किये गये। अपीलार्थीगण द्वारा आरोपों से इंकार किया गया तथा परीक्षण की मांग की गयी।

15. अभियोजन पक्ष की ओर से अपने कथन के समर्थन में अभियोजन साक्षी संख्या 1 रूप किशोर शर्मा, अभियोजन साक्षी संख्या 2 संजय, अभियोजन साक्षी संख्या 3 जुगेन्द्र सिंह, अभियोजन साक्षी संख्या 4 डाक्टर सर्वोदय कुमार, अभियोजन साक्षी संख्या 5 उपनिरीक्षक वेद प्रकाश, अभियोजन साक्षी 6 उपनिरीक्षक रामपाल सिंह, अभियोजन साक्षी संख्या 7 क्षेत्राधिकारी, पवन कुमार यादव अभियोजन साक्षी संख्या 8 एस0 एस0 आई0 बृजमोहन सिंह को परीक्षित कराया गया ळें

16. अपीलार्थीगण का बयान धारा 313 दं0प्रं0सं0 के अन्तर्गत अंकित किया गया जिसमें उन्होने अभियोजन कथानक को गलत बताया तथा गलतफहमी व लोगों के उकसाने के कारण झूंठा फसाया जाना बताया।

17. अपीलार्थीगण की ओर से अपने बचाव में बचाव साक्षी संख्या 1 के रूप में महेश कुमार शुक्ला को परीक्षित कराया गया ळें

18. विद्वान विचारण न्यायालय ने उभय पक्ष को सुनकर तथा पत्रावली पर उपलब्ध समस्त साक्ष्य एवं अभिलेखों पर सम्यक विचार करने के उपरान्त अपीलार्थीगण को प्रश्नगत अपराध में दोषी पाते हुए उपरोक्तानुसार दण्डित किया है जिससे क्षुब्ध होकर अपीलार्थीगण ने उपरोक्त अपीलें इस न्यायालय में योजित की ळें

19. अपीलार्थीगण की ओर से उनके विद्वान अधिवक्ता श्री योगेश कुमार श्रीवास्तव एवं श्री एस0 के0 उपाध्याय, राज्य की ओर से श्री रतन सिंह विद्वान अपर शासकीय अधिवक्ता को विस्तारपूर्वक सुना तथा पत्रावली एवं प्रश्नगत निर्णय व आदेश का सम्यक परिशीलन किया।

20. अपीलार्थीगण की ओर से मुख्य रूप से यह तर्क प्रस्तुत किया गया कि अपीलार्थीगण/अभियुक्तगण निर्दोष है उन्हें इस प्रकरण में महज झूठा फसाया गया है। विद्वान विचारण न्यायालय ने पत्रावली पर उपलब्ध समस्त साक्ष्य एवं अभिलेखों पर सम्यक विचार नहीं किया तथा मनमाने तौर पर अपीलार्थीगण की दोषसिद्वि निर्धारित कर दण्डित किया है तथा दी गयी सजा भी अत्यधिक है। यह भी तर्क रखा गया कि प्रश्नगत प्रकरण में घटना की प्रथम सूचना रिपोर्ट अपीलार्थी अमित शर्मा के भाई विशेश्वर शर्मा द्वारा दर्ज करायी गयी थी। अपीलार्थी अमित शर्मा घटना के समय आई0 सी0 आई0 सी0 आई0 बैंक शाहजहांपुर में क्लर्क था तथा घटना के समय वह घर पर मौजूद नहीं था। घटना अज्ञात बदमाशों द्वारा कारित की गयी है परन्तु इस सम्बंध में विद्वान विचारण न्यायालय द्वारा सम्यक विचार नहीं किया गया है। मृतका के पिता ने धारा 156 (3) दं0 प्र0 सं0 के अन्तर्गत प्रार्थना पत्र घटना के करीब एक माह बाद दिया था। मृतका की शादी अपीलार्थी अमित शर्मा के साथ सम्पन्न हुई थी। दहेज का कोई विवाद नहीं था और न ही दहेज मांगने के सम्बंध में कभी कोई शिकायत मृतका के पिता अथवा मृतका द्वारा की गयी। अपीलार्थीगण के कब्जा अथवा निशानदेही से किसी हथियार की बरामदगी नहीं बतायी जाती है। अभियोजन साक्षी संख्या 1 रूप किशोर शर्मा ने अपने बयान में स्वयं यह स्वीकार किया है कि मृतका ने उसके विरूद्व एक प्रार्थना पत्र एस0 एस0 पी0 को दिया था जिसके सम्बंध में उसने राजीनामा होने की बात स्वयं स्वीकार की है। अभियोजन साक्षी संख्या 1 रूप किशोर शर्मा जो मृतका का पिता तथा अभियोजन साक्षी संख्या 2 संजय जो मृतका का भाई है उन्होनें दहेज मांगने की कहानी गलत बनायी है। अपीलार्थीगण ने न तो मृतका को कोई चोट पहुंचायी है और न ही उसके साथ कोई क्रूरता का व्यवहार किया है परन्तु इस सम्बंध में विद्वान विचारण न्यायालय द्वारा सम्यक विचार नहीं किया गया। विद्वान विचारण न्यायालय द्वारा निर्धारित दोषसिद्वि एवं दण्डादेश विधि संगत नहीं है। अपीलार्थीगण के विरूद्व लगाये गये आरोप संदेह से परे सिद्व नहीं है एवं अपीलार्थीगण दोषमुक्त होने योग्य ळें

21. इसके विपरीत विद्वान अपर शासकीय अधिवक्ता द्वारा यह तर्क प्रस्तुत किया गया कि प्रस्तुत मामले में दहेज की मांग को लेकर मृतका को प्रताडित करने के सम्बंध में साक्ष्य उपलब्ध है। विद्वान विचारण न्यायालय ने पत्रावली पर उपलब्ध समस्त साक्ष्य एवं अभिलेखों पर सम्यक विचार करने के उपरान्त अपीलार्थीगण को दोषसिद्व एवं दण्डित किया है जिसमें कोई विधिक त्रुटि अथवा अनियमितता नहीं ळें

22. उल्लेखनीय है कि इस घटना की प्रथम सूचना रिपोर्ट अपीलार्थी अमित शर्मा के भाई विशेश्वर शर्मा द्वारा लूट एवं हत्या की घटना दर्शाते हुए अज्ञात के विरूद्व धारा 394, 302 भा0 दं0 सं0 के अन्तर्गत दर्ज करायी गयी थी।

23. दौरान विवेचना मृतका के पिता रूप किशोर शर्मा द्वारा एक आवेदन पत्र अन्तर्गत धारा 156 (3) दं0 प्र0 सं0 प्रस्तुत किया गया जिसमें मृतका की हत्या दहेज के कारण करने की बात कही गयी है। उक्त प्रार्थना पत्र पर मुख्य न्यायिक मजिस्ट्रेट, बुलन्दशहर के आदेश के क्रम में विवेचना अभियोजन साक्षी संख्या 7 पवन कुमार यादव, क्षेत्राधिकारी के सुपुर्द की गयी और उन्होनें अपीलार्थीगण के विरूद्व धारा 498ए, 304बी0 भा0 दं0 सं0 एवं धारा 3/4 दहेज प्रतिषेध अधिनियम के अन्तर्गत आरोप पत्र न्यायालय प्रेषित किया।

24. विद्वान विचारण न्यायालय ने अपीलार्थीगण को धारा 304 बी0, 498ए भा0 दं0 सं0 एवं धारा 3 व 4 दहेज प्रतिषेध अधिनियम के अन्तर्गत दोषी पाते हुए उपरोक्तानुसार दण्डित किया है। धारा 304 बी0 भा0 दं0 सं0 के अन्तर्गत निम्न प्राविधान ळेः–

304 B. Dowry death.

(1) Where the death of a woman is caused by any burns or bodily injury or occurs otherwise than under normal circumstances within seven years of her marriage and it is shown that soon before her death she was subjected to cruelty or harassment by her husband or any relative of her husband for, or in connection with, any demand for dowry. Such death shall be called "dowry death", and such husband or relative shall be deemed to have caused her

death. **Explanatin.**- For the purposes of this sub-section "dowry" shall have the same meaning as in section 2 of the Dowry Prohibition Act 1961.

25. उपरोक्त से यह स्पष्ट है कि धारा 304 बी0 भा0 दं0 सं0 के अपराध के लिए निम्न तत्वों का होना आवश्यक ळेः—

(1) महिला की मृत्यु अप्राकृतिक दशा में जलने के कारण या शारीरिक चोट के कारण हुई हो।

(2) ऐसी मृत्यु, मृतका के विवाह के सात वर्ष के अन्दर हुई हो।

(3) मृतका को उसके पति या पति के रिश्तेदारों द्वारा प्रताडित किया गया हो।

(4) ऐसी प्रताडना दहेज की मांग को लेकर की जा रही हो।

26. अभियोजन साक्षी संख्या 1 रूप किशोर शर्मा ने अपने बयान में यह कहा है कि मृतका पूनम उसकी बेटी थी उसने उसकी शादी दिनांक 21—2—2003 को अमित के साथ की थी जो शिवा कालोनी बुलन्दशहर में रहते है। उसके द्वारा की गयी शादी से पूनम के ससुराल वाले पति अमित, सास कुसुम, जेठ विशेश्वर खुश नहीं थे। ये दहेज में एक लाख रूपया मांगते थे जब उसने बारात को बिदा किया तो बिदा होते समय अमित व विशेश्वर ने उससे एक लाख रूपये की मांग की थी उसने कहा कि वह अपने फंड से निकालकर पैसा लगाया है यदि उसके पास होगा तो वह धीरे धीरे दे देगा फिर ये लोग उसकी लडकी को बिदा कराकर ले गये। शादी के दो दिन बाद उसकी लडकी का पति अमित स्वयं उसकी लडकी को घर लेकर आया तो लडकी ने उसे बताया कि पति अमित, जेठ विशेश्वर, ससुर रामसनेही, ननन्द पूनम व जेठानी (विशेश्वर की पत्नी) उससे एक लाख रूपये मांगने का दबाव दे रहे है। उसने लडकी से कहा कि नई—नई बात है वह इन्हें समझा देगा इसके बाद अमित लडकी को बिदा कराकर अपने घर ले आया। लडकी शादी के बाद से इस घटना तक उसके घर कई बार आयी गयी थी लेकिन ये एक लाख रूपये की मांग का दबाव उस पर बराबर बनाये हुए थे। दिनांक 11—8—2003 को औरंगाबाद थाने से उसके पास पुलिस पहुंची। मुलजिमान ने उसकी लडकी पर दबाव देकर उसके व उसके लडके के खिलाफ रिपोर्ट दर्ज करायी। वह 5—6 लोगों के साथ अपनी लडकी की ससुराल यमुनापुरम आया। हम लोगों ने मुलजिमान से कहा कि हम तुम्हें एक लाख रूपया दे देगें तुम हमारी लडकी को ठीक रखो इसके बाद भी ये लोग उसकी लडकी पर फिर भी एक लाख रूपये का दबाव देते रहें। अप्रैल, 2004 में अमित, पूनम को लेकर उसके घर गया वह घर पर नहीं मिला तो अमित लडकी को लेकर स्कूल गया। लडकी ने रोकर उससे कहा कि ज्यादा परेशान कर रहे है एक लाख रूपया दे दो मेरे पति सास, जेठ उसे तंग परेशान व गाली गलौज कर रहे हैं। वह इनकी एक लाख की मांग पूरी नहीं कर पाया। ये लडकी को लेकर यमुनापुरम अपने घर आ गये। यह भी कहा कि शादी का बिचौलियां जोगेन्द्र जो उसी कालोनी में मुलजिमान के पास रहता है। दिनांक 12—8—2004 को 12—00 बजे दिन जोगेन्द्र ने उसे आकर सूचना दी की तुम्हारी लडकी को पति, जेठ, जेठानी, सास, ससुर ने मार दिया है। इस सूचना पर वह गांव से ट्रैक्टर ट्राली भरकर गांव के लोगों के साथ यमुनापुरम आया। उसे लडकी की लाश वहां नही मिली इस पर वह चीलघर पर पहुंचे वहां लडकी की लाश चीलघर के अन्दर थी। चीलघर से वह थाने आया। दरोगाजी को उसने लिखित तहरीर दी। उसका मुकदमा नहीं लिखा गया इसके बाद वह अपने घर को चला गया फिर वह थाने आया पुलिस वालों ने उससे दबाव देकर उसके हस्ताक्षर करा लिया और उसे कोई कागज नहीं दिया। उसके बाद उसने वकील साहब के माध्यम से न्यायालय में प्रार्थना पत्र दिया जिस पर न्यायालय के आदेश से इस मुकदमें की दहेज हत्या के सम्बंध में विवेचना प्रारम्भ हुई। मुलजिमान ने उसकी बेटी को एक लाख रूपये की मांग पूरा न होने के कारण हत्या कर दी।

27. अभियोजन साक्षी संख्या 2 संजय ने अपने बयान में यह कहा है कि पूनम उसकी छोटी बहन थी। पूनम की शादी उसने दिनांक 21—2—2003 को अमित के साथ की थी उसके द्वारा की गयी शादी से पूनम की ससुराल वाले पति अमित, सास कुसुम, ससुर राम सनेही, जेठ विशेश्वर खुश नहीं थे। ये लोग दहेज में एक लाख रूपये की मांग करते थे। शादी के समय ही इन लोगों ने उससे झगडा किया था कि शादी के लिए जो तय था वह हमें नहीं दिया उसने उन लोगों की खुशामद

की इस समय हमारे पास नहीं है हम तुम्हें दे देगें तब ये उसकी बहन को बिदा कराकर ले गये इसके बाद जब भी उसकी बहन उसके पास आती थी और उसे बताती थी कि एक लाख रूपये उसकी ससुराल वालों को दो वरना ये लोग मुझे पीटते है। अमित और उसकी बहन जब उसके पास आते थे और एक लाख रूपये की मांग करते थे हम लोग मुलजिम की एक लाख रूपये की मांग को पूरी नहीं कर पाये। दिनांक 28 जुलाई, 2004 को अमित और पूनम उसके घर आये थे और अमित ने उससे एक लाख रूपये की मांग की उसने अमित से कहा कि आप बैठ जाइये वह अभी अपने पिता को खाजपुर से बुलाकर लाता हूं वह अपने पिता को बुलाकर लाया उससे पैसे नहीं बने तो उसके पिताजी ने कहा कि दस–पांच दिन में वह अपने फंड से निकाल कर दे दूंगा। अमित पूनम को उसके पास छोडकर आया था। उसने मुलजिमान के घर पर आकर पंचायत की उनके हाथ पैर जोडे इस पर अमित व उनकी माताजी दोनो गये थे और पूनम को बिदा करा लाये थे। दिनांक 11 अगस्त, 2004 को अमित, कुसुमलता, विशेश्वर जेठ और जेठानी पूनम ने दहेज की मांग पूरी न होने पर पूनम की हत्या कर दी। हमारी इस शादी के बिचौलिया जोगेन्द्र सिंह जो यमुनापुरम बुलन्दशहर में रहते है ने हमारे घर जाकर बताया कि पूनम के ससुराल वालों ने पूनम को मार दिया है। हम ट्रैक्टर ट्राली में मुलजिमान के घर गये वहां उसकी बहन की लाश मिली थी।

28. अभियोजन साक्षी संख्या 3 जुगेन्द्र सिंह, शादी का बिचौलिया है उसने अपने बयान में यह कहा है कि वादी मुकदमा रूप किशोर शर्मा उसके गांव के है व मुलजिमान अमित व श्रीमती कुसुम को भी जानता हूं ये उसके पडोसी है जो शिवा कालोनी में रहते है। मृतका पूनम रूप किशोर शर्मा की पुत्री थी। उसने पूनम की शादी दिनांक 21–2–2003 को अमित के साथ तय करायी थी। श्रीमती कुसुम, अमित की मां है उसके द्वारा करायी गयी शादी से पूनम की ससुराल वाले सन्तुष्ट नहीं थे जिनमें पूनम की सास व पति सन्तुष्ट नहीं थे। ये लोग उससे कहते थे कि आपने शादी में कम पैसा दिलाया है ये लोग उससे एक लाख रूपया और दिलाने की मांग करते थे। यह बात उसने रूप किशोर और लडके सूला को बतायी थी। अमित और पूनम उसका घर नजदीक होने के कारण उसके घर आये थे। पूनम ने उससे कहा कि भैयया ये लोग मुझे परेशान कर रहे है और बार बार एक लाख रूपये की मांग कर रहे है। मेरे रूप किशोर से कहने पर उन्होने कहा कि वह रूपया देगा मगर वह रूपया नहीं दे सके। उसने अपनी ओर से मुलजिमान को समझाने का प्रयास किया था पर ये लोग नहीं माने और बार बार दहेज की मांग करते रहे। यह भी कहा कि यह घटना दिनांक 11/12–8–2004 की मध्य रात्रि को सुबह के समय वह अपनी डेरी पर भैसों का दूध निकाल रहा था। रजबाहें की पटरी पर घूमने वाले लोगों ने उस समय उसे बताया था कि तुमने जो शादी करायी थी वह लडकी खत्म हो गयी है। इस सूचना को पाकर वह मुलजिमान के घर पर गया था वहां पर श्रीमती कुसुम, पूनम के साथ बैठी थी। अमित घर पर मौजूद नहीं था। उसने श्रीमती कुसुम से पूनम की मृत्यु के बारे में पूछा तो उन्होने बताया कि बदमाश पूनम को मार गये है। मेरे मुलजिमान के घर पहुंचने से पहले ही पूनम का शव, शव परीक्षण हेतु भेजा जा चुका था। इसके अलावा मुझे पूनम की हत्या के बारे में कोई जानकारी नहीं मिली कि पूनम की हत्या कैसे हुई फिर मैनें अपने गांव आकर रूप किशोर शर्मा को बताया कि पूनम को उसके पति अमित व उसकी सास कुसुमलता ने मार दिया ळें

29. अभियोजन साक्षी संख्या 1 रूप किशोर शर्मा जो कि मृतका का पिता है तथा अभियोजन साक्षी संख्या 2 जो कि मृतका का भाई है एवं अभियोजन साक्षी संख्या 3 जोगेन्द्र सिंह जो कि शादी का बिचौलिया है की साक्ष्य से यह स्पष्ट है कि मृतका की शादी अमित शर्मा के साथ दिनांक 21–2–2003 को सम्पन्न हुई थी। अभियोजन साक्षी संख्या 1 रूप किशोर शर्मा द्वारा धारा 156 (3) दं0 प्र0 सं0 के अन्तर्गत आवेदन पत्र भी प्रस्तुत किया गया था जिसे उसने प्रदर्श क–13 व शपथ पत्र को प्रदर्श क–14 के रूप में साबित किया है। उक्त आवेदन पत्र में भी मृतका की शादी अपीलार्थी अमित शर्मा के साथ दिनांक 21–2–2003 को सम्पन्न होने का उल्लेख किया गया ळें

30. अभियोजन साक्षी संख्या 7 पवन कुमार यादव, (क्षेत्राधिकारी) ने अपने बयान में यह कहा है कि मृतका के पिता ने शादी का एक कार्ड दिया था जिसका उल्लेख उसने केस डायरी में किया था। इस साक्षी ने शादी के उक्त कार्ड को वस्तु प्रदर्श–1

के रूप में साबित किया है। उक्त शादी के कार्ड में भी मृतका की शादी अपीलार्थी अमित शर्मा के साथ दिनांक 21–2–2003 को सम्पन्न होने का उल्लेख किया गया है। अपीलार्थीगण की ओर से शादी की तिथि के सम्बंध में ऐसा कोई साक्ष्य प्रस्तुत नहीं किया गया जिससे की मृतका की शादी के सम्बंध में कोई विवाद किया जा सके या शादी के सम्बंध में कोई संदेह व्यक्त किया जा सके बल्कि पत्रावली पर उपलब्ध साक्ष्य से यह भली भांति सिद्व है कि मृतका पूनम की शादी अपीलार्थी अमित शर्मा के साथ दिनांक 21–2–2003 को सम्पन्न हुई थी।

31. अब देखना यह है कि क्या मृतका की मृत्यु शादी के सात वर्ष के अन्दर सामान्य परिस्थितियों से भिन्न परिस्थितियों में हुई है तो उल्लेखनीय है कि इस घटना की प्रथम सूचना रिपोर्ट अपीलार्थी अमित शर्मा के भाई विशेश्वर द्वारा लूट एवं हत्या की घटना दर्शाते हुए अज्ञात के विरूद्व धारा 394, 302 भा0 दं0 सं0 के अन्तर्गत दर्ज करायी गयी थी। दौरान विवेचना मृतका के पिता रूप किशोर शर्मा के आवेदन पत्र अन्तर्गत धारा 156 (3) दं0 प्र0 सं0 पर विद्वान मुख्य न्यायिक मजिस्ट्रेट द्वारा पारित आदेश के क्रम में तत्कालीन वरिष्ठ पुलिस अधीक्षक द्वारा इस मामले की विवेचना पवन कुमार यादव (क्षेत्राधिकारी) के सुपुर्द की गयी। मृतका के पिता रूप किशोर शर्मा द्वारा अपीलार्थीगण के विरूद्व दहेज के कारण मृतका की हत्या करने का उल्लेख किया गया है। अभियोजन साक्षी संख्या 7 पवन कुमार यादव (विवेचनाधिकारी) ने यह मुकदमा दहेज मृत्यु का पाते हुए अपीलार्थीगण के विरूद्व धारा 498ए, 304बी0 भा0 दं0 सं0 व 3/4 दहेज प्रतिषेध अधिनियम के अन्तर्गत आरोप पत्र न्यायालय प्रेषित किया था। अभियोजन साक्षी संख्या 4 डाक्टर सर्वोदय कुमार द्वारा मृतका के शव का शव विच्छेदन दिनांक 12–8–2004 को अपरान्ह 2–30 पर किया गया था। शव विच्छेदन के समय डाक्टर ने मृतका के शरीर पर 13 कटे हुए घाव पाया है तथा यह उल्लेख किया है कि चोट संख्या 1 के नीचे खोपडी की हड्डियां, मस्तिष्क मय झिल्ली के कटा हुआ था। हृदय रक्त से खाली था। चोट संख्या 11 व 12 के नीचे छोटी आंत जगह–जगह से कटी हुई थी। डाक्टर ने यह भी उल्लेख किया है कि मृतका की मृत्यु मृत्युपूर्व आयी चोटों के कारण हुए सदमें, रक्तस्राव व बेहोशी के कारण हुई थी।

32. उल्लेखनीय है कि दौरान विवेचना यह मामला लूट एवं हत्या का नहीं पाया गया बल्कि विवेचनाधिकारी ने यह मामला दहेज हत्या से सम्बन्धित पाते हुए अपीलार्थीगण के विरूद्व धारा 498ए, 304बी0 भा0 दं0 सं0 व धारा 3/4 दहेज प्रतिषेध अधिनियम के अन्तर्गत आरोप पत्र न्यायालय प्रेषित किया है। जैसा कि ऊपर उल्लेख किया जा चुका है कि मृतका की शादी दिनांक 21–2–2003 को अपीलार्थी अमित शर्मा के साथ सम्पन्न हुई थी तथा पत्रावली पर उपलब्ध साक्ष्य से यह साबित है कि मृतका की मृत्यु उसके शरीर पर आयी चोटों के परिणाम स्वरूप दिनांक 12–8–2004 को हुई है। घटना के समय मृतका अपने ससुराल में थी तथा उसके साथ मृतका की सास अपीलार्थी कुसुमलता को घर में उपस्थित होने का उल्लेख किया गया है। साक्ष्य से इतना स्पष्ट है कि मृतका की मृत्यु शादी के सात वर्ष के अन्दर सामान्य परिस्थितियों से भिन्न परिस्थितियों में हुई ळें

33. अपीलार्थीगण की ओर से एक तर्क यह रखा गया कि मौके पर व मृतका के दाहिने हाथ से कुछ बाल प्राप्त हुए थे जिनके मिलान हेतु विवेचनाधिकारी ने सम्बन्धित मजिस्ट्रेट को रिपोर्ट प्रेषित की थी परन्तु मृतका के हाथ में बाल किसके थे इसकी जांच नही करायी गयी तथा फील्ड यूनिट के द्वारा लिए गये फिंगर प्रिन्ट व फोटोग्राफ आदि की भी जांच नहीं करायी गयी है। यह घटना अज्ञात बदमाशों द्वारा कारित की गयी थी परन्तु इस सम्बंध में विद्वान विचारण न्यायालय द्वारा सम्यक विचार नहीं किया गया तो उल्लेखनीय है कि यदि मृतका के हाथ में प्राप्त बालों तथा फील्ड यूनिट द्वारा लिए गये फिंगर प्रिन्ट व फोटोग्राफ आदि का मिलान व जांच न कराये जाने के आधार पर अभियोजन कथानक किसी भी प्रकार से प्रभावित नहीं होता है। अभियोजन साक्षी संख्या 1 रूप किशोर शर्मा ने अपने प्रार्थना पत्र अन्तर्गत धारा 156 (3) दं0 प्र0 सं0 में यह उल्लेख किया है कि अपीलार्थीगण ने साजिश के तहत मृतका की हत्या कर लूट, डकैती की घटना की झूंठी रिपोर्ट थाने पर दर्ज करायी है। प्रथम सूचना रिपोर्ट के अनुसार, यह घटना रात्रि के 11–00 बजे की होने का उल्लेख किया गया है। इस घटना में अपीलार्थी कुसुमलता को सामान्य चोटें आने की बात कही गयी है। अभिलेखीय सूची 30 बी0 के साथ चुटैल कुसुमलता की डाक्टरी परीक्षण की प्रमाणित छाया

प्रति दाखिल की गयी है जो अभिलेख पर उपलब्ध है जिसमें अपीलार्थी/चुटैल कुसुमलता के शरीर पर 7 चोटें पाये जाने का उल्लेख है जो अबरेडेड कंटीयूजन, कंटीयूसड स्वीलिंग, व ट्रैमेटिक स्वीलिंग आदि के रूप में है तथा डाक्टर ने इन सभी चोटों को साधारण प्रकृति का बताया है। उल्लेखनीय है कि अपीलार्थी कुसुमलता के शरीर पर धारदार हथियार की कोई चोट नहीं पायी गयी है तथा उसके शरीर पर कोई कटा अथवा भोंका हुआ घाव नहीं पाया गया है। इसके विपरीत मृतका के शरीर पर 13 कटे हुए घाव पाये गये है जिनमें चोट संख्या 1 लगायत 9 मृतका के सिर, चेहरे आदि पर तथा चोट संख्या 10 मृतका के गर्दन पर तथा चोट संख्या 11 व 12 मृतका के पेट में तथा चोट संख्या 13 मृतका के बायें हाथ में पाये गये है। मृतका की चोट संख्या 1 लगायत 12 उसके मर्मस्थल पर है। मृतका की चोटों को द्रृष्टिगत रखते हुए यह नहीं कहा जा सकता है कि मृतका को उक्त चोटें लूट कारित करने के दौरान पहुंचायी गयी हो। प्रथम सूचना रिपोर्ट के अनुसार, मृतका व उसकी सास को मात्र मकान में मौजूद होने का उल्लेख किया गया है यदि बदमाशों की संख्या चार थी और घर में केवल दो ही महिलायें थी तो वे महिलाओं को अपने कब्जे में कर उन्हें किसी कमरें मे बंद कर सकते थे तथा उनके हाथ पैर बांधकर भी डाल सकते थे लेकिन इस तरह मृतका को धारदार हथियार से उसके मर्मस्थलों पर चोटें पहुंचायी जाए यह कहानी स्वाभाविक एवं विश्वसनीय नहीं प्रतीत होती ळें

34. चूँकि प्रस्तुत मामले में आरोप पत्र दहेज मृत्यु के सम्बंध में प्रेषित किया गया है और पत्रावली पर उपलब्ध साक्ष्य में दहेज की मांग करना, दहेज की मांग को लेकर मृतका को प्रताडित करना तथा उसके साथ क्रूरता का व्यवहार करना व उसकी मृत्यु कारित करने की बात कही गयी है। मृतका की मृत्यु शादी के सात वर्ष के अन्दर सामान्य परिस्थितियों से भिन्न परिस्थितियों में उसके शरीर पर पायी गयी चोटों के कारण हुई है। ऐसी दशा में विद्वान विचारण न्यायालय ने धारा 113 भारतीय साक्ष्य अधिनियम में दिए गये प्रावधानों की उपधारणा करते हुए जो अपीलार्थीगण को धारा 498ए, 304बी0 भा0 दं0 सं0 तथा धारा 3 व 4 दहेज प्रतिषेध अधिनियम के अन्तर्गत दोषसिद्वि किया है उसमें कोई विधिक त्रुटि अथवा अनियमितता नहीं पायी जाती है। यहॉ यह भी उल्लेखनीय है कि अभियोजन साक्षी संख्या 1 रूप किशोर शर्मा, अभियोजन साक्षी संख्या 2 संजय जो कि मृतका के क्रमशः पिता एवं भाई है उनके साक्ष्य में यह आया है कि शादी के समय से ही अपीलार्थीगण द्वारा दहेज में एक लाख रूपये की मांग शुरू कर दी गयी तथा इस एक लाख रूपये की मांग का लगातार दबाव बनाये हुए थे। अभियोजन साक्षी संख्या 1 रूप किशोर शर्मा ने अपने बयान में यह उल्लेख किया है कि मुलजिमान ने उसकी लडकी पर दबाव बनाकर उसके व उसके लडके के खिलाफ रिपोर्ट दर्ज करायी थी जिस पर वह मुलजिमान के घर जाकर उन्हें समझाया था।

35. अपीलार्थीगण की ओर से एक तर्क यह भी रखा गया कि अभियोजन साक्षी संख्या 1 रूप किशोर शर्मा ने अपने बयान में यह स्वयं स्वीकार किया है कि मृतका ने उसके विरूद्व शिकायती आवेदन पत्र दिया था इससे यही जाहिर होता है कि पिता, पुत्री के मध्य मधुर सम्बंध नहीं थे इसलिए दहेज की मांग करने की बात कही गयी है वह विश्वसनीय नहीं है तो उल्लेखनीय है कि अभियोजन साक्षी संख्या 1 रूप किशोर शर्मा ने अपने बयान में यह स्पष्ट उल्लेख किया है कि अपीलार्थीगण ने उसकी पुत्री पर दबाव बनाकर उसके विरूद्व रिपोर्ट दर्ज करायी थी। अभियोजन साक्षी सख्या 3 जोगेन्द्र सिंह शादी का बिचौलिया है उसने अपने जिरह में यह उल्लेख किया है कि मृतका ने एस0 एस0 पी0 को दिनांक 11–8–2003 को एक प्रार्थना पत्र भेजा था जिसके बाबत उसे जानकारी है। यह भी कहा है कि यह प्रार्थना पत्र कुसुम ने भिजवाया था। यह प्रार्थना पत्र रूप किशोर शर्मा के खिलाफ था। यह भी कहा कि पूनम ने उसे यह बात बतायी थी कि उसकी सास ने उसे पटाकर रूप किशोर शर्मा के खिलाफ प्रार्थना पत्र भिजवाया है। इस प्रार्थना पत्र में राजीनामा हुआ था। इससे भी यही जाहिर होता है कि यदि कोई प्रार्थना पत्र मृतका की ओर से मृतका के पिता अथवा उसके परिवारजन के विरूद्व दिया गया है तो वह प्रार्थना पत्र किसी साजिश के तहत दिलवाने की सम्भावना से इंकार नहीं किया जा सकता है और फिर यदि कोई प्रार्थना पत्र मृतका ने अपने पिता रूप किशोर शर्मा के विरूद्व दिया भी है तो मात्र उक्त आधार पर यह उपधारणा कायम नहीं की जा सकती है कि अपीलार्थीगण ने मृतका से दहेज में

एक लाख रूपये की मांग न की हो। अभियोजन साक्षी संख्या 1 रूप किशोर शर्मा, अभियोजन साक्षी संख्या 2 संजय तथा अभियोजन साक्षी संख्या 3 जोगेन्द्र सिंह की साक्ष्य में यह आया है कि अपीलार्थीगण दहेज में एक लाख रूपये की मांग को लेकर मृतका को प्रताडित व परेशान कर रहे थे तथा एक लाख रूपये की मांग का दबाव बनाया था। अभियोजन साक्षी संख्या 1 रूप किशोर शर्मा ने अपने बयान में यह भी उल्लेख किया है कि शादी मे बिदाई के समय अपीलार्थीगण ने एक लाख रूपये की मांग की थी तथा शादी के दो दिन बाद अपीलार्थी अमित, मृतका को लेकर उसके घर आया था तब उसकी लडकी (मृतका) ने उससे अपीलार्थीगण द्वारा एक लाख रूपये मांगने का दबाव बनाने की बात बतायी थी। इस साक्षी ने अपने मुख्य बयान में यह भी कहा है कि एक बार अपीलार्थी अमित, मृतका पूनम को लेकर उसके स्कूल तक गया था जहाँ पर उसकी लडकी ने उसे बताया था कि एक लाख रूपये दे दो ये लोग ज्यादा परेशान कर रहे है। अभियोजन साक्षी संख्या 1 रूप किशोर शर्मा की साक्ष्य से यह स्पष्ट है कि शादी के समय से ही अपीलार्थीगण एक लाख रूपया अतिरिक्त की माँग कर रहे थे और मृतका पर लगातार दबाव बनाये हुए थे। अभियोजन साक्षी संख्या 2 संजय ने भी अपीलार्थीगण द्वारा मृतका को शादी में एक लाख रूपये की मांग को लेकर प्रताडित करने का उल्लेख किया है1 उपरोक्त साक्षीगण तथा अभियोजन साक्षी संख्या 3 जोगेन्द्र सिंह जो कि शादी का बिचौलिया है की साक्ष्य से यह स्पष्ट है कि अपीलार्थीगण दहेज में एक लाख रूपये की माँग को लेकर मृतका पर दबाव बनाये हुए थे तथा मृतका को प्रताडित करने का भी उल्लेख किया गया है और इसी दहेज की माँग पूरा न होने के कारण मृतका की हत्या कारित करने की बात कही गयी है। ***ए0 आई0 आर0 2007 एस0 सी0 107 दाण्डिक अपील संख्या 1027 वर्ष 2006, (एस0 एल0 पी0 (क्रि0) नं0 5592 वर्ष 2005) निर्णीत दिनांक 9–10–2006 कैलाश प्रति राज्य मध्य प्रदेश*** के मामले में माननीय उच्चतम न्यायालय द्वारा प्रस्तर 11 में निम्न व्यवस्था दी गयी ळेः–

11. No presumption under Section 113-B of the Evidence Act would be drawn against the accused if it is shown that after the alleged demand, cruelty or harassment the dispute stood resolved and there was no evidence of cruelty or harassment thereafter. Mere lapse of some time by itself would not provide to an accused a defence, if the course of conduct relating to cruelty or harassment in connection with the dowry demand is shown to have existed earlier in time not too late and not too stale before the date of death of the victim. This is so because the exspression used in the relevant provision is "soon before."The expression is a relative term which is required to be consider under specific circumstances of each case and no strait- jacket formula can be laid down by fixing any time- limit. The expression is pregnant with the idea of promimity test. It cannot be said that the term "soon before" is synonymous with the term "immediately before." This is because of what is stated in Section 114. Illistration (a) of the Evidence Act. The determination of the period which can come within term "soon before" is left to be determined by the courts, depending upon the facts and circumstances of each case. Suffice, however, to indicate that the expression " soon before" would normally imply that the interval should not be much between the cruelty or harassment concerned and the death in question. There must be existence of a proximate and live link (see Hira Lal Vs. State (Govt. Of NCT), Delhi (2003 (8) SCC 80).

36. साक्ष्य में यह आया है कि मृतका को दहेज में एक लाख रूपये की माँग को लेकर प्रताडित किया जा रहा था तथा उसके ऊपर एक लाख रूपये की माँग को लेकर लगातार अपीलार्थीगण द्वारा दबाव बनाया गया था। अभियोजन साक्षी संख्या 1 रूप किशोर शर्मा की साक्ष्य से यह स्पष्ट है कि उक्त एक लाख रूपये की माँग अपीलार्थीगण ने शादी के दिन से ही प्रारम्भ कर दी थी और मृतका की मृत्यु तक उसे दहेज की माँग को लेकर परेशान एवं प्रताडित किया

गया है। अपीलार्थीगण, मृतका पर दहेज की माँग में एक लाख रूपये दिलाने का दबाव बराबर बनाये हुए थे। उपरोक्त से यह स्पष्ट है कि मृतका को दहेज की माँग को लेकर प्रताडित किया गया है और यह प्रताडना दहेज के खातिर थी। मृतका की मृत्यु सामान्य परिस्थितियों से भिन्न परिस्थितियों में शादी के सात वर्ष के अन्दर हुई है। शव विच्छेदन के समय मृतका के शरीर पर 13 कटे हुए घाव पाये गये हैं। दहेज माँगने व दहेज की माँग को लेकर प्रताडित करने की प्रचुर मात्रा में साक्ष्य पत्रावली पर उपलब्ध है। अतएव पत्रावली पर उपलब्ध समस्त साक्ष्य से यह साबित है कि मृतका को दहेज में एक लाख रूपये की माँग को लेकर प्रताडित किया गया, उसके साथ क्रूरता का व्यवहार किया गया। मृतका की मृत्यु शादी के सात वर्ष के अन्दर सामान्य परिस्थितियों से भिन्न परिस्थितियों में उसके शरीर पर पायी गयी चोटों के परिणामस्वरूप हुई है। ऐसी दशा में विद्वान विचारण न्यायालय ने जो धारा 113 भारतीय साक्ष्य अधिनियम के अन्तर्गत उपधारणा का संदर्भ लेते हुए अपीलार्थीगण को प्रश्नगत अपराध में दोषसिद्वि एवं दण्डित किया है उसमें कोई विधिक त्रुटि अथवा अनियमितता नहीं पायी जाती ळें

37. अपीलार्थीगण की ओर से अपने बचाव में बचाव साक्षी संख्या 1 के रूप में महेश कुमार शुक्ला को परीक्षित कराया गया है उसने अपने बयान में यह उल्लेख किया है कि उसके मकान में उसके अलावा अन्य किरायेदार भी रहते है। वह हाजिर अदालत अमित को पहचानता है। वह उसके मकान के पडोस वाले मकान में किराये पर रहता था। दिनांक 10 अगस्त 2004 को अमित ने उसके मकान में किराये पर कमरा लिया था उसके इस मकान के किराये वाले हिस्से को देखने अमित व उसकी पत्नी दोनो आये थे। पहले वाले मकान मालिक ने ही उसके मकान को किराये पर अमित को दिलाया था क्योंकि उनके मकान में जगह कम थी और उसके मकान में सुविधाये ज्यादा थी। दिनांक 11 अगस्त 2004 की रात को अमित कुमार उसके मकान में मौजूद था और सोये थे। दिनांक 12–8–2004 की सुबह करीब छः साढे छः बजे पूर्व मकान मालिक श्रवण कुमार गुप्ता उसके घर आए और उन्होने ं बुलन्दशहर मे ं अमित के घर पर हुई घटना के बारे मे ं जानकारी दी। सूचना मिलने के तुरन्त बाद ही उसने अमित को बस से बुलन्दशहर के लिए बैठा दिया था। इस साक्षी ने अपनी जिरह मे ं यह कहा कि उसके पास अमित की किरायेदारी के सम्बंध मे ं कोई अभिलेखीय साक्ष्य नही ं है।

38. उल्लेखनीय है कि इस साक्षी ने अपीलार्थी अमित शर्मा को घटना के एक दिन पूर्व अपना मकान किराये पर देने की बात कही है और यह भी कहा है कि घटना की रात्रि दिनांक 11 अगस्त, 2004 की रात को अमित कुमार उसके मकान में मौजूद थे। हमारे विचार से उक्त साक्षी की साक्ष्य से अपीलार्थीगण को कोई लाभ प्राप्त नहीं होता है।

39. पत्रावली पर उपलब्ध साक्ष्य से यह भली भांति सिद्व है कि अपीलार्थीगण ने मृतका को दहेज की माँग को लेकर प्रताडित किया है तथा उसके साथ क्रूरता का व्यवहार किया है। मृतका की मृत्यु शादी के सात वर्ष के अन्दर सामान्य परिस्थितियों से भिन्न परिस्थितियों में उसके शरीर पर पायी गयी चोटों के परिणाम स्वरूप हुई है। ऐसी दशा में हम विद्वान विचारण न्यायालय के प्रश्नगत निर्णय एवं निष्कर्षों में कोई विधिक त्रुटि अथवा अनियमितता नहीं पाते हैं।

40. अपीलार्थीगण की ओर से अन्त में दण्ड के सम्बंध में यह तर्क प्रस्तुत किया गया कि प्रश्नगत प्रकरण में अपीलार्थी अमित शर्मा को धारा 304ख भा0 दं0 सं0 के अन्तर्गत आजीवन कारावास तथा अपीलार्थी कुसुमलता को धारा 304ख भा0 दं0 सं0 के अन्तर्गत सात वर्ष के कारावास के दण्ड से दण्डित किया गया है। अपीलार्थी अमित शर्मा, मृतका का पति है तथा अपीलार्थी कुसुमलता मृतका की सास है। अपीलार्थी अमित शर्मा को दी गयी सजा अत्याधिक है और वह लगभग 10 वर्षो से अधिक समय से जेल में निरूद्व है। अतएव उसके द्वारा जेल में बिताई गयी अवधि सजा हेतु उचित एवं पर्याप्त होगी। अपने तर्क के समर्थन में ***2003 (1) एस0 सी0 133 राज्य कर्नाटक प्रति एम0 वी0 मंजूनाथेगोडा एवं अन्य, हरी ओम प्रति राज्य हरियाणा एवं एक अन्य निर्णीत दिनांक 31 अक्टूबर 2014, 2014 ला सूट (एस0 सी0) 894,1994 सुप्रीम (एस0 सी0) 1014 हेम चन्द्र प्रति राज्य हरियाणा एवं जी0 वी0 सिद्दारमेश प्रति राज्य कर्नाटक निर्णीत दिनांक 5 फरवरी, 2010, 2010 ला सूट (एस0 सी0) 45*** माननीय उच्चतम न्यायालय द्वारा दी गयी विधि व्यवस्थायें भी प्रस्तुत की है।

41. उल्लेखनीय है कि ***राज्य कर्नाटक प्रति एम0 वी0 मंजूनाथेगोडा एवं अन्य*** के प्रकरण में मृतका के शरीर पर तीन चोटें पायी गयी थी और मृतका की मृत्यु का कारण सिर की चोट के परिणामस्वरूप सदमा एवं हैमेरेज से होना पाया गया

था। ***हरी ओम प्रति राज्य हरियाणा एवं एक अन्य*** में जहरीला पदार्थ खाकर आत्महत्या के सम्बंध में था। ***हेम चन्द्र प्रति राज्य हरियाणा*** के मामले में मृतका की मृत्यु का कारण स्ट्रंगुलेशन बताया गया था तथा ***जी0 वी0 सिद्दारमेश प्रति राज्य कर्नाटक*** में मृतका की मृत्यु का कारण हैंगिंग के फलस्वरूप एक्सीफीसिया से होना पाया गया था जब कि प्रश्नगत प्रकरण में मृतका के शरीर पर तेरह कटे हुए घाव पाये गये है जिसमें चोट संख्या 13 को छोडकर अन्य सभी चोटें मृतका के नाजुक अंगो सिर, गर्दन व पेट में पायी गयी है जिससे यह प्रकट होता है कि मृतका को चोटें काफी क्रूररतम एवं निर्ममतापूर्ण ढंग से पहुंचायी गयी थी। अतः इस प्रकरण के तथ्य एवं परिस्थितियो ं को दृष्टिगत रखते हुए अपीलार्थी अमित शर्मा की सजा को कम करने का कोई आधार नही ं पाया जाता है।

42. अपीलार्थी अमित शर्मा, मृतका का पति है। विद्वान विचारण न्यायालय ने प्रकरण के समस्त तथ्य एवं परिस्थितियो ं को दृष्टिगत रखते हुए अपीलार्थी अमित शर्मा को आजीवन कारावास के दण्ड से तथा अपीलार्थी कुसुमलता मृतका की सास को सात वर्ष के कारावास के दण्ड से दण्डित किया है। विद्वान विचारण न्यायालय द्वारा दी गयी सजा मे ं हस्तक्षेप का कोई आधार नही ं पाया जाता है।

43. विद्वान विचारण न्यायालय ने पत्रावली पर उपलब्ध समस्त साक्ष्य एवं अभिलेखों पर सम्यक विचार करने के उपरान्त अपीलार्थीगण को प्रश्नगत अपराध में दोषी पाते हुए तदनुसार उन्हें दण्डित किया है जो कि विधिपूर्ण एवं उचित है जिसमें हस्तक्षेप का हम कोई आधार नहीं पाते ळें

44. उपरोक्त विवेचना से हम इसी मत के हैं कि उपरोक्त दोनो अपीलें बलहीन है एवं निरस्त होने योग्य है तदनुसार उपरोक्त दोनो दाण्डिक अपीलें **निरस्त** की जाती है तथा विद्वान विचारण न्यायालय द्वारा पारित दोषसिद्वि एवं दण्डादेश की पुष्टि की जाती ळें।

45. अपीलार्थी **अमित शर्मा** जेल में निरूद्व है उसे सजा भुगतने हेतु यथावत निरूद्व रखा जाए।

46. अपीलार्थी **श्रीमती कुसुमलता** जमानत पर है उसके जमानतनामें एवं बंधपत्र निरस्त किये जाते हैं। अपीलार्थी श्रीमती कुसुमलता को निर्देशित किया जाता है कि वह सजा भुगतने के लिए तुरन्त सम्बन्धित न्यायालय के समक्ष आत्मसर्मपण करें।

47. निर्णय की प्रति एवं अधीनस्थ न्यायालय की पत्रावली अविलम्ब सम्बन्धित न्यायालय को अनुपालनार्थ भेजी जाए।

(2021)02ILR A501
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 10.02.2021

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE GAUTAM CHOWDHARY, J.

Criminal Appeal No. 4702 of 2012

Ashiq Ali & Anr. ...Appellants (In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellants:
Sri M.F. Ansari, Sri I.M. Khan, Sri N.I. Jafri, Sri P.C. Mishra, Sri Rajesh Kumar Chauhan, Sri Ranjeet Asthana

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

A. Evidence Act (1 of 1872) S.32 - Dying declaration - Dying declaration can be oral or in writing & in any adequate method of communication whether by words or by signs or otherwise - When it is recorded, no oath is necessary nor is the presence of a magistrate is absolutely necessary, although to assure authenticity it is usual to call a magistrate, if available for recording the statement of a man about to die - when such statement is recorded by a magistrate there is no specified statutory form for such recording - person who records a dying declaration must be satisfied that the deceased was in a fit state of mind - Court in order to satisfy whether the deceased was in a fit mental condition to make the dying declaration

and had the opportunity to observe and identify the assailant, look into the medical opinion - where the eyewitnesses state that the deceased was in a fit and conscious state to make the declaration, the medical opinion will not prevail, nor can it be said that since there is no certification of the doctor as to the fitness of the mind of the declarant, the dying declaration is not acceptable - Where it is proved by the testimony of the magistrate that the declarant was fit to make the statement even without examination by the doctor the declaration can be acted upon provided the court ultimately holds the same to be voluntary and truthful. A certification by the doctor is essentially a rule of caution and therefore the voluntary and truthful nature of the declaration can be established otherwise. (Para 8)

B. Dying declaration should be of such a nature as to inspire full confidence of the court in its truthfulness and correctness, since the accused has no power of cross-examination - Court should see that the statement of the deceased was not as a result of either tutoring or prompting or a product of imagination. (Para 8)

C. Penal Code (45 of 1860), S.302, S.304 Part I - Accused set deceased ablaze by pouring kerosene oil on him - deceased had 75% burn injuries - first dying declaration was recorded at police station where he declared the names of the accused who set ablaze him - Held - Dying declaration properly evaluated - Dying declaration of deceased proved that accused poured kerosene on deceased & set him ablaze on fire - Injuries though were sufficient in the ordinary course of nature to have caused death but accused had no intention to cause death of deceased - death was not premeditated - Conviction altered from S. 302 to S. 304 Part I. (Para 17,25, 26)

Writ Petition partly allowed. (E-4)

List of Cases cited: -

1. Kushal Rao Vs St. of Bom. AIR 1958 SC 22

2. Sharad Birdhichand Sarda Vs St. of Mah. S.C.Cr.R.1985 page 28,

3. Samshul Haque Vs St. of Assam AIR 2019 SC 4163

4. Ashraf Ali Vs St. of Assam 2008(3) Crimes (SC) 112

5. Ranvir Yadav Vs St. of Bih. 2009(4) Supreme 205

6. Sukhjit Singh Vs St. of Pun. 2014 Supreme (SC) 667

7. Sujit Biswas Vs St. of Assam, 2013 Supreme (SC) 503

8. Maheshwar Tigga Vs. St. of Jharkhand2020 SC 4535

9. Govindappa & ors. Vs St. of Karnat. (2010) 6 SCC 533

10. Laxman Vs St. of Mah. (2002) 6 SCC 710

11. Latoor Singh Vs St. of NCT of Delhi Criminal Appeal No.10 of 2000 17.3.2015.

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

1. By way of this appeal, the appellants have challenged the Judgment and order dated 9.11.2012 passed by court of Additional Sessions Judge, Etha in Sessions Trial No.578 of 2005, State Vs. Ashiq Ali and Others arising out of Case Crime No.80 of 2005 under Sections 302/34 I.P.C., Police Station Aliganj, District Etah whereby the accused-appellant was convicted under Section 302 read with Section 34 of IPC and sentenced to imprisonment for life with fine of Rs.5,000/- in each.

2. The brief facts are that Tej Singh met with a very tragic death when he was at his field at night, both the accused came

and set him ablaze. He immediately went to police station and conveyed that he was set ablaze by the accused which was ascribed as written report (Exhibit-3) which culminated into FIR which is Exhibit-5. On dying declaration of Tej Singh, which is at Exhibit-15 he named Ashik Ali and Ahmad Raj Khan and stated that on 17.6.2005 at about 10:00 p.m. when he was at fields of Gajroob which is situated at village Agaunapur, in furtherance of their common intention so as to do away. The accused set deceased ablaze by pouring kerosene oil on him. They caused the death of Tej Singh. During the investigation recovery of burn cloths, injury report and post-mortem report were produced on record. The deceased succumbed to his burn injuries that is why accused have been charged with commission of offence under Section 302 read with 34 IPC.

3. The charge sheet was laid before the learned Magistrate and as the case was exclusively triable by the Court of Sessions, it was committed to the Court of Sessions. The learned Sessions Judge summoned the accused read over charge against them which were framed on 3.1.2006. The accused pleaded not guilty and claimed to be tried.

4. The prosecution so as to bring home the charges examined eleven witnesses, who are as under:-

1	Rajrani	P.W.1
2.	Ahvaran Singh	P.W.2
3.	Balram Singh	P.W.3
4.	Dr. V.K. Dubey	P.W. 4
5.	A.C. Dubey	P.W. 5
6.	Narendra Singh	P.W. 6
7.	Raj Bahadur	P.W.7
8.	Rajesh Kumar	P.W.8
9.	Virendra Singh	P.W.9
10.	Dr. P. K. Gupta	P.W.10
11.	M.U. Ali	P.W.11

5. In support of the ocular version of the witnesses, following documents were produced and contents were proved by leading evidence:

1	F.I.R.	Ext. Ka-5
2.	Written report	Ext. Ka-3
3.	Dying declaration - Tej Singh	Ext. Ka-15
4.	Recovery of memo of Plastic 'Pipiya'	Ext. Ka-1
5.	Recovery memo of burn Cloth	Ext. Ka-2
6.	Bed Head Ticket	Ext. Kha-1
7.	Photo copy of register	Ext. Ka-17
8.	Injury report	Ext. Ka-16
9.	P.M. Report	Ext. Ka-4

10.	Site Plan with Index	Ext. Ka-7

6. Learned counsel appearing on behalf of accused-appellants has relied on the decisions in Kushal Rao Versus The State of Bombay, AIR 1958 SC 22, Sharad Birdhichand Sarda Vs. State of Maharastra, S.C. Cr.R.1985 page 28, Samshul Haque Vs. State of Assam, AIR 2019 SC page 4163, Ashraf Ali Vs. State of Assam, 2008(3) Crimes (SC) 112, Ranvir Yadav Vs. State of Bihar, 2009(4) Supreme 205, Sukhjit Singh Vs. State of Punjab, 2014 Supreme (SC) 667, Sujit Biswas Vs. State of Assam, 2013 (Supreme (SC) 503 and Maheshwar Tigga Vs. State of Jharkhand, 2020 SC 4535.

7. Learned A.G.A. appearing on behalf of State has relied on the decisions in Govindappa and others Vs. State of Karnataka, (2010) 6 SCC 533, Laxman Versus State of Maharashtra, (2002) 6 SCC 710, Criminal Appeal No.10 of 2000 and Latoor Singh Vs. State of NCT of Delhi decided on 17.3.2015.

8. The juristic theory regarding acceptability of a dying declaration is that such declaration is made in extremity, when the party is at the point of death and when every hope of this world is gone, when every motive to falsehood is silenced, and the man is induced by the most powerful consideration to speak only the truth. Notwithstanding the same, great caution must be exercised in considering the weight to be given to this species of evidence on account of the existence of many circumstances which may affect their truth. The situation in which a man is on death bed is so solemn and serene, is the reason in law to accept the veracity of his statement. It is for this reason the requirements of oath and cross-examination are dispensed with. Since the accused has no power of cross-examination, the court insist that the dying declaration should be of such a nature as to inspire full confidence of the court in its truthfulness and correctness. The court, however has to always be on guard to see that the statement of the deceased was not as a result of either tutoring or prompting or a product of imagination. The court also must further decide that the deceased was in a fit state of mind and had the opportunity to observe and identify the assailant. Normally, therefore, the court in order to satisfy whether the deceased was in a fit mental condition to make the dying declaration look up to the medical opinion. But where the eyewitnesses state that the deceased was in a fit and conscious state to make the declaration, the medical opinion will not prevail, nor can it be said that since there is no certification of the doctor as to the fitness of the mind of the declarant, the dying declaration is not acceptable. A dying declaration can be oral or in writing and in any adequate method of communication whether by words or by signs or otherwise will suffice provided the indication is positive and definite. In most cases, however, such statements are made orally before death ensues and is reduced to writing by someone like a magistrate or a doctor or a police officer. When it is recorded, no oath is necessary nor is the presence of a magistrate is absolutely necessary, although to assure authenticity it is usual to call a magistrate, if available for recording the statement of a man about to die. There is no requirement of law that a dying declaration must necessarily be made to a magistrate and when such statement is recorded by a magistrate there is no specified statutory form for such recording.

Consequently, what evidential value or weight has to be attached to such statement necessarily depends on the facts and circumstances of each particular case. What is essentially required is that the person who records a dying declaration must be satisfied that the deceased was in a fit state of mind. Where it is proved by the testimony of the magistrate that the declarant was fit to make the statement even without examination by the doctor the declaration can be acted upon provided the court ultimately holds the same to be voluntary and truthful. A certification by the doctor is essentially a rule of caution and therefore the voluntary and truthful nature of the declaration can be established otherwise.

9. While considering the factual situation, it emerges that the conviction is based on dying declaration. It is an admitted position of fact that the deceased had 75% burn injuries. He was given sedative. Evidence of PW-9 and PW-10 is important. There was no signature of the accused. There was ante-mortem injury on the deceased who was admitted in the hospital on 18.6.2005.

10. Learned counsel for the appellant has taken us through the evidence and he requested us again and again to peruse the oral testimony. It is submitted that the accused are in jail since 2012, more particularly since 9.11.2012. Any of the accused is not named in the FIR. It is submitted that the medical evidence shows that the deceased died on the next day i.e. 18.6.2005. It is submitted that PW-9 could not have recorded the dying declaration at 2:00 a.m. The sedative was given to the deceased as he was having 75% burns. He could not give his declaration because of the burn injuries coupled with the fact that he was put to sedative and, therefore, all witnesses except Dr. and Tehsildar have not supported the case of the prosecution. No specific question has been asked in the statement recorded under Section 313 of IPC.

11. Learned counsel for the appellant has relied on the decisions have been discussed herein above.

12. The submission of learned counsel for State was that the first dying declaration was recorded at 10:00 p.m. in the police station where he went with burn injuries and declared the names of the accused who set ablaze him.

13. Learned AGA has taken us to the meaning of compos mentis and he has taken us to the fact that the conduct of the deceased has also to be seen as to when he was in the police station, he was in a fit state of mind. It is submitted that the sedative compos may not totally sever the nervous system. There is no question in the cross examination of Tehsildar that the deceased was not in a fit state of mind. Compass injection was given after the dying declaration was recorded. It is further submitted that the learned counsel for appellant that there was no light so as to identify the accused is also falsified by the fact that in the place, the deceased saw the accused. It is submitted that the judgment of Kushal Rao (supra) will have to be applied as he also relied on the same. The accused has put the question on the dying declaration in his examination under Section 313 Cr.P.C.. PW-9 evidence is very clear that the dying declaration was explained to the deceased.

14. Having considered the decisions cited by learned counsel for appellant, two

things emerge that the first statement was made by the deceased when he went to give his written report, in that also, he has very categorically taken the names of the accused. The depositions of Rajrani PW-1, Ahvaran Singh-PW-2, Balram Singh-P.W.-3, Dr. V.K. Dubey-P.W. 4, A.C. Dubey-P.W. 5, Narendra Singh-P.W. 6, Raj Bahadur-P.W.7, Rajesh Kumar-P.W.8, Virendra Singh-P.W.9, Dr. P. K. Gupta-P.W.10, M.U. Ali-P.W.11 cumulatively go to show that the dying declaration cannot be easily brushed aside. The testimony of PW-2 is also in favour of prosecution.

15. We are left with the evidence of PW-4 Dr. V.K. Dubey who had performed the post-mortem. According to him, the death had occurred day prior to the day he had carried out the post-mortem. The body had been mutilated due to poring of kerosene oil. The police authorities have also supported the dying declaration, incident and that the Nayab Tehsildar Dr. P.K. Gupta had certified that the deceased who was injured had deposed on oath and his thumb impression on the dying declaration was taken. In the cross examination, PW-9 has withstood the cross examination and has categorically stated that the deceased was in proper sense and was conscious. He had been admitted in the hospital on 18.6.2005 at 7:00 a.m.

16. PW-10 Dr. P.K. Gupta stated that he had time and again seen the deceased and he was in proper state of mind to give his declaration. He has also withstood the cross examination done by the defence. He has explained the meaning of proper set of mind and compos mentis. There was superficial injuries of burns on the person of the deceased. Dr. A.K. Sengar had given the compos and had given the medicines.

17. We are convinced that the dying declaration has been properly evaluated. PW-11's evidence has also been properly evaluated. PW-5 also properly evaluated. The death was not homicidal death. The questions arises who were the author of the said incident. Death occurred due to poring of kerosene oil and setting ablaze.

18. Learned Judge has discussed the evidence regarding dying declaration and we do not think that there is any reason to not believe the same. The definition of compos mentis will also not permit us to upturn the decision of learned Judge as far it points the finger towards accused and accused alone. In the light of the decision of the Apex Court in **Govindappa and others (supra)** there is no reason for us not to accept the dying declaration and its evidencily value under Section 32 of IPC.

19. The decision on which reliance is placed by learned counsel would also not come to the aid of the appellant as the facts are different except that of **Khushal Rao Versus State of Mombay and Sharad Birdhichand Sarda Versus State of Maharashtra, Supreme Court Criminal Ruling 1985, Page 28** in which matter, the conviction was confirmed.

20. However, the question which falls for our consideration is whether, on reappraisal of the peculiar facts and circumstances of the case, the conviction of the appellant under Section 302 of I.P.C. of the Indian Penal Code should be upheld or the conviction deserves to be converted under Section 304 Part-I or Part-II of the Indian Penal Code. It would be relevant to refer Section 299 of the Indian Penal Code, which read as under:

"299. Culpable homicide: *Whoever causes death by doing an act with*

the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide."

21. The academic distinction between "murder' and "culpable homicide not amounting to murder' has always vexed the Courts. The confusion is caused, if Courts losing sight of the true scope and meaning of the terms used by the legislature in these sections, allow themselves to be drawn into minute abstractions. The safest way of approach to the interpretation and application of these provisions seems to be to keep in focus the keywords used in the various clauses of Section 299 and 300 of I.P.Code. The following comparative table will be helpful in appreciating the points of distinction between the two offences.

Section 299	**Section 300**
A person commits culpable homicide if the act by which the death is caused is done-	Subject to certain exceptions culpable homicide is murder is the act by which the death is caused is done.
	INTENTION
(a) with the intention of causing death; or	(1) with the intention of causing death; or
(b) with the intention of causing such bodily injury as is likely to	(2) with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused;
cause death; or	
KNOWLEDGE	**KNOWLEDGE**
(c) with the knowledge that the act is likely to cause death.	(4) with the knowledge that the act is so immediately dangerous that it must in all probability cause death or such bodily injury as is likely to cause death, and without any excuse for incurring the risk of causing death or such injury as is mentioned above.

22. On overall scrutiny of the facts and circumstances of the present case coupled with the opinion of the Medical Officer and considering the principle laid down by the Apex Court in the Case of **Tukaram and Ors Vs. State of Maharashtra,** reported in **(2011) 4 SCC 250** and in the case of **B.N. Kavatakar and Another Vs. State of Karnataka,** reported in **1994 SUPP (1) SCC 304**, we are of the considered opinion that the offence would be one punishable under Section 304 part-I of the IPC.

23. From the upshot of the aforesaid discussions, it appears that the death caused by the accused was not premeditated, accused had no intention to cause death of deceased, the injuries were though sufficient in the ordinary course of nature to have caused death, accused had no intention to do away with deceased, hence the instant case falls under the Exceptions 1 and 4 to Section 300 of IPC. While considering Section 299 as reproduced herein above offence committed will fall under Section 304 Part-I as per the observations of the Apex Court in **Veeran**

and others Vs. State of M.P. Decided, (2011) 5 SCR 300 which have to be also kept in mind.

24. We have relied on the decision of Kushal Rao (supra) to come to the conclusion that the dying declaration has been rightly and properly made the basis of punishing the accused. The judgment in Maheshwar Tigga (supra) will not come to the aid of the accused as the facts are quite different.

25. From the aforesaid discussion, three things emerge that it was homicidal death; the author of the said offences were the appellants but the injuries and the motives were not such that the accused wanted to do away with the deceased; and the evidence on record will permit us to listen punishment to the lower decree namely under Section 304 to Part -I for a period of ten years. The default sentence is maintained. If the accused have completed ten years of incarceration, they be set free. If they have not paid the fine, the default sentence shall begin after ten years.

26. The appeal is partly allowed. Both the accused are held guilty of offences punishable under Section 304 Part-I read with 34 of IPC.

27. Record and proceedings be sent back to the Court below forthwith.

(2021)02ILR A508
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 08.02.2021

BEFORE

THE HON'BLE VIVEK VARMA, J.

Criminal Revision No. 144 of 2021

Iqrar Ahmad ...Revisionist

Versus

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

Counsel for the Revisionist:
Sri Ishwar Chandra Tyagi, Sri Anmol Kumar Dubey

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

A. Criminal Law - Code of Criminal Procedure, 1973 - Section 401/397 - Negotiable Instrument Act, 1881 - Section 138-cheque dishonoured-conviction-parties arrived at a compromise-revisionist does not take effective steps to compound the offence at initial stages-However, compounding of offence under N. I. Act is no more *res integra* and the offences can be compounded on any stage of proceedings-the court allowed the revision subject to payment of Rs. 5000/- as cost to opposite party.(Para 4,7,12)

B. The petitioner had already entered into a compromise with a complainant and the complainant had appeared and stated that the entire money had been received by him and he had no objection if the conviction already recorded u/s 138 of the Act is set aside. Once a person is allowed to compound a case u/s 147 of the N. I. Act, the conviction u/s 138 of the Act, should also be set aside.(Para 8)

The revision is allowed. (E-5)

List of Cases cited:-

1. K.M. Ibrahim Vs K.P. Mohammad & anr. (2010) 1 SCC 798

2. Damodar S. Prabhu Vs Sayed Babalal H.(2010) 5 SCC 663

3. Meters & Instruments Pvt. Ltd. & anr. Vs Kanchan Mehta (2018) 1 SCC 560

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

1. This revision has been filed against the judgment and order dated 9.12.2020

passed by Additional District and Sessions Judge/ Special Judge (SC/ST Act), Amroha/ J.P. Nagar in Criminal Appeal No. 18 of 2018 (Iqrar Ahmad vs. State of U.P.), whereby the judgment and sentence dated 6.7.2018 passed by Judicial Magistrate, Hasanpur Amroha/ J.P. Nagar has been confirmed.

2. The revisionist/applicant has been convicted under Section 138 of Negotiable Instruments Act and awarded sentence to undergo simple imprisonment of three months and also to pay a fine of Rs.1,35,000/-, in default, to suffer further simple imprisonment for three months.

3. In brief, the proceedings under Section 138 of the Negotiable Instruments Act were initiated against the revisionist with the allegation that cheque no.77163 dated 10.1.2012 for a sum of Rs.1,35,000/- issued by the revisionist was dishonoured on account of insufficient funds. The opposite party no.2 filed a complaint case before the Judicial Magistrate, Hasanpur Amroha/ J.P. Nagar, under Section 138 of the Negotiable Instruments Act. The proceedings of the case, ultimately resulted in order of conviction. Against the order of conviction an appeal was preferred and the appellate Court dismissed the appeal of the revisionist and confirmed the judgment.

4. Learned counsel for the revisionist submits that now the rival parties have sorted out their dispute and have arrived at a compromise. In this regard, a compromise deed dated 11.12.2020 has been annexed as Annexure SA-1 to the supplementary affidavit.

5. Learned counsel for the opposite party no.2 has filed a short counter affidavit and stated that he had received the entire cheque amount of Rs.1,35,000/- and does not want to continue the criminal proceedings and the matter may be decided in terms of the compromise deed.

6. Heard Sri Ishwar Chandra Tyagi, learned counsel for the revisionist, Sri Anmol Kumar Dubey, learned counsel for opposite party no.2, Sri Nikhil Chiturvedi, learned AGA for the State and perused the record.

7. The law regarding compounding of offence under Negotiable Instruments Act is no more *res integra* and the offences under the said Act can be compounded on any stage of the proceedings.

8. The Hon'ble Supreme Court in the case of **K. M. Ibrahim vs. K.P. Mohammad and another** reported in **(2010) 1 SCC 798** has held as under :

"7. Mr. Rohtagi submitted that the said position had been accepted by this Court in various decisions, such as in the case of O.P. Dholakia vs. State of Haryana & Anr. [(2000) 1 SCC 762], wherein it was held that since the petitioner had already entered into a compromise with the complainant and the complainant had appeared through counsel and stated that the entire money had been received by him and he had no objection if the conviction already recorded under Section 138 of the Negotiable Instruments Act is set aside, the Hon'ble Judges thought it appropriate to grant permission, in the peculiar facts and circumstances of the case, to compound the offence. While doing so, this Court also indicated that necessarily the conviction and sentence under Section 138 of the Act stoodannulled.

8. The said view has been consistently followed in the case of (1) Anil

Kumar Haritwal & Anr. vs. Alka Gupta & Anr. [(2004) 4 SCC 366]; (2) B.C. Seshadri vs. B.N. Suryanarayana Rao [2004 (11) SCC 510] decided by a three Judge Bench; (3) G. Sivarajan vs. Little Flower Kuries & Enterprises Ltd. & Anr. [(2004 11 SCC 400]; (4) Kishore Kumar vs. J.K. Corporation Ltd. [(2004 13 SCC 494]; (5) Sailesh Shyam Parsekar vs. Baban [(2005 (4) SCC 162]; (6) K. Gyansagar vs. Ganesh Gupta & Anr. [(2005) 7 SCC 54]; (7) K.J.B.L. Rama Reddy vs. Annapurna Seeds & Anr. [(2005) 10 SCC 632]; (8) Sayeed Ishaque Menon vs. Ansari Naseer Ahmed [(2005) 12 SCC 140]; (9) Vinay Devanna Nayak vs. Ryot Sewa Sahakari Bank Ltd. [(2008) 2 SCC 305], wherein some of the earlier decisions have been noticed; and (10) Sudheer Kumar vs. Manakkandi M.K. Kunhiraman & Anr. [2008 (1) KLJ 203], which was a decision of aDivision Bench of the Kerala High Court, wherein also the issue has been gone into in great detail.

9. The golden thread in all these decisions is that once a person is allowed to compound a case as provided for under Section 147 of the Negotiable Instruments Act, the conviction under Section 138 of the said Act should also be set aside. In the case of Vinay Devanna Nayak (supra), the issue was raised and after taking note of the provisions of Section 320 Cr.P.C., this Court held that since the matter had been compromised between the parties and payments had been made in full and final settlement of the dues of the Bank, the appeal deserved to be allowed and the appellant was entitled to acquittal. Consequently, the order of conviction and sentence recorded by all the courts were set aside and the appellant was acquitted of the charge leveled against him.

10. The object of Section 320 Cr.P.C., which would not in the strict sense of the term apply to a proceeding under the Negotiable Instruments Act, 1881, gives the parties to the proceedings an opportunity to compound offences mentioned in the table contained in the said section, with or without the leave of the court, and also vests the court with jurisdiction to allow such compromise. By virtue of Sub-Section (8), the Legislature has taken one step further in vesting jurisdiction in the Court to also acquit the accused/convict of the offence on the same being allowed to be compounded.

11. Inasmuch as, it is with a similar object in mind that Section 147 has been inserted into the Negotiable Instruments Act, 1881, by amendment, an analogy may be drawn as to the intention of the Legislature as expressed in Section 320(8) Cr.P.C., although, the same has not been expressly mentioned in the amended section to a proceeding under Section 147 of the aforesaid Act.

12. Apart from the above, this Court is further empowered under Article 142 of the Constitution to pass appropriate orders in line with Sub-Section (8) of Section 320 Cr.P.C. in an application under Section 147 of the aforesaid Act, in order to do justice to the parties.

13. As far as the non-obstante clause included in Section 147 of the 1881 Act is concerned, the 1881 Act being a special statute, the provisions of Section 147 will have an overriding effect over the provisions of the Code relating to compounding of offences. The various decisions cited by Mr. Rohtagi on this issue does not add to the above position.

14. It is true that the application under Section 147 of the Negotiable Instruments Act was made by the parties after the proceedings had been concluded before the Appellate Forum. However, Section 147 of the aforesaid Act does not

bar the parties from compounding an offence under Section 138 even at the appellate stage of the proceedings. Accordingly, we find no reason to reject the application under Section 147 of the aforesaid Act even in a proceeding under Article 136 of the Constitution.

15. Since the parties have settled their disputes, in keeping with the spirit of Section 147 of the Act, we allow the parties to compound the offence, set aside the judgment of the courts below and acquit the appellant of the charges against him.

16. The appeal is, accordingly, allowed in the aforesaid terms."

9. In **Damodar S. Prabhu vs. Sayed Babalal H.** reported in **(2010) 5 SCC 663** the Hon'ble Supreme court has held as follows:

"6. Mr. Goolam E. Vahanvati, Solicitor General (now Attorney- General for India) had appeared as amicus curiae in the present matter and referred to the facts herein as an illustration of how parties involved in cheque bounce cases usually seek the compounding of the offence at a very late stage. The interests of justice would indeed be better served if parties resorted to compounding as a method to resolve their disputes at an early stage instead of engaging in protracted litigation before several forums, thereby causing undue delay, expenditure and strain on part of the judicial system. This is clearly a situation that is causing some concern, since Section 147 of the Act does not prescribe as to what stage is appropriate for compounding the offence and whether the same can be done at the instance of the complainant or with the leave of the court.

7. The learned Attorney General stressed on the importance of using compounding as an expedient method to hasten the disposal of cases. In this regard, the learned Attorney General has proposed that this Court should frame some guidelines to disincentivise litigants from seeking the compounding of the offence at an unduly late stage of litigation. In other words, judicial directions have been sought to nudge litigants in cheque bounce cases to opt for compounding during the early stages of litigation, thereby bringing down the arrears.

8. Before examining the guidelines proposed by the learned Attorney General, it would be useful to clarify the position relating to the compounding of offences under the Negotiable Instruments Act, 1881. Even before the insertion of Section 147 in the Act (by way of an amendment in 2002) some High Courts had permitted the compounding of the offence contemplated by Section 138 during the later stages of litigation. In fact in O.P. Dholakia v. State of Haryana, (2000) 1 SCC 672, a division bench of this Court had permitted the compounding of the offence even though the petitioner's conviction had been upheld by all the three designated forums. After noting that the petitioner had already entered into a compromise with the complainant, the bench had rejected the State's argument that this Court need not interfere with the conviction and sentence since it was open to the parties to enter into a compromise at an earlier stage and that they had not done so. The bench had observed:-

"3. ... taking into consideration the nature of the offence in question and the fact that the complainant and the accused have already entered into a compromise, we think it appropriate to grant permission in the peculiar facts and circumstances of the present case, to compound."

Similar reliefs were granted in orders reported as Sivasankaran v. State of Kerala & Anr., (2002) 8 SCC 164, Kishore

Kumar v. J.K. Corporation Ltd., (2004) 12 SCC 494 and Sailesh Shyam Parsekar v. Baban, (2005) 4 SCC 162, among other cases.

9. As mentioned above, the Negotiable Instruments Act, 1881 was amended by the Negotiable Instruments (Amendment and Miscellaneous Provisions) Act, 2002 which inserted a specific provision, i.e. Section 147 to make the offences under the Act compoundable'. We can refer to the following extract from the Statement of Objects and Reasons attached to the 2002 amendment which is self- explanatory."

10. The Hon'ble Supreme Court in the case of **Damodar S. Prabhu vs. Sayed Babalal H. (Supra)** has framed guidelines with respect to granting permission for compounding of offence at various stages. The guidelines in the form of directions in the aforesaid judgment reads as follows :

'THE GUIDELINES'

"(i) In the circumstances, it is proposed as follows:

(a) That directions can be given that the Writ of Summons be suitably modified making it clear to the accused that he could make an application for compounding of the offences at the first or second hearing of the case and that if such an application is made, compounding may be allowed by the court without imposing any costs on the accused.

(b) If the accused does not make an application for compounding as aforesaid, then if an application for compounding is made before the Magistrate at a subsequent stage, compounding can be allowed subject to the condition that the accused will be required to pay 10% of the cheque amount to be deposited as a condition for compounding with the Legal Services Authority, or such authority as the Court deems fit.

(c) Similarly, if the application for compounding is made before the Sessions Court or a High Court in revision or appeal, such compounding may be allowed on the condition that the accused pays 15% of the cheque amount by way of costs.

(d) Finally, if the application for compounding is made before the Supreme Court, the figure would increase to 20% of the cheque amount."

11. Recently, in the case of **Meters and Instruments Private Limited and another vs. Kanchan Mehta** reported in **(2018) 1 SCC 560**, the Hon'ble Supreme Court observed as follows :

"18. From the above discussion following aspects emerge:

18.1) Offence under Section 138 of the Act is primarily a civil wrong. Burden of proof is on accused in view presumption under Section 139 but the standard of such proof is "preponderance of probabilities". The same has to be normally tried summarily as per provisions of summary trial under the Cr.P.C. but with such variation as may be appropriate to proceedings under Chapter XVII of the Act. Thus read, principle of Section 258 Cr.P.C. will apply and the Court can close the proceedings and discharge the accused on satisfaction that the cheque amount withassessed costs and interest is paid and if there is no reason to proceed with the punitive aspect.

18.2) The object of the provision being primarily compensatory, punitive element being mainly with the object of enforcing the compensatory element, compounding at the initial stage has to be encouraged but is not debarred at later stage subject to appropriate compensation

as may be found acceptable to the parties or the Court.

18.3) Though compounding requires consent of both parties, even in absence of such consent, the Court, in the interests of justice, on being satisfied that the complainant has been duly compensated, can in its discretion close the proceedings and discharge the accused.

18.4) Procedure for trial of cases under Chapter XVII of the Act has normally to be summary. The discretion of the Magistrate under second proviso to Section 143, to hold that it was undesirable to try the case summarily as sentence of more than one year may have to be passed, is to be exercised after considering the further fact that apart from the sentence of imprisonment, the Court has jurisdiction under Section 357(3) Cr.P.C. to award suitable compensation with default sentence under Section 64 IPC and with further powers of recovery under Section 431 Cr.P.C. With this approach, prison sentence of more than one year may not be required in all cases.

18.5) Since evidence of the complaint can be given on affidavit, subject to the Court summoning the person giving affidavit and examining him and the bank's slip being prima facie evidence of the dishonor of cheque, it is unnecessary for the Magistrate to record any further preliminary evidence. Such affidavit evidence can be read as evidence at all stages of trial or other proceedings. The manner of examination of the person giving affidavit can be as per Section 264 Cr.P.C. The scheme is to follow summary procedure except where exercise of power under second proviso to Section 143 becomes necessary, where sentence of one year may have to be awarded and compensation under Section 357(3) is considered inadequate, having regard to the amount of the cheque, the financial capacity and the conduct of the accused or any other circumstances.

19. In view of the above, we hold that where the cheque amount with interest and cost as assessed by the Court is paid by a specified date, the Court is entitled to close the proceedings in exercise of its powers under Section 143 of the Act read with Section 258 Cr.P.C. As already observed, normal rule for trial of cases under Chapter XVII of the Act is to follow the summary procedure and summons trial procedure can be followed where sentence exceeding one year may be necessary taking into account the fact that compensation under Section 357 (3) Cr.P.C. with sentence of less than one year will not be adequate, having regard to the amount of cheque, conduct of the accused and other circumstances."

12. Following the aforesaid propositions of law and taking into account the fact that the parties have agreed to end the proceedings by way of compromise and the opposite party no.2 has already received the amount of cheque and he does not want to pursue the proceedings against the revisionist, this Court deems it appropriate to compound the offence on the basis of compromise deed dated 11.12.2020 entered into between the parties. However, in terms of the guidelines framed by the Hon'ble Supreme Court as the revisionist has not appeared before the Court and has not taken effective steps to compound the offence at initial stages, in the backdrop of peculiar facts and circumstance of the case, this court deems it appropriate to permit the compounding of offence subject to payment of Rs.5000/- as cost/interest to the opposite party no.2 to be paid by the revisionist within a period of two weeks from today.

13. Further, taking into account the fact that the revisionist has caused undue delay in making endevour for compounding the offence in terms of guidelines framed by the Hon'ble Supreme Court in **Damodar S. Prabhu vs. Sayed Babalal H. (Supra)**, the revisionist is directed to pay a cost of 15% of the cheque amount to the High Court Legal Services Committee, High Court, Allahabad within a period of three weeks from today.

14. In case, the amount of Rs.5000/- towards cost/interest is paid to the opposite party no.2 and 15% of the cheque amount is deposited by the revisionist to the High Court Legal Services Committee, High Court, Allahabad with the stipulated period, the judgment and sentence dated 6.7.2018 passed by the trial Court duly confirmed by the appellate Court vide judgment and order dated 9.12.2020 is set aside.

15. The revision is allowed in the above terms.

(2021)02ILR A514
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 03.02.2021

BEFORE

THE HON'BLE SAMIT GOPAL, J.

Criminal Revision No. 1156 of 2017

Mool Chandra ...Revisionist
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Revisionist:
Sri Vikas Tripathi, Sri Dileep Kumar Pandey, Sri Harish Yadav, Sri Jitendra Kumar

Counsel for the Opposite Parties:
A.G.A., Sri Achyutanand Pandey, Sri Santosh Kumar Singh

A. Criminal Law - Code of Criminal Procedure, 1973-Sections 401/397 & 127-determination of quantum of maintenance-Learned court below rightly passed the order for enhancement of maintenance as the revisionist is employed and getting salary having two school going daughter, also the cost of living has been increased-the object of section 125 Cr.P.C. was conceived to ameliorate the agony, anguish, financial suffering of a woman who left her matrimonial home along with her children-husband can not take subterfuges to deprive her of the benefit of living with dignity.(Para 1 to 13)

Monetary relief granted to the aggrieved woman and the children must be adequate, fair ,reasonable, and consistent with the standard of living to which the aggrieved woman was accustomed to in her matrimonial home.(Para 8 to 9)

The revision is dismissed.(E-5)

List of Cases cited:-

1. Bhuwan Mohan Singh Vs Meena & ors. (2015) 6 SCC 353

2. Rajnesh Vs Neha & anr. : Crl. Appl. No. 730 of 2020 (arising out of SLP (Crl.) 9503 of 2018)Nov. 4, 2020: 2020 SCC Online SC 903

(Delivered by Hon'ble Samit Gopal, J.)

1. Heard Sri Dileep Kumar Pandey, learned counsel for the revisionist and Sri Santosh Kumar Singh, learned Advocate holding brief of Sri Achyutanand Pandey, learned counsel for Opposite Party No.2 and Sri B.B. Upadhyay, learned A.G.A. for the State and perused the record.

2. The present revision has been preferred against the judgment and order

dated 08.02.2017 passed by the Principal Judge, Family Court, Banda in Case No. 110/11 of 2014 (Smt. Meena Devi and others Vs. Mool Chandra) under Section 127 Cr.P.C., by which, the court concern has allowed the application filed under Section 127 Cr.P.C. and has directed the revisionist to pay Rs. 4,000/- per month to the opposite party no.2 Smt. Meena Devi and Rs. 2,000/- per month each to the opposite party no.3 Kumari Anju and opposite party no.4 Kumari Mansi from the date of the order. It has been further directed that the said amount shall be paid by 10th of every month to them.

3. The facts of the present case are that the opposite party nos. 2, 3 and 4 filed an application under Section 125 Cr.P.C. claiming maintenance from the revisionist who is the husband of the opposite party no.2 Smt. Meena Devi and the father of the opposite party nos. 3 and 4 i.e. Kumari Anju and Kumari Mansi which was decided vide order dated 05.01.2012 passed in Criminal Case No. 604/IX of 2010 (Smt. Meena Devi & others Vs. Mool Chandra) by the Civil Judge, (Junior Division)/Judicial Magistrate, Baberu, District Banda, by which, the said application under Section 125 Cr.P.C. was allowed and the opposite party therein who is the revisionist in the present revision was directed to pay by the 10th of every month Rs. 1,000/- to Smt. Meena Devi and Rs. 750/- each to Kumari Anju and Kumari Mansi.

4. Subsequently, an application dated 26.06.2013 under Section 127 Cr.P.C. was filed by the opposite party nos. 2, 3 and 4 with the prayer that the applicant no.1 Smt. Meena Devi be paid Rs. 2,000/- per month and the applicant nos. 2 and 3 Kumari Anju and Kumari Mansi be paid Rs. 1,500/- each per month from respondent Mool Chandra who is the revisionist herein. During pendency of the application under Section 127 Cr.P.C. further an application dated 15.09.2015 was filed by the wife and daughters of the revisionist with the prayer that the amount of maintenance be enhanced to Rs. 4,000/- each to the said persons.

5. The court concerned vide the impugned order allowed the application filed under Section 127 Cr.P.C. vide its order dated 08.02.2017 and enhanced the amount of maintenance from Rs. 1,000/- to Rs. 4,000/- to be paid to Smt. Meena Devi, the wife of the revisionist and from Rs. 750/- to Rs. 2,000/- each to the daughters of the revisionist, namely, Kumari Anju and Kumari Mansi from the date of the order.

6. Learned counsel for the revisionist argued that the court below erred in law in enhancing the amount of maintenance without any basis and even failed to consider the fact that the revisionist was working as a sweeper who had taken a loan from the department, from co-workers and from the bank and is also suffering from diabetes and thyroid and as such is himself spending a handsome amount of money from his salary for repayment of the loans and for his illness and without considering the same, the maintenance as awarded has been enhanced. It is further argued that Smt. Meena Devi the wife of the revisionist is working in private hospitals as a sweeper and earning Rs. 10,000/- per month and the said fact has not been considered and ignored by the court concerned while enhancing the amount of maintenance. It is thus argued that the order impugned enhancing the amount of maintenance is irrational and has not considered the

important aspects of the matter and thereby the amount of maintenance has been enhanced without any basis and sufficient reason.

7. Per contra, learned counsel for the opposite party no.2 and the learned AGA argued that the order impugned does not suffer from any irregularity or illegality and the same is a just and a proper which has considered the factum of the situation and also the fact that the cost of living has increased and as such the same has been rightly passed.

8. The Apex Court in the case of **Bhuwan Mohan Singh Vs. Meena and others : (2015) 6 SCC 353** has held that wife is also entitled in law to lead a life in the similar manner as she would have lived in the house of her husband. It is further held that the husband cannot deprive her of the benefit of living with dignity. Para 2 of the judgment is as follows:

"2. Be it ingeminated that Section 125 of the Code of Criminal Procedure (for short "the Code") was conceived to ameliorate the agony, anguish, financial suffering of a woman who left her matrimonial home for the reasons provided in the provision so that some suitable arrangements can be made by the Court and she can sustain herself and also her children if they are with her. The concept of sustenance does not necessarily mean to lead the life of an animal, feel like an unperson to be thrown away from grace and roam for her basic maintenance somewhere else. She is entitled in law to lead a life in the similar manner as she would have lived in the house of her husband. That is where the status and strata come into play, and that is where the obligations of the husband, in case of a wife, become a prominent one. In a proceeding of this nature, the husband cannot take subterfuges to deprive her of the benefit of living with dignity. Regard being had to the solemn pledge at the time of marriage and also in consonance with the statutory law that governs the field, it is the obligation of the husband to see that the wife does not become a destitute, a beggar. A situation is not to be maladroitly created whereunder she is compelled to resign to her fate and think of life "dust unto dust". It is totally impermissible. In fact, it is the sacrosanct duty to render the financial support even if the husband is required to earn money with physical labour, if he is able bodied. There is no escape route unless there is an order from the Court that the wife is not entitled to get maintenance from the husband on any legally permissible grounds."

9. Further in the case of **Rajnesh Vs. Neha and another : Criminal Appeal No. 730 of 2020 (Arising out of SLP (Crl.) 9503 of 2018)** decided on **November 4, 2020** : 2020 SCC Online SC 903 the Apex Court has discussed about the determinants of maintenance allowance payable to wife and children. In the said judgment it has been observed as follows:

"III Criteria for determining quantum of maintenance:

(i) The objective of granting interim / permanent alimony is to ensure that the dependant spouse is not reduced to destitution or vagrancy on account of the failure of the marriage, and not as a punishment to the other spouse. There is no straitjacket formula for fixing the quantum of maintenance to be awarded.

The factors which would weigh with the Court inter alia are the status of the parties; reasonable needs of the wife

and dependant children; whether the applicant is educated and professionally qualified; whether the applicant has any independent source of income; whether the income is sufficient to enable her to maintain the same standard of living as she was accustomed to in her matrimonial home; whether the applicant was employed prior to her marriage; whether she was working during the subsistence of the marriage; whether the wife was required to sacrifice her employment opportunities for nurturing the family, child rearing, and looking after adult members of the family; reasonable costs of litigation for a non-working wife. [Refer to Jasbir Kaur Sehgal v District Judge, Dehradun & Ors. (1997) 7 SCC 7, refer to Vinny Paramvir Parmar v Paramvir Parmar (2011) 13 SCC 112.]

In Manish Jain v Akanksha Jain : (2017) 15 SCC 801 this Court held that the financial position of the parents of the applicant-wife, would not be material while determining the quantum of maintenance. An order of interim maintenance is conditional on the circumstance that the wife or husband who makes a claim has no independent income, sufficient for her or his support. It is no answer to a claim of maintenance that the wife is educated and could support herself. The court must take into consideration the status of the parties and the capacity of the spouse to pay for her or his support. Maintenance is dependent upon factual situations; the Court should mould the claim for maintenance based on various factors brought before it.

On the other hand, the financial capacity of the husband, his actual income, reasonable expenses for his own maintenance, and dependant family members whom he is obliged to maintain under the law, liabilities if any, would be required to be taken into consideration, to arrive at the appropriate quantum of maintenance to be paid. The Court must have due regard to the standard of living of the husband, as well as the spiralling inflation rates and high costs of living. The plea of the husband that he does not possess any source of income ipso facto does not absolve him of his moral duty to maintain his wife if he is able bodied and has educational qualifications. [Reema Salkan v Sumer Singh Salkan (2019) 12 SCC 303]

(ii) A careful and just balance must be drawn between all relevant factors. The test for determination of maintenance in matrimonial disputes depends on the financial status of the respondent, and the standard of living that the applicant was accustomed to in her matrimonial home. [Chaturbhuj v Sita Bai (2008) 2 SCC 316]

The maintenance amount awarded must be reasonable and realistic, and avoid either of the two extremes i.e. maintenance awarded to the wife should neither be so extravagant which becomes oppressive and unbearable for the respondent, nor should it be so meagre that it drives the wife to penury. The sufficiency of the quantum has to be adjudged so that the wife is able to maintain herself with reasonable comfort.

(iii) Section 23 of HAMA provides statutory guidance with respect to the criteria for determining the quantum of maintenance. Sub-section (2) of Section 23 of HAMA provides the following factors which may be taken into consideration : (i) position and status of the parties, (ii) reasonable wants of the claimant, (iii) if the petitioner/claimant is living separately, the justification for the same, (iv) value of the claimant's property and any income derived from such property, (v) income from claimant's own earning or from any other source.

(iv) Section 20(2) of the D.V. Act provides that the monetary relief granted to the aggrieved woman and / or the children must be adequate, fair, reasonable, and consistent with the standard of living to which the aggrieved woman was accustomed to in her matrimonial home.

(v) The Delhi High Court in Bharat Hedge v Smt. Saroj Hegde : (2007) 140 DLT 16 laid down the following factors to be considered for determining maintenance:

"1. Status of the parties.

2. Reasonable wants of the claimant.

3. The independent income and property of the claimant.

4. The number of persons, the non-applicant has to maintain.

5. The amount should aid the applicant to live in a similar lifestyle as he/she enjoyed in the matrimonial home.

6. Non-applicant's liabilities, if any.

7. Provisions for food, clothing, shelter, education, medical attendance and treatment etc. of the applicant.

8. Payment capacity of the non-applicant.

9. Some guess work is not ruled out while estimating the income of the non-applicant when all the sources or correct sources are not disclosed.

10. The non-applicant to defray the cost of litigation.

11. The amount awarded u/s 125 Cr.PC is adjustable against the amount awarded u/ 24 of the Act. 17."

(vi) Apart from the aforesaid factors enumerated hereinabove, certain additional factors would also be relevant for determining the quantum of maintenance payable.

(a) Age and employment of parties:

In a marriage of long duration, where parties have endured the relationship for several years, it would be a relevant factor to be taken into consideration. On termination of the relationship, if the wife is educated and professionally qualified, but had to give up her employment opportunities to look after the needs of the family being the primary caregiver to the minor children, and the elder members of the family, this factor would be required to be given due importance. This is of particular relevance in contemporary society, given the highly competitive industry standards, the separated wife would be required to undergo fresh training to acquire marketable skills and re-train herself to secure a job in the paid workforce to rehabilitate herself. With advancement of age, it would be difficult for a dependant wife to get an easy entry into the work-force after a break of several years.

(b) Right to residence:

Section 17 of the D.V. Act grants an aggrieved woman the right to live in the "shared household". Section 2(s) defines "shared household" to include the household where the aggrieved woman lived at any stage of the domestic relationship; or the household owned and rented jointly or singly by both, or singly by either of the spouses; or a joint family house, of which the respondent is a member.

The right of a woman to reside in a "shared household" defined under Section 2(s) entitles the aggrieved woman for right of residence in the shared household, irrespective of her having any legal interest in the same. This Court in Satish Chander Ahuja v Sneha Ahuja : Civil Appeal No. 2483 / 2020 decided vide Judgment dated 15.10.2020 (supra) held that "shared household" referred to in

Section 2(s) is the shared household of the aggrieved person where she was living at the time when the application was filed, or at any stage lived in a domestic relationship. The living of the aggrieved woman in the shared household must have a degree of permanence. A mere fleeting or casual living at different places would not constitute a "shared household". It is important to consider the intention of the parties, nature of living, and nature of the household, to determine whether the premises is a "shared household". Section 2(s) read with Sections 17 and 19 of the D.V. Act entitles a woman to the right of residence in a shared household, irrespective of her having any legal interest in the same. There is no requirement of law that the husband should be a member of the joint family, or that the household must belong to the joint family, in which he or the aggrieved woman has any right, title or interest. The shared household may not necessarily be owned or tenanted by the husband singly or jointly.

Section 19 (1)(f) of the D.V. Act provides that the Magistrate may pass a residence order inter alia directing the respondent to secure the same level of alternate accommodation for the aggrieved woman as enjoyed by her in the shared household. While passing such an order, the Magistrate may direct the respondent to pay the rent and other payments, having regard to the financial needs and resources of the parties.

(c) Where wife is earning some income:

The Courts have held that if the wife is earning, it cannot operate as a bar from being awarded maintenance by the husband. The Courts have provided guidance on this issue in the following judgments.

In Shailja & Anr. v Khobbanna : (2018) 12 SCC 199 [See also decision of the Karnataka High Court in P. Suresh v S. Deepa & Ors., 2016 Cri LJ 4794] this Court held that merely because the wife is capable of earning, it would not be a sufficient ground to reduce the maintenance awarded by the Family Court. The Court has to determine whether the income of the wife is sufficient to enable her to maintain herself, in accordance with the lifestyle of her husband in the matrimonial home. [Chaturbhuj Vs. Sita Bai : (2008) 2 SCC 316] Sustenance does not mean, and cannot be allowed to mean mere survival. [Vipul Lakhanpal v Smt. Pooja Sharma, 2015 SCC OnLine HP 1252]

In Sunita Kachwaha & Ors. v Anil Kachwaha : (2014) 16 SCC 715 the wife had a postgraduate degree, and was employed as a teacher in Jabalpur. The husband raised a contention that since the wife had sufficient income, she would not require financial assistance from the husband. The Supreme Court repelled this contention, and held that merely because the wife was earning some income, it could not be a ground to reject her claim for maintenance.

The Bombay High Court in Sanjay Damodar Kale v Kalyani Sanjay Kale : 2020 SCC OnLine Bom 694 while relying upon the judgment in Sunita Kachwaha (supra), held that neither the mere potential to earn, nor the actual earning of the wife, howsoever meagre, is sufficient to deny the claim of maintenance.

An able-bodied husband must be presumed to be capable of earning sufficient money to maintain his wife and children, and cannot contend that he is not in a position to earn sufficiently to maintain his family, as held by the Delhi High Court in Chander Prakash Bodhraj v Shila Rani Chander Prakash : AIR 1968 Delhi 174. The onus is on the husband to establish

with necessary material that there are sufficient grounds to show that he is unable to maintain the family, and discharge his legal obligations for reasons beyond his control. If the husband does not disclose the exact amount of his income, an adverse inference may be drawn by the Court.

This Court in Shamima Farooqui v Shahid Khan : (2015) 5 SCC 705 cited the judgment in Chander Prakash (supra) with approval, and held that the obligation of the husband to provide maintenance stands on a higher pedestal than the wife.

(d) Maintenance of minor children:

The living expenses of the child would include expenses for food, clothing, residence, medical expenses, education of children. Extra coaching classes or any other vocational training courses to complement the basic education must be factored in, while awarding child support. Albeit, it should be a reasonable amount to be awarded for extra-curricular / coaching classes, and not an overly extravagant amount which may be claimed. Education expenses of the children must be normally borne by the father. If the wife is working and earning sufficiently, the expenses may be shared proportionately between the parties.

(e) Serious disability or ill health:

Serious disability or ill health of a spouse, child / children from the marriage / dependant relative who require constant care and recurrent expenditure, would also be a relevant consideration while quantifying maintenance."

10. The fact that the revisionist is employed and was getting a salary of Rs. 15,938/- after the necessary deductions which was paid to him in October, 2014 is not denied. Even the fact that after the payment in October, 2014, the revisionist was entitled to enhanced payment on the recommendation of the 7th Pay Commission is also not denied.

11. In the cross examination of the revisionist on 22.12.2016 he had stated to be receiving about Rs. 17,000/- per month as his salary. The ailment which is being taken by the revisionist and is stated to be one of the factors of too much expenditure is a common and a regular ailment and apparently there is no proof of the same being a serious ailment. The daughters of the revisionist are stated to be grown up children as per the application dated 23.03.2012 filed under Section 13 of the Hindu Marriage Act by the revisionist himself in the year 2012, in which, it is stated that he started living in Kanpur after joining his services in the year 2003 after which one daughter was born who was about 10-11 years old and later on another daughter was born who is aged about 7 years and as such they are of the age of school going children. The fact of rise in inflation, cost of living and also taking into consideration the salary of the revisionist which keeps on increasing every year by way of dearness allowance, increment etc. cannot be ignored.

12. Having taken into consideration, the relevant factors for determining the quantum of maintenance in the light of the legal principles laid by the Apex Court and the facts of the present case, this Court is of the view that the amount of maintenance as awarded is appropriate and there is no irregularity and illegality in the order impugned.

13. The present revision is thus **dismissed**.

14. The party(ies) shall file computer generated copy of such judgment

downloaded from the official website of High Court Allahabad before the concerned Court/Authority/Official.'

15. The computer generated copy of such judgment shall be self-attested by the counsel(s) of the party(ies) concerned.

16. The concerned Court /Authority /Official shall verify the authenticity of such computerized copy of the judgment from the official website of High Court Allahabad and shall make a declaration of such verification in writing.

(2021)02ILR A521
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 10.02.2021

BEFORE

THE HON'BLE SAMIT GOPAL, J.

Criminal Revision No. 2547 of 2016

Shri Praveen Srivastava ...Revisionist
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Revisionist:
Sri Brijesh Kumar Srivastava, Sri Ajay Kumar Chaurasiya, Sri Ravi Prakash Srivastava

Counsel for the Opposite Parties:
A.G.A., Sri Abhishek Srivastava, Sri Praveen Kumar Srivastava

A. Criminal Law - Code of Criminal Procedure,1973-Sections 401/397 & 125-determination of quantum of maintenance-Learned court below rightly passed the order for maintenance as the revisionist is employed and getting salary having one school going daughter, also the cost of living has been increased-the object of section 125 Cr.P.C. was conceived to ameliorate the agony, anguish, financial suffering of a woman who left her matrimonial home along with her children-husband can not take subterfuges to deprive her of the benefit of living with dignity.(Para 1 to 10)

Monetary relief granted to the aggrieved woman and the children must be adequate, fair, reasonable, and consistent with the standard of living to which the aggrieved woman was accustomed to in her matrimonial home. (Para 5,6)

The revision is dismissed. (E-5)

List of Cases cited:-

1. Bhuwan Mohan Singh Vs Meena & ors. (2015) 6 SCC 353

2. Rajnesh Vs Neha & anr. :Crl. Appl. No. 730 of 2020 (arising out of SLP (Crl.) 9503 of 2018)Nov. 4, 2020: 2020 SCC Online SC 903

(Delivered by Hon'ble Samit Gopal, J.)

1. Heard Sri Ajay Kumar Chaurasia, learned counsel for the revisionist, Sri Praveen Kumar Srivastava, learned counsel for the opposite party no.2 and Sri Ashwini Prakash Tripathi, learned AGA for the State and perused the record. As per the office report dated 21.08.2017, the lower court records which were summoned are tagged with the present revision, which have also been perused.

2. The present revision has been preferred against the judgment and order dated 20.05.2016 passed by the Family Court, Gorakhpur in Case No. 62 of 2005 (Smt. Sarika Vs. Shri Praveen Srivastava) by which the wife of the revisionist has been directed to be paid Rs. 10,000/- and Kumari Bhumika Srivastava, the daughter of the revisionist and the opposite party no.2 has been directed to be paid Rs.

5,000/- from the date of the order which will be effective from May, 2016 as maintenance.

3. Learned counsel for the revisionist argued that the order impugned is bad in law as the opposite party no.2 was living in adultery and the child born from her is not from his contact and the paternity of the said child is seriously disputed. It is further argued that the marriage of the revisionist with the opposite party no.2 took place on 16.05.2003 and the gavna (second marriage) took place on 17.05.2003 and the girl child was born on 28.01.2004 in a normal delivery which is after 8 months and 11 days of marriage and as such is evident that the said child is not born out of the wedlock of the revisionist and the opposite party no.2. Learned counsel has then argued vehemently that the quantum of maintenance as awarded being Rs. 10,000/- per month to the wife and Rs. 5,000/- per month to the daughter is quite excessive looking to the facts and circumstances of the case, specially the fact that the revisionist is drawing a salary of Rs. 15,000/- per month only. Learned counsel confines his argument primarily to the quantum of maintenance as awarded to the wife and the daughter and then argues that looking to the fact that the wife was living in adultery and the girl child was not born out of his wedlock, the same be reduced.

4. Per contra, learned counsel for the opposite party no.2 has opposed the arguments of the learned counsel for the revisionist and argued that the order impugned is an order passed after considering the entire evidence on record. It is argued that the question of the wife living in adultery and paternity of the girl child being disputed by the revisionist has been dealt with elaborately by the court concerned in the impugned judgment and after meticulously dealing with the same, a specific finding has been returned by the court concerned that the girl child has been born out of the wedlock of the revisionist and the opposite party no.2. Learned counsel has further argued that in so far as the quantum of the maintenance as awarded is concerned, the statement of the revisionist that he was getting a salary of Rs. 15,000/- per month, is negated from the salary slip filed before the Court below which was of the year 2016, in which, he was shown to be getting a salary of Rs. 42,814/- out of which Rs. 2,628/- were the necessary deductions and then he was getting a salary of Rs. 40,186/-. It is argued that the court below as on the question of salary also given a specific finding that the evidence on record being the documents and the statements as recorded before it clearly show that the revisionist has tried to conceal the same and has spoken a lie.

5. The Apex Court in the case of **Bhuwan Mohan Singh Vs. Meena and others : (2015) 6 SCC 353** has held that wife is also entitled in law to lead a life in the similar manner as she would have lived in the house of her husband. It is further held that the husband cannot deprive her of the benefit of living with dignity. Para 2 of the judgment is as follows:

"2. Be it ingeminated that Section 125 of the Code of Criminal Procedure (for short "the Code") was conceived to ameliorate the agony, anguish, financial suffering of a woman who left her matrimonial home for the reasons provided in the provision so that some suitable arrangements can be made by the Court and she can sustain herself and also her children if they are with her. The concept of

sustenance does not necessarily mean to lead the life of an animal, feel like an unperson to be thrown away from grace and roam for her basic maintenance somewhere else. She is entitled in law to lead a life in the similar manner as she would have lived in the house of her husband. That is where the status and strata come into play, and that is where the obligations of the husband, in case of a wife, become a prominent one. In a proceeding of this nature, the husband cannot take subterfuges to deprive her of the benefit of living with dignity. Regard being had to the solemn pledge at the time of marriage and also in consonance with the statutory law that governs the field, it is the obligation of the husband to see that the wife does not become a destitute, a beggar. A situation is not to be maladroitly created whereunder she is compelled to resign to her fate and think of life "dust unto dust". It is totally impermissible. In fact, it is the sacrosanct duty to render the financial support even if the husband is required to earn money with physical labour, if he is able bodied. There is no escape route unless there is an order from the Court that the wife is not entitled to get maintenance from the husband on any legally permissible grounds."

6. Further, in the case of **Rajnesh Vs. Neha and another : Criminal Appeal No. 730 of 2020 (Arising out of SLP (Crl.) 9503 of 2018)** decided on **November 4, 2020 : 2020 SCC Online SC 903** the Apex Court has discussed about the determinants of maintenance allowance payable to wife and children. In the said judgment it has been observed as follows:-

"III Criteria for determining quantum of maintenance:

(i) The objective of granting interim / permanent alimony is to ensure that the dependant spouse is not reduced to destitution or vagrancy on account of the failure of the marriage, and not as a punishment to the other spouse. There is no straitjacket formula for fixing the quantum of maintenance to be awarded.

The factors which would weigh with the Court inter alia are the status of the parties; reasonable needs of the wife and dependant children; whether the applicant is educated and professionally qualified; whether the applicant has any independent source of income; whether the income is sufficient to enable her to maintain the same standard of living as she was accustomed to in her matrimonial home; whether the applicant was employed prior to her marriage; whether she was working during the subsistence of the marriage; whether the wife was required to sacrifice her employment opportunities for nurturing the family, child rearing, and looking after adult members of the family; reasonable costs of litigation for a non-working wife. [Refer to Jasbir Kaur Sehgal v District Judge, Dehradun & Ors. (1997) 7 SCC 7, refer to Vinny Paramvir Parmar v Paramvir Parmar (2011) 13 SCC 112.]

In Manish Jain v Akanksha Jain : (2017) 15 SCC 801 this Court held that the financial position of the parents of the applicant-wife, would not be material while determining the quantum of maintenance. An order of interim maintenance is conditional on the circumstance that the wife or husband who makes a claim has no independent income, sufficient for her or his support. It is no answer to a claim of maintenance that the wife is educated and could support herself. The court must take into consideration the status of the parties and the capacity of the spouse to pay for her or his support. Maintenance is

dependent upon factual situations; the Court should mould the claim for maintenance based on various factors brought before it.

On the other hand, the financial capacity of the husband, his actual income, reasonable expenses for his own maintenance, and dependant family members whom he is obliged to maintain under the law, liabilities if any, would be required to be taken into consideration, to arrive at the appropriate quantum of maintenance to be paid. The Court must have due regard to the standard of living of the husband, as well as the spiralling inflation rates and high costs of living. The plea of the husband that he does not possess any source of income ipso facto does not absolve him of his moral duty to maintain his wife if he is able bodied and has educational qualifications. [Reema Salkan v Sumer Singh Salkan (2019) 12 SCC 303]

(ii) A careful and just balance must be drawn between all relevant factors. The test for determination of maintenance in matrimonial disputes depends on the financial status of the respondent, and the standard of living that the applicant was accustomed to in her matrimonial home. [Chaturbhuj v Sita Bai (2008) 2 SCC 316]

The maintenance amount awarded must be reasonable and realistic, and avoid either of the two extremes i.e. maintenance awarded to the wife should neither be so extravagant which becomes oppressive and unbearable for the respondent, nor should it be so meagre that it drives the wife to penury. The sufficiency of the quantum has to be adjudged so that the wife is able to maintain herself with reasonable comfort.

(iii) Section 23 of HAMA provides statutory guidance with respect to the criteria for determining the quantum of maintenance. Sub-section (2) of Section 23 of HAMA provides the following factors which may be taken into consideration : (i) position and status of the parties, (ii) reasonable wants of the claimant, (iii) if the petitioner/claimant is living separately, the justification for the same, (iv) value of the claimant's property and any income derived from such property, (v) income from claimant's own earning or from any other source.

(iv) Section 20(2) of the D.V. Act provides that the monetary relief granted to the aggrieved woman and / or the children must be adequate, fair, reasonable, and consistent with the standard of living to which the aggrieved woman was accustomed to in her matrimonial home.

(v) The Delhi High Court in Bharat Hedge v Smt. Saroj Hegde : (2007) 140 DLT 16 laid down the following factors to be considered for determining maintenance:

"1. Status of the parties.

2. Reasonable wants of the claimant.

3. The independent income and property of the claimant.

4. The number of persons, the non-applicant has to maintain.

5. The amount should aid the applicant to live in a similar lifestyle as he/she enjoyed in the matrimonial home.

6. Non-applicant's liabilities, if any.

7. Provisions for food, clothing, shelter, education, medical attendance and treatment etc. of the applicant.

8. Payment capacity of the non-applicant.

9. Some guess work is not ruled out while estimating the income of the non-applicant when all the sources or correct sources are not disclosed.

10. The non-applicant to defray the cost of litigation.

11. The amount awarded u/s 125 Cr.PC is adjustable against the amount awarded u/ 24 of the Act. 17."

(vi) Apart from the aforesaid factors enumerated hereinabove, certain additional factors would also be relevant for determining the quantum of maintenance payable.

(a) Age and employment of parties:

In a marriage of long duration, where parties have endured the relationship for several years, it would be a relevant factor to be taken into consideration. On termination of the relationship, if the wife is educated and professionally qualified, but had to give up her employment opportunities to look after the needs of the family being the primary caregiver to the minor children, and the elder members of the family, this factor would be required to be given due importance. This is of particular relevance in contemporary society, given the highly competitive industry standards, the separated wife would be required to undergo fresh training to acquire marketable skills and re-train herself to secure a job in the paid workforce to rehabilitate herself. With advancement of age, it would be difficult for a dependant wife to get an easy entry into the work-force after a break of several years.

(b) Right to residence:

Section 17 of the D.V. Act grants an aggrieved woman the right to live in the "shared household". Section 2(s) defines "shared household" to include the household where the aggrieved woman lived at any stage of the domestic relationship; or the household owned and rented jointly or singly by both, or singly by either of the spouses; or a joint family house, of which the respondent is a member.

The right of a woman to reside in a "shared household" defined under Section 2(s) entitles the aggrieved woman for right of residence in the shared household, irrespective of her having any legal interest in the same. This Court in Satish Chander Ahuja v Sneha Ahuja : Civil Appeal No. 2483 / 2020 decided vide Judgment dated 15.10.2020 (supra) held that "shared household" referred to in Section 2(s) is the shared household of the aggrieved person where she was living at the time when the application was filed, or at any stage lived in a domestic relationship. The living of the aggrieved woman in the shared household must have a degree of permanence. A mere fleeting or casual living at different places would not constitute a "shared household". It is important to consider the intention of the parties, nature of living, and nature of the household, to determine whether the premises is a "shared household". Section 2(s) read with Sections 17 and 19 of the D.V. Act entitles a woman to the right of residence in a shared household, irrespective of her having any legal interest in the same. There is no requirement of law that the husband should be a member of the joint family, or that the household must belong to the joint family, in which he or the aggrieved woman has any right, title or interest. The shared household may not necessarily be owned or tenanted by the husband singly or jointly.

Section 19 (1)(f) of the D.V. Act provides that the Magistrate may pass a residence order inter alia directing the respondent to secure the same level of alternate accommodation for the aggrieved woman as enjoyed by her in the shared household. While passing such an order, the Magistrate may direct the respondent to

pay the rent and other payments, having regard to the financial needs and resources of the parties.

(c) Where wife is earning some income:

The Courts have held that if the wife is earning, it cannot operate as a bar from being awarded maintenance by the husband. The Courts have provided guidance on this issue in the following judgments.

In Shailja & Anr. v Khobbanna : (2018) 12 SCC 199 [See also decision of the Karnataka High Court in P. Suresh v S. Deepa & Ors., 2016 Cri LJ 4794] this Court held that merely because the wife is capable of earning, it would not be a sufficient ground to reduce the maintenance awarded by the Family Court. The Court has to determine whether the income of the wife is sufficient to enable her to maintain herself, in accordance with the lifestyle of her husband in the matrimonial home. [Chaturbhuj Vs. Sita Bai : (2008) 2 SCC 316] Sustenance does not mean, and cannot be allowed to mean mere survival. [Vipul Lakhanpal v Smt. Pooja Sharma, 2015 SCC OnLine HP 1252]

In Sunita Kachwaha & Ors. v Anil Kachwaha : (2014) 16 SCC 715 the wife had a postgraduate degree, and was employed as a teacher in Jabalpur. The husband raised a contention that since the wife had sufficient income, she would not require financial assistance from the husband. The Supreme Court repelled this contention, and held that merely because the wife was earning some income, it could not be a ground to reject her claim for maintenance.

The Bombay High Court in Sanjay Damodar Kale v Kalyani Sanjay Kale : 2020 SCC OnLine Bom 694 while relying upon the judgment in Sunita Kachwaha (supra), held that neither the mere potential to earn, nor the actual earning of the wife, howsoever meagre, is sufficient to deny the claim of maintenance.

An able-bodied husband must be presumed to be capable of earning sufficient money to maintain his wife and children, and cannot contend that he is not in a position to earn sufficiently to maintain his family, as held by the Delhi High Court in Chander Prakash Bodhraj v Shila Rani Chander Prakash : AIR 1968 Delhi 174. The onus is on the husband to establish with necessary material that there are sufficient grounds to show that he is unable to maintain the family, and discharge his legal obligations for reasons beyond his control. If the husband does not disclose the exact amount of his income, an adverse inference may be drawn by the Court.

This Court in Shamima Farooqui v Shahid Khan : (2015) 5 SCC 705 cited the judgment in Chander Prakash (supra) with approval, and held that the obligation of the husband to provide maintenance stands on a higher pedestal than the wife.

(d) Maintenance of minor children:

The living expenses of the child would include expenses for food, clothing, residence, medical expenses, education of children. Extra coaching classes or any other vocational training courses to complement the basic education must be factored in, while awarding child support. Albeit, it should be a reasonable amount to be awarded for extra-curricular / coaching classes, and not an overly extravagant amount which may be claimed. Education expenses of the children must be normally borne by the father. If the wife is working and earning sufficiently, the expenses may be shared proportionately between the parties.

(e) Serious disability or ill health:

Serious disability or ill health of a spouse, child / children from the marriage / dependant relative who require constant care and recurrent expenditure, would also be a relevant consideration while quantifying maintenance."

7. The fact that the revisionist is employed and working in the Indian Railways and is a government servant and is getting a salary after the necessary deductions which is Rs. 40,186/- in the year 2016 is a fact for which a specific finding has been returned by the court below based on evidence on record and documents.

8. As of now, the fact of rise in inflation, rise of cost of living and also taking into account that the girl child was born in the year 2004 and as of now is about 16 years of age and is of the age of a school going child and also taking into consideration the salary of the revisionist which keeps on increasing every year by means of dearness allowance, increment etc. cannot be ignored.

9. Having taken into consideration, the relevant factors for determining the quantum of maintenance in the light of the legal principles laid by the Apex Court and the facts of the present case, this Court is of the view that the amount of maintenance as awarded is appropriate and there is no irregularity and illegality in the order impugned.

10. The present revision is thus **dismissed**.

11. Since the present revision has been dismissed, hence the interim order dated 29.08.2016 passed in the matter by this Court stands discharged.

12. The lower court records be sent back to the concerned court forthwith.

13. The party(ies) shall file computer generated copy of such judgment downloaded from the official website of High Court Allahabad before the concerned Court/Authority/Official.

14. The computer generated copy of such judgment shall be self-attested by the counsel(s) of the party(ies) concerned.

15. The concerned Court/Authority/Official shall verify the authenticity of such computerized copy of the judgment from the official website of High Court Allahabad and shall make a declaration of such verification in writing.

(2021)02ILR A527
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 22.01.2021

BEFORE

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

Application U/S 482 Cr.P.C. No. 1210 of 2021

Smt. Indra Gandhi & Anr. ...Applicants
Versus
State of U.P. ...Opposite Party

Counsel for the Applicants:
Sri Prashant Sharma

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

Criminal Law-Impugned notice passed u/s 344 Cr.P.C.-for giving false evidence-detail order since already passed-notice impugned need not to be elaborate-as detail order already passed-Appeal also

filed-proper remedy to invoke provision u/s 344 (4)-appropriate response.

Application dismissed. (E-7)

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

1. Heard Sri Prashant Sharma, learned counsel for the applicants and Sri Pankaj Saxena, learned A.G.A.-I for the State-opposite party.

2. The present application under Section 482 Cr.P.C. has been filed seeking to quash the entire criminal proceedings of Case No. 17 of 2020 (State of U.P. vs. Shyamlal and another) under Section 344 Cr.P.C., pending in the court of Additional Sessions Judge, Devband, District- Saharanpur as well as the notice dated 3.11.2020, under the said proceedings.

3. Facts of the case are that pursuant to a First Information Report dated 23.9.2014, lodged by the son of the applicants under Sections 452, 307, 504, 506 IPC, registered as Case Crime No. 727 of 2014, P.S.- Devband, District- Saharanpur, a charge sheet was submitted and thereafter, the trial was initiated.

4. The sessions trial, being Sessions Trial No. 529 of 2015 was decided in terms of an order dated 8.10.2020 whereunder, the accused Dileep was acquitted. The Court of Session, at the time of delivery of the judgement, expressed an opinion to the effect that the main witnesses in the case i.e. P.W. 2- Shyam Lal (applicant no. 2 herein) and P.W. 3- Smt. Indra Gandhi (applicant no. 1 herein) had wilfully given false evidence, and accordingly, proceedings under Section 344 Cr.P.C. were directed to be initiated against them.

5. Pursuant to the aforesaid order, a notice dated 3.11.2020 has been issued to the applicants directing them to show cause. It is at this stage that the present application under Section 482 Cr.P.C. has been filed.

6. Counsel for the applicants has sought to contend that the aforesaid notice dated 3.11.2020, which according to him, is a summoning order, has been issued on a printed proforma, without application of mind and accordingly, the proceedings initiated pursuant thereto, cannot be sustained.

7. Learned counsel for the applicants also asserts that against the aforesaid judgement dated 8.10.2020, passed by the Court of Session, an appeal against acquittal, has been filed being Criminal Appeal U/S 372 Cr.P.C. Defective No. - 118 of 2020, dated 11.8.2020, before this Court, which is stated to be pending.

8. Per contra, Sri Pankaj Saxena, learned A.G.A.-I appearing for the State-opposite party no. 1 submits that the notice dated 3.11.2020 issued to the applicants in respect of the opinion expressed by the Court of Session in its judgement dated 8.10.2020, is simply a notice for showing cause and cannot be said to be a summoning order. He submits that no detailed reasons are required to be stated therein and the contention of the counsel for the applicants that it has been issued on a printed proforma, is totally without basis.

9. It is further submitted that in case the applicants have filed an appeal against the judgement dated 8.10.2020 passed in the sessions trial and if the aforesaid appeal is in order, it would be open to the applicants to apprise the court below of the said fact and make a prayer for staying the

proceedings of the trial as per sub-section (4) of Section 344 Cr.P.C.

10. In order to appreciate the rival contentions, the relevant statutory provisions may be adverted to.

11. The provisions as to offences affecting the administration of justice are given under Chapter XXVII of Code of Criminal Procedure, 1973. Section 344 provides a summary procedure for trial for giving false evidence. The provisions under Section 344 Cr.P.C., are as follows :-

"344. Summary procedure for trial for giving false evidence.-(1) If, at the time of delivery of any judgment or final order disposing of any judicial proceeding, a Court of Session or Magistrate of the first class expresses an opinion to the effect that any witness appearing in such proceeding had knowingly or wilfully given false evidence or had fabricated false evidence with the intention that such evidence should be used in such proceeding, it or he may, if satisfied that it is necessary and expedient in the interest of justice that the witness should be tried summarily for giving or fabricating, as the case may be, false evidence, take cognizance of the offence and may, after giving the offender a reasonable opportunity of showing cause why he should not be punished for such offence, try such offender summarily and sentence him to imprisonment for a term which may extend to three months, or to fine which may extend to five hundred rupees, or with both.

(2) In every such case the Court shall follow, as nearly as may be practicable, the procedure prescribed for summary trials.

(3) Nothing in this section shall affect the power of the Court to make a complaint under section 340 for the offence, where it does not choose to proceed under this section.

(4) Where, after any action is initiated under sub- section (1), it is made to appear to the Court of Session or Magistrate of the first class that an appeal or an application for revision has been preferred or filed against the judgment or order in which the opinion referred to in that sub- section has been expressed, it or he shall stay further proceedings of the trial until the disposal of the appeal or the application for revision, as the case may be, and thereupon the further proceedings of the trial shall abide by the results of the appeal or application for revision."

12. The provisions contained under Section 344 Cr.P.C. provide a summary procedure for trial for giving false evidence in a case, if the Court of Session or Magistrate of the first class, at the time of delivery of any judgement or final order disposing of any judicial proceeding, expresses an opinion to the effect that any witness appearing in such proceeding had knowingly or wilfully given false evidence or had fabricated false evidence with the intention that such evidence should be used in such proceeding.

13. The section provides a summary procedure, which empowers the Court of Session or Magistrate of the first class to try such offenders summarily, in case it is satisfied that the same is necessary and expedient in the interest of justice. It is provided that before proceeding, the offender is to be provided a reasonable opportunity of showing cause why he should not be punished for such offence. In terms of sub-section (2), the Court is enjoined to follow, as nearly as may be practicable, the procedure prescribed for summary trials.

14. Under Section 344 Cr.P.C., the Court of Session or Magistrate of the first

class is empowered to try cases of perjury committed before him and punish the offenders summarily. The provision is of a limited scope, being confined to obvious cases of perjury and authorizing a small punishment. The exercise of powers under the section is discretionary. The section authorizes the court to exercise the power only at the time of delivery of the judgement or final order and not earlier. Before trying the offender, the Court is required to give him reasonable opportunity of showing cause why he should not be punished for such an offence.

15. The provisions contained under sub-section (4) of Section 344 provide that where, after any action is initiated under sub-section (1), it is made to appear to the Court of Session or Magistrate of the first class that an appeal or an application for revision has been preferred or filed against the judgement or order in which the opinion referred to in that sub-section has been expressed, it or he shall stay further proceedings of the trial until the disposal of the appeal or the application for revision, as the case may be, and thereupon the further proceedings of the trial shall abide by the results of the appeal or application for revision.

16. Sub-section (4) of Section 344 gives the Court power to stop further proceedings of any summary trial initiated under the Section, if it is brought to its notice that an appeal or a revision application has been preferred against the judgement or order in the main proceedings. It would also follow that pending the disposal of the appeal or revision, if any sentence has been imposed in sub-section (1), the same would not be executed.

17. The order dated 3.11.2020 has been issued for the purpose of giving the applicants an opportunity of showing cause pursuant to the opinion expressed by the Court of Session in its judgement dated 8.10.2020. The object of the order being to put the applicants to notice by providing them a reasonable opportunity of showing cause pursuant to the opinion already expressed in the judgement dated 8.10.2020, the Court was not required to give elaborate reasons for its satisfaction for proceeding summarily to try the witnesses for giving false evidence. The purpose is only to notify the persons concerned to submit their response.

18. At this stage, the Court of Session or the Magistrate is only required to be satisfied that there is sufficient ground to proceed to try the witnesses summarily and not that there is sufficient ground to punish them. The order dated 3.11.2020, therefore, cannot be faulted with for the reason that the same does not contain elaborate or detailed reasons.

19. In the event an appeal has been preferred against the judgement dated 8.10.2020 passed in the sessions trial, as is sought to be contended, and if the appeal is in order, it would be open to the applicants herein to invoke the provisions contained under sub-section (4) of Section 344 Cr.P.C. and move an appropriate application before the court concerned in response to the notice dated 3.11.2020.

20. Counsel for the applicants has not disputed the aforestated legal position, and makes a prayer to withdraw the present application stating that he would file an appropriate application/response to the notice dated 3.11.2020 issued by the court below pursuant to the order dated 8.10.2020 passed in Sessions Trial No. 529 of 2015.

21. The application under Section 482 Cr.P.C. stands dismissed accordingly.

(2021)02ILR A531
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 10.02.2021

BEFORE

THE HON'BLE MRS. SAROJ YADAV, J.

U/S 482/378/407 No. 6256 of 2019

Deepak Singh & Anr. ...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Ajai Kumar Singh, Shobhit Singh

Counsel for the Opposite Parties:
G.A.

Criminal Law-Name of the Petitioners were dropped from the chargesheet-on account of separate living-summoned in Application u/s 319 Cr.P.C.- on the basis of Pws cross-examined by defence-no illegality in summoning order.

Application rejected. (E-7)

List of Cases cited: -

1. Brijendra Singh & ors. Vs St. of Raj. (2017) SC 2839

2.Hardeep Singh Vs St. of Punj. & ors. 2014(3) SCC 92

(Delivered by Hon'ble Mrs. Saroj Yadav, J.)

1. This petition has been filed by the petitioners praying to quash/set aside the order dated 10.05.2019 passed by learned Additional Sessions Judge, Court No. 11, Hardoi in Sessions Trial No. 47/18 (State Vs. Dharamveer Singh and Others) and Crime No. 203/17.

2. Heard learned counsel for the petitioners, learned counsel for the opposite party no. 2 and learned Additional Government Advocate appearing on behalf of the State.

3. Learned counsel for the petitioners submitted that the petitioners were named in the first information report but after investigation, the Investigating Officer found that the petitioners were not present in the Village at the time of incident and the location of the petitioner no. 1 was in Delhi and Haryana since 01.10.2017 till 15.10.2017, whereas the alleged incident took place on 12.10.2017. The petitioner no. 2 is the wife of the petitioner no. 1 and she is residing with him. Both the petitioners are residing separately since 2015, the petitioner no. 1 is doing a private job in Delhi. On the basis of the evidence collected during investigation, the Investigating Officer did not find any involvement of the petitioners in the alleged crime, as such, he dropped the names of the petitioners but during trial, the informant moved an application under Section 319 Cr.P.C. for summoning the petitioners as accused and learned Trial Court allowed the same without considering the material available on record i.e. call details of the petitioner no. 1, availed by the Investigating Officer. Learned counsel for the petitioners further submitted that learned Trial Court has passed the impugned order summoning the petitioners as accused persons only on the basis of the evidence of P.W. 1 to 4, which is not justified, so the impugned order should be quashed.

4. Learned counsel for the petitioners has relied upon the judgment of the Apex Court in the case of ***Brijendra Singh & Others Vs. State of Rajasthan (2017) SC 2839 decided on 27.04.2017.***

5. Contrary to it, learned counsel for the informant as well as learned A.G.A. appearing on behalf of the State opposed the arguments advanced by the learned counsel for the petitioners and submitted that while deciding the application moved under Section 319 Cr.P.C., learned Trial Court has to take into consideration only that evidence and material which is available on record. In this matter, learned Trial Court considered the evidence of the witnesses of facts examined in the Court and on the basis of that evidence has passed the order, which is legally correct because in the case of ***Hardeep Singh Versus State of Punjab and Others 2014(3) SCC 92***, the Hon'ble Apex Court has made it clear that only that evidence will be considered which is produced before the Court, hence, the order passed by the learned Trial Court on the basis of the statements of witnesses P.W. 1 to 4 is perfectly correct and this petition deserves rejection.

6. Considered the submissions of both the sides and perused the case laws cited above.

7. Learned counsel for the petitioners relied upon the following extract of the case of ***Brijendra Singh & Others Vs. State of Rajasthan (Supra).***

"In Hardeep Singh's case, the Constitution Bench has also settled the controversy on the issue as to whether the word "evidence' used in Section 319(1) Cr.P.C. has been used in a comprehensive sense and indicates the evidence collected during investigation or the word "evidence' is limited to the evidence recorded during trial. It is held that it is that material, after cognizance is taken by the Court, that is available to it while making an inquiry into or trying an offence, which the court can utilise or take into consideration for supporting reasons to summon any person on the basis of evidence adduced before the Court. The word "evidence' has to be understood in its wider sense, both at the stage of trial and even at the stage of inquiry. It means that the power to proceed against any person after summoning him can be exercised on the basis of any such material as brought forth before it. At the same time, this Court cautioned that the duty and obligation of the Court becomes more onerous to invoke such powers consciously on such material after evidence has been led during trial. The Court also clarified that "evidence' under Section 319 Cr.P.C. could even be examination-in-chief and the Court is not required to wait till such evidence is tested on cross-examination, as it is the satisfaction of the Court which can be gathered from the reasons recorded by the Court in respect of complicity of some other person(s) not facing trial in the offence.

8. In ***Hardeep Singh Vs State of Punjab (Supra)*** the Constitution Bench of Hon'ble Apex Court has held that *"for the exercise of power under Section 319 Cr.P.C., the use of word `evidence' means material that has come before the court during an inquiry or trial by it and not otherwise. If from the evidence led in the trial the court is of the opinion that a person not accused before it has also committed the offence, it may summon such person under Section 319 Cr.P.C. With respect to documentary evidence, it is sufficient, as can be seen from a bare*

perusal of Section 3 of the Evidence Act as well as the decision of the Constitution Bench, that a document is required to be produced and proved according to law to be called evidence. Whether such evidence is relevant, irrelevant, admissible or inadmissible, is a matter of trial. It is, therefore, clear that the word "evidence" in Section 319 Cr.P.C. means only such evidence as is made before the court, in relation to statements, and as produced before the court, in relation to documents. It is only such evidence that can be taken into account by the Magistrate or the Court to decide whether power under Section 319 Cr.P.C. is to be exercised and not on the basis of material collected during investigation."

9. Perusal of the impugned order shows that the learned Trial Court has passed the impugned order summoning the accused persons on the basis of evidence of P.W. 1 to 4. All these witnesses were cross-examined by the counsel of the defence. The statements of above-mentioned witnesses are available on the record. They all have stated that the petitioners along with other accused persons used to demand dowry and used to torture and harass the deceased and the petitioners were also involved in the crime. As far as the call details are concerned, those can be considered only when these are duly proved at proper stage.

10. Hence, in the light of the discussions made herein above and the law laid down by the Apex court, there appears no illegality or infirmity in the impugned order, therefore, the petition deserves rejection.

11. The petition under Section 482 Cr.P.C. is, accordingly, dismissed.

(2021)02ILR A533
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 31.07.2020

BEFORE

THE HON'BLE RAHUL CHATURVEDI, J.

Application U/S 482 Cr.P.C. No. 12047 of 2020

Satish Kumar ...Applicant
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Applicant:
Sri Shashi Kant Pandey

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

(A) Criminal Law - Indian Penal Code, 1860 - Section 363 - punishment for kidnapping, Section 376 - punishment for rape , Protection of Children from Sexual Offence (POCSO) Act - Section 3 - Penetrative sexual assault , Section 4 - Punishment for penetrative sexual assault - victim may at best be a witness - no law, where under the Magistrate may direct the detention of a witness simply because he does not like him to go to any particular place, and as such the petitioner has been sent to Nari Niketan pursuant to a judicial order which *per-se* appears to be without jurisdiction - detention can not be said to be a "legal" just because it carries the thrust of a judicial order which is patently tangent to a established norm in this regard - child marriage is voidable at the instance of minor, otherwise the marriage is not void *ipso-facto.* (Para - 24,26)

Applicant and victim **(girl)** were undergoing in their teens, as a natural outcome - developed tender affinity towards each other which ultimately turned into a torrid and dense love affair between them - Eventually on 25.01.2019 she on her own free will and accord, decided to

join the company of applicant and flee away on 25.01.2019 to some unknown destination - father of the victim girl asserted his right over the victim lodging a report U/s 154 Cr.P.C against the applicant. (Para -8)

HELD:- After changing her **(minor girl)** marital status, she has got every right to chose her future as to whom with she wants to go, ignoring her wish, she was virtually detained an dumped into Protection Home/ Nari Niketan since last one year, is against one's freedom and liberty which is a touch stone of Article 21 of the Constitution of India - even assuming that **victim** was minor at relevant point of time, she cannot be detained in Nari Niketan or any protective Home against her wish and desire - no case for prosecution U/s 363, 376 I.P.C. is made out against the applicant. (Para - 20,22)

Application u/s 482 Cr.P.C. allowed. (E-6)

List of Cases cited: -

1. Kajal & ors. Vs St. of U.P. (Habeas Corpus Petition No. 3914/18 decided on 22.02.2019)

2. Raj Kumari Vs Suptd., of Women, 1997 (2) AWC 720

3. Kalyani Chaudhary Vs St. of U.P. 1978 Cr.L.J. 1003

4. Smt. Pushpa Devi Vs St.of U.P. through Principal Secretary (Misc. Bench No. 265/2019) decided on 30.08.2019

5. Shafin Jahan Vs Ashokan K.M. (Crl. Appeal No. 366/2018 decided on 8th March, 2018)

6. Juhi Devi Vs St. of Bihar, 2005 (13) SCC 376

7. Gian Devi Vs Superintendent, Nari Niketan, Delhi, 1976(3) SCC 234

8. Suhani Vs St. of U.P. , Crl. Appeal No. 4532/2018 decided on 26th April, 2018

9. Smt. Kanchan Singh & anr. Vs St.of U.P. & ors. , Habeas Corpus Writ Petition No. 33676 of 2015

10. Jaymala Vs Home Sec., Govt. of J.& K. , [AIR 1982 SC 1296]

11. Smt. Raj KumariI Vs Suptd., Women Protection, Meerut 1997 (2) AWC 720

12. Sonu Paswan Vs St. of U.P. , 2013 31 LCD 1107(DB)

13. Saheen parveen & anr. Vs St of U.P. & ors. , Misc. Bench No. 3519 of 2015 (decided on 23.7.2015)

(Delivered by Hon'ble Rahul Chaturvedi, J.)

1. Heard Shri Shashi Kant Pandey, learned counsel for the applicant, Mohd. Afzal, brief holder of the State and learned A.G.A. for the State and perused the material on record.

2. Formulating moot question of law, as to whether girl's freedom could be numbed, butchered or sacrificed in the name of minority, though she has changed her marital status after tying marital knots with Satish Kumar; in the garb of pendency of criminal trial against Satish Kumar (herein the applicant).

3. While hearing the arguments on 29.07.2020, the learned counsel for the applicant informed this Court that, the victim Ms. Sonam is presently detained in Nari Niketan, Meerut for the last more than one year, which pricked the judicial conscious of the Court and it ordered to summon the girl on 31.07.2020 from Nari Niketan, Meerut.

4. Today, the girl Ms. Sonam is before this Court, brought by Devendra Kumar, Sub Inspector, Police Station Bahadurgarh and Sri Rajesh, Head Constable 42 of the same Police Station

and the court had an opportunity to have a brief conversation with her.

5. After the aforesaid conversation, this Court decided that the instant 482 Cr.P.C. application be adjudicated at the threshold/admission stage itself. In the opinion of the Court, her detention in Protective Home/Nari Niketen is de-hoarse and against the established legal norms, more particularly in the current scenario when there is a rampant impact of the pandemic (Covid-19), the conditions of such Nari Niketans are pathetic. This Court is aware of the emerging recent news, where considerable number of detenues were found Corona Positive, some were suffering from AIDS and few of them are pregnant in a different Nari Niketan, i.e., Bal Sanrakshan Grih (Child Protection Home) especially Kanpur. This is the horrifying and alarming stage, which warrants immediate action by law courts regarding such poor victims left on their destiny, in the garb of legal orders passed by law courts.

FACTUAL MATRIX OF THE CASE:-

6. The learned counsel for the applicant, Shri S.K. Pandey tried to invoke the extraordinary jurisdiction of this Court U/s 482 Cr.P.C. assailing the charge sheet dated 19.10.2019 as well as entire proceedings of S.S.T. No. 107/2019 Inre: State Vs. Satish Kumar and others arising out of Case Crime No. 0016/2019 U/s 363, 376 I.P.C. and U/s 3/4 Protection of Children from Sexual Offence (POCSO) Act, P.S. Bahadurgarh, District Hapur and also to quash the order dated 03.03.2020 passed by Special Judge (POCSO), Hapur. In addition to above, it was also prayed to release the girl Ms. Sonam, wife of applicant (Satish Kumar) from Nari Niketan, Meerut, who is languishing there from the last more than one year in a most inhuman, horrendous and pathetic condition. This prayer of the applicant was rejected by the learned Trial Judge while passing the impugned order dated 03.03.2020, attributed the reason that since the applicant is facing trial /prosecution, by means of S.S.T. No. 107 of 2019, thus his application for release the victim Ms. Sonam is stood rejected.

7. Before coming to the legal aspect of the issue, it is imperative to give an eagle's eye view to the facts of the case to appreciate the controversy involved therein.

8. Applicant Satish Kumar and victim Ms. Sonam daughter of Nepal Singh are resident of Village Pasvada, P.S. Bahadurgarh, Hapur. Both of them were under going in their teens, as a natural outcome, they developed tender affinity towards each other which ultimately turned into a torrid and dense love affair between them. Eventually on 25.01.2019 she on her own free will and accord, decided to join the company of applicant and flee away on 25.01.2019 to some unknown destination.

9. After coming to know that his daughter has fled away with the applicant, opposite party no. 3, Nepal Singh, father of the victim girl, shed crocodile tears in the name of 'concern' and 'affection', asserted his right over the victim. As per prevailing practices now-a-days, father succeeded in lodging a report U/s 154 Cr.P.C. on 28.01.2019 at Police Station Bahadurgarh, Hapur against the applicant Satish Kumar and his named accomplice; namely; Arjun projecting the age of his daughter as minor (16 years), that she went to attend the classes of sewing on 25.01.2019 around

1.00 in afternoon and since then, she did not return home. In the F.I.R. it is alleged by the informant that Satish Kumar and Arjun have enticed away his minor daughter on a motorcycle and her whereabouts are not known to him since then. Contended by the learned counsel that this is a tailored story, that too, after elapse of three days of the alleged incident, relying upon the figment of imagination of the complainant, which do not even contain a grain of truth in it. Eventually, the aforesaid F.I.R. was got registered as Case Crime No. 0016/2019 U/s 363 I.P.C. at Police Station Bahadurgarh, District Hapur.

10. Pursuant to the F.I.R., the investigation started rolling and police nabbed the victim as well as the applicant Satish Kumar after considerable period, say about 5-6 months after the alleged incident. The girl (victim) Ms. Sonam was produced before Civil Judge (Junior Division), Hapur for recording her statement U/s 164 Cr.P.C. on 28.06.2019 (after almost 5 months from the date of alleged F.I.R.), wherein she completely blasted and negated every word of the F.I.R. and so-called "concern" and "sentiments" of her father Nepal Singh qua her, by mentioning that she in her 164 Cr.P.C. statement categorically stated that she is aged about 20 years, had prior acquaintance with Satish Kumar for the last 2 years, later on they developed deep affinity and tender feeling towards him. Sensing that her father wants to marry her with some other person against her wish, she on her own, joined the company of the applicant, Satish Kumar, both of them decided to flee to Delhi. She further stated in her 164 Cr.P.C. statement that she joined the company of the applicant, according to her own sweet and free will and accord. Thus, after keeping certain clothes and belongings with her, she went along with the applicant to Delhi and started residing there in a rented accommodation as husband and wife. On 10th of June, 2019, they performed their marriage in a Arya Samaj Temple, Delhi. She further stated that she wants to live in the company of applicant Satish Kumar and does not want to return to her parental home. In support of his contention, the learned counsel for the applicant has annexed the marriage certificate issued by Arya Samaj Mandir, Harit Vihar, Delhi dated 10.06.2019. A marriage registration certificate issued by S.D.M. Civil Line, Central, Delhi dated 12.06.2019 (Annexure No.4) and her Aadhaar Card showing her date of birth as 05.01.2001. Thus on the date of marriage i.e. 10.06.2019, her age was 18(+) and she has attained the age of majority and thus contended by counsel that victim was on the relevant date i.e. 25.01.2019 was *Sui juris*, no fetters could be placed upon her or her choice of person with whom she is staying as husband and wife nor can any restriction could be imposed upon her as to where she should stay or with whom she should stay. Not only this, the applicant along with his wife approached before this Court and filed a Civil Misc. Writ Petition seeking protection but prior to that father of the suffering girl i.e., Ms. Sonam, filed a Habeas Corpus Petition No. 205/2019 before this Court projecting wrong and state facts.

11. This Court has perused the orders of Habeas Corpus Petition dated 30.08.2019, whereby Shri Mahraj Singh, Investigating Officer was directed to enquire about as to whether Ms. Sonam has completed High School Examination or not. Thereafter, the Court was informed that in year 2018, she appeared in the High School Examination and her date of birth in the High School Certificate has been

mentioned as 01.01.2003. On these premises, the Habeas Corpus Petition was disposed-off directing the Chief Judicial Magistrate, Hapur to decide the question of custody of victim Ms. Sonam strictly in accordance with law.

12. After having direction from this Court, the parent of victim moved an application for taking the custody of their daughter, Ms. Sonam. The order of Chief Judicial Magistrate, Hapur dated 18.10.2019 is explicit, self speaking that though she was under age on the date of incident but in the opinion of the Chief Judicial Magistrate concerned since her parent were highly umbraged qua her and if the custody of girl is given to them, it is every likely that any thing untoward may happen for her. On the other hand Ms. Sonam too has given an application before Chief Judicial Magistrate, Hapur and appeared before him expressing grave concern and threat from her own parent, that they may kill her or compel to marry her with some stranger for money. Taking into account the entire gamout of circumstances, the learned C.J.M. Hapur vide order dated 18.10.2019 remitted her to Nari Niketan, Meerut. From the order it is also borne out that during investigation Ms. Sonam/the victim was sent to Nari Niketan, Meerut on 28.06.2019 and infact since then she is in Nari Niketan, Meerut. While passing order, dated 18.10.2019 the learned C.J.M. Hapur simply ignored her wish and willingness to handover her to the applicant to whom she got married. It seems that while passing order dated 18.10.2019, the learned counsel for the applicant has drawn the attention of the court to the ossification report of the victim Ms. Sonam dated 11.12.2019 conducted during the investigation by C.M.O. Hapur (Annexure No.10) and on a perusal of x-ray report and general appearance, the panel of doctors opined that she is of 19 years.

13. From the above factual controversy, two facts are explicitly clear that (a) she is married to the applicant, Satish Kumar in a Arya Samaj Temple, Delhi and got the marriage registered as per legal requirement. (b). At no stage, prior to sending her Nari Niketan, Meerut her consent was taken by the learned Chief Judicial Magistrate, Hapur while passing the impugned order dated 18.10.2019, though in her 164 Cr.P.C. statement, she is repeatedly urging that she is a married wife of applicant and wants to go with him. Thus the Magistrate concern has given a complete goby to the establish norms, practice and judicial pronouncement in this regard.

14. Even if this court computes the age of the victim Ms. Sonam as of day i.e. on 31.07.2020, her age comes to 17 years, 7 months, taking her date of birth as 01.01.2003 mentioned in her High School Certificate on its face value. Though in Aadhaar Card her date of birth is mentioned as 01.01.2001 and as per the opinion of the doctors, her age is 19 years. She has crossed the magical figure of 18 years.

15. The applicant Satish Kumar moved an application for release of his wife Ms. Sonam from Nari Niketan, Meerut, referring her age as 19 years as per the medical experts and there is marriage between the applicant and victim Ms. Sonam but her date of birth as mentioned in her High School Certificate is 17(+) years and thus the learned Trial Judge vide order dated 03.03.2020 rejected the release application moved by applicant holding that she is still short of that magical number

and trial against the applicant is still in progress thus the applicant's application was declined.

Aggrieved by the aforesaid developments and orders, the accused Satish Kumar preferred present 482 Cr.P.C. application invoking the extraordinary powers of this Court.

16. As mentioned above, pursuant to the earlier order of this court dated 29.07.2020, the victim Ms. Sonam is before this Court. The Court has put certain questions to her, which were replied by Ms. Sonam; whereby she states that her name is Sonam, she has willingly married to the applicant, Satish Kumar in a Arya Samaj Temple at Delhi and got her marriage registered. She has attained the age of majority and wants to go with her husband/Satish Kumar. She further apprized the court that she is coming from Nari Niketan, Meerut where she is residing from last more than a year in an inhuman conditions. Her biological existence was assured but no human dignity. On these unequivocal and explicit reply, the court has opportunity to scruitinize the legal premises and veracity, validity of orders of C.J.M., Hapur and order dated 03.03.2020 passed by Addl. District and Sessions Judge (Special Judge POCSO) Hapur dated 03.03.2020, whereby the learned Trial Judge refused to release the girl in favour of applicant.

17. So far as custody of the girl is concern, she is in Nari Niketan, Meerut since mid of 2019 pursuant to the judicial orders, ignoring her will, wish and desire on the ground that on the relevant date, she was just short of 18 years, is unacceptable. The learned counsel for the applicant in support of his contention has cited number of citations viz **(1) Kajal and others Vs. State of U.P. (Habeas Corpus Petition No. 3914/18 decided on 22.02.2019) (2) Raj Kumari Vs. Superintendent, of Women 1997 (2) AWC 720 (3) Kalyani Chaudhary Vs. State of U.P. 1978 Cr.L.J. 1003 (4) Smt. Pushpa Devi Vs. State of U.P. through Principal Secretary (Misc. Bench No. 265/2019) decided on 30.08.2019,** The Hon'ble Apex Court citation in the case of (i) **Shafin Jahan Vs. Ashokan K.M. (Crl. Appeal No. 366/2018 decided on 8th March, 2018** (ii) **Juhi Devi Vs. State of Bihar, 2005 (13) SCC 376** (iii) **Gian Devi Vs. Superintendent, Nari Niketan, Delhi, 1976(3) SCC 234** and lastly (iv) **Suhani Vs. State of U.P. (Crl. Appeal No. 4532/2018) decided on 26th April, 2018.**

18. In **Habeas Corpus Writ Petition No. 33676 of 2015 (Smt. Kanchan Singh and another Vs. State of U.P. and others) decided on 14.07.2015** this Court has held as under: -

"For the aforesaid reasons and in view of the settled law on the issue that even a minor cannot be detained in the Government Protective Home against her wishes, the petitioner no.1, who is seventeen and half years old as per her High School Certificate and as per medical opinion, is aged about nineteen years and she understands her well being, her detention in Nari Niketan against her wishes, is per se undesirable and the order dated 28.2.2015 passed by the Special Judge, POCSO Act, Deoria directing her detention in Nari Niketan without specifying the period of detention is not sustainable".

The tone, texture and tanner of above observation is the same which relates

to girl's liberty, respect and acknowledgment of her desire and any number of criminal prosecution or technical justification would not going to curt or deter her from her desire.

19. Let us examine rest of cases one by one:-

(I) In the case of **KAJAL AND OTHERS VS. STATE OF U.P.** (supra), the father lodged a FIR that his minor daughter aged about 15 years left his house and it was suspected that accused might have enticed her away. Her interest was protected by this Court that she may produced for recording her statement and for medical examination. Though in her 164 Cr.P.C. statement where she has blasted the prosecution story in the court. In this case too ignoring the wish and desire to join the company of her husband, she was dumped into Nari Niketan.

(II) The Division Bench relying upon the judgment in the case of **JAYMALA VS. HOME SECRETARY, GOVERNMENT OF JAMMU AND KASHMIR** [AIR 1982 SC 1296] has held that:-

It may be further appreciated that a victim of offence under section 363, 366-A, 366 of 376 I.P.C. could not be falling in the category of an accused and as such no court could be authorized under any provisions of law to authorize the detention of such a lady even into protective custody if the lady objects to such detention. In various decisions this Court opined that generally an order was passed sending the girl to Nari Niketan being ignorant of the constitutional provisions. Liberty being the most valuable fundamental right of a person. There is no age bar when it comes to valuing the liberty of a person be she a woman or be he agent. Even a child has a right to avail of his or her liberties, of course within the caring custody of parents. No law could be upheld even in a case of a child if he is deprived of the right to life and valued the right to liberty.

It may also be appreciated that the issue whether the victim/detenue who is a minor, can be sent to Nari Niketan against her wish, is no longer res in tegra and has been conclusively settled by a catena of decisions of this Court. In the case of Smt. Kalyani Chowdhary Versus State of U.P. reported in 1978 Cr.L.J. 1003 (D.B.), a Division Bench of this Court has taken the view that:

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

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

20. After going through the above citation and decisions, the court is of the considered opinion that when a particular minor is set at liberty in respect of her person or whether she shall be governed by a direction of her parent, the question of the custody of a minor girl will depend upon various factors, such as her marriage, which she has stated that taken place with Satish Kumar/the applicant and she wants to go with him. After changing her marital

status, she has got every right to chose her future as to whom with she wants to go, ignoring her wish, she was virtually detained an dumped into Protection Home/ Nari Niketan since last one year, is against one's freedom and liberty which is a touch stone of Article 21 of the Constitution of India.

21. In the case of **SMT. RAJ KUMARI VS. SUPERINTENDENT, WOMEN PROTECTION, MEERUT & OTHERS** reported in 1997 (2) AWC 720 decided by co-ordinate Bench of this Court has opined that:-

"In view of the above, it is well settled view of this Court that even a minor cannot be detained in Government Protective Home against her wishes. In the instant matter, petitioner has desired to go with Sunil Kumar besides this according to the two medical reports i.e. of the Chief Medical Officer and L.L.R.M. College, Meerut, the petitioner is certainly not less than 17 years and she understands her well being and also is capable of considering her future welfare. As such, we are of the opinion that her detention in Government Protective Home, Meerut against her wishes is undesirable and impugned order dated 23.11.1996 passed by the Magistrate directing her detention till the party concerned gets a declaration by the civil court or the competent court law regarding her age, is not sustainable and is liable to be quashed."

22. Thus in view of above, even assuming that Ms. Sonam was minor at relevant point of time, she cannot be detained in Nari Niketan or any protective Home against her wish and desire.

23. Learned A.G.A. has pointed out that detention of Ms. Sonam cannot be said to an illegal detention on the ground that she has been sent to Nari Niketan pursuant to the order of C.J.M.

24. This Court is of considered opinion that this objection too is unsustainable in the eye of law in the light of ratio of case law lay down in the case of **PUSHPA DEVI VS. STATE OF U.P.** (Supra), that the victim may at best be a witness. But there is no law, where under the Magistrate may direct the detention of a witness simply because he does not like him to go to any particular place, and as such the petitioner has been sent to Nari Niketan pursuant to a judicial order which *per-se* appears to be without jurisdiction. A detention can not be said to be a "legal" just because it carries the thrust of a judicial order which is patently tangent to a established norm in this regard.

25. Yet another contention was raised by learned A.G.A. before the court , Ms. Sonam is a minor girl as per the High School Certificate, thus she cannot be set at liberty or allow to go with her husband, merely on the account that she was having an affairs with applicant and solemnized marriage with him. As per the High School Certificate, her age on the date of incident was minor, but presently she has attained almost age of majority, though 5 months are still left. The parent have made an application before C.J.M. Hapur seeking custody of their daughter but there is clear finding of C.J.M. concern dated 18.10.2019 (Annexure No. 9) that either they will kill her or sell her for money with somebody else. In this precarious condition, instead of handing her over to her husband where she can reside safely and happily and pursue her future, she was dumped in to Nari Niketan from last one year. Today more than one year has been lapsed in Nari

Niketan, Meerut and she is consistently demanding that she may be permitted to join the company of her husband but just because, the Special Sessions Trial is pending against her husband, her release in the favour of her husband has been declined by passing the impugned order dated 03.03.2020 which is under challenge.

26. Learned counsel for the applicant has cited the judgment in the case of **SONU PASWAN VS. STATE OF U.P. 2013 31 LCD 1107(DB)**, it was held that child marriage is voidable at the instance of minor, otherwise the marriage is not void *ipso-facto*. In this view also Magistrate does not have any right to snatch the custody of Ms. Sonam from her husband and place her into the Protective Home.

27. Thus in the above noted citations if it is considered with the facts and circumstances of present case, it would become evident that Ms. Sonam/victim is few months short in attaining the age of majority, she understands the good and bad for her future. After the conversation with her, the court is of the view that she is an intelligent girl who can express her opinion about her future, her plans with her husband and she states that she would be physically, mentally and psychologically at ease with her husband/the applicant. Her 164 Cr.P.C. statement before the Magistrate needs no elaboration. In the said statement she clearly spelled out that on her own will and accord, she joined the company of her husband/applicant. She vividly narrated the entire story before the learned Magistrate which clearly reflects that there is no iota of any threat, pressure or coercion from the side of applicant. Even today, she has expressed her willingness to go with her husband. The victim could be safely termed as in consensual relationship with the applicant.

28. To segregate the couple, on the ground that she is minor by few months or other technical reasons, is not only unreasonable but tangent to the established norms.

Under these circumstances, her detention in the light of above judgments is too harsh and would lead to grave and unfathomable miscarriage of justice without any justifiable or reason just because that she is "subject" of Sessions Trial, her husband is facing prosecution and on the other hand she is detained in a Protective Home at Meerut under the perverse judicial order of C.J.M. Hapur dated 18.10.2019.

29. Last but not the least, the counsel for the applicant has placed the reliance of **SAHEEN PARVEEN AND ANOTHER VS. STATE OF U.P. AND OTHERS** decided by Lucknow Bench of this Court bearing Misc. Bench No. 3519 of 2015 (decided on 23.7.2015) wherein the Court has observed as under: -

"If a minor, of her own, abandons the guardianship of her parents and joins a boy without any role having been played by the boy in her abandoning the guardianship of her parents and without her having been subjected to any kind of pressure, inducement, etc. and without any offer or promise from the accused, no offence punishable under Section 363 I.P.C. will be made out when the girl is aged more than 17 years and is mature enough to understand what she is doing. Of

curse, if the accused induces or allures the girl and that influences the minor in leaving her guardian's custody and the keeping and going with the accused, then it would be difficult for the Court to accept that minor had voluntarily come to the accused. In case the victim/prosecutrix willingly, of her own accord, accompanies the boy, the law does not cast a duty on the boy of taking her back to her father's house or even of telling her not to accompany him."

30. Thus from the aforesaid judgment it is clear that no offence U/s 363 I.P.C. is made out against the applicant, where the girl though minor by few months who understands the pros and cons of action and her future and thereafter her own volition and accord she joined the company of the applicant as his married wife. The ingredients of Section 361 I.P.C. are not satisfied where though the minor girl of more than 17(+) years age alleged to have been joined the company of accused on her own volition and accord, left her guardian's protection, knowingly (having capacity to know the full import of what she is doing) and voluntarily joined the accused person. Under these circumstances, the accused person cannot be charged for taking her away for keeping her under lawful guardianship. Because, the basic ingredients of Section 361 I.P.C. i.e. "enticement" is completely missing.

31. It is the sacrosanct duty upon the Court to try and guadge the basic "intelligentsia' of the girl and after examination. If the Court finds that the alleged girl was subject matter of allurement, threat or pressure by the accused/applicant, certainly, no mercy would be extended to the boy, but in the instant case, in the statement of victim recorded U/s 164 Cr.P.C. she has narrated the entire story as to how she met with the applicant, since from how many years they were under the intimate relationship, under what circumstances she joined the company of applicant and out of joint decision they went to Delhi, where they spent about 5-6 months as husband and wife, solemnized their marriage and got their marriage registered and now she wants to go with the applicant, as his married wife, then no case for prosecution U/s 363, 376 I.P.C. is made out against the applicant.

32. At this stage, the Court wants to record its deep anguish and concern the growing in the rampant practice of lodging the FIR by father/guardian of the girl by cooking up a story by kidnapping against her husband/boyfriend. This is ostensibly to show their so-called "concern" and "welfare" qua their daughter. This is a misnomer and misconception by initiating a criminal prosecution. By this, the guardian would give unbridgeable dent to the future of their own daughter and ruining her future. Instead of imparting good education and inculcating good moral values so that she may not deviate or divert from correct path. The father/guardian wants to establish their concern by lodging the FIR. It would complex the entire issue. Emotions and sentiments are not mechanical, it is inculcated and nurtured, cannot obtain perforce or exercising the external force or by the threat of prosecution. This would create more damage to the inter-se relationship between the father/guardian and the girl. It would be pertinent to mention herein that first and foremost responsibility and duty of a father is to take care and guide his child towards the basic moral of family and customary, if a father fails to own such a basic responsibility towards his family, he cannot be said to be

a dedicated and loving father and on happening of such a scene, he cannot raise finger against anyone and curse on destiny. In Vedas it is truly said as under:

यथा ह्योकेन चक्रेण न रथस्य गतिर्भवेत्।
एवं परुषकारेण विना दैवं न सिद्धति।।

Meaning

रथ कभी एक पहिये पर नहीं चल सकता है उसी प्रकार पुरुषार्थ विहीन व्यक्ति का भाग्य सिद्ध नहीं होता।

It is further said in sanskrit shlokas that a person might be learned, wealthy and mighty but if he is not following his religion, which is basically to maintain and nurture the moral of his family high, he is the weakest and most poor person in the society.

बलवानप्यशक्तोऽसौ धनवानपि निर्धनः।
श्रुतवानपि मूर्खोऽसौ यो धर्मविमुखो जनः।।

Meaning in Hindi

जो व्यक्ति कर्मठ नहीं है अपना धर्म नहीं निभाता वो शक्तिशाली होते हुए भी निर्बल है, धनी होते हुए भी गरीब है और पढ़े लिखे होते हुये भी अज्ञानी हैं।

33. Even according to the christian moral and values in sacred Timothy 5.8 it has been mentioned:

"....But if anyone does not provide for his relatives, and especially for members of his household, he has denied the faith and is worse than unbeliever.."

34. Retrieving to the current case, after thorough scrutiny of the material available on record and respecting and acknowledging the desire of the girl, Ms. Sonam, this court is of the firm opinion that the charge sheet dated 19.10.2019 U/s 363, 376 I.P.C. and U/s 3/4 POCSO Act, Police Station Bahadurgarh, Hapur, leading S.S.T. No. 107/2019 (State Vs. Satish Kumar) pending in the court of Addl. Sessions Judge (Special Judge), Hapur is an exercise in futility and accordingly quashed in exercise of powers U/s 482 Cr.P.C.

35. The victim, Ms. Sonam is set at liberty forthwith, she may be permitted to join the company of her husband Satish Kumar/applicant. The Superintendent of Police, Hapur would ensure the safety and security of the couple. Though there are no chance that opposite party no.2, Nepal Singh or his allies would commit some mischief against the applicant and his wife Ms. Sonam., however, for the purposes of their safety, Superintendent of Police, Hapur may keep close vigil regarding their welfare. The police personal named above need not to attend the court in connection with the case in future. The office is directed to send a copy of this judgment to Superintendent, Nari Niketan, Meerut and the learned Trial Judge, Hapur to apprise them about the order and suitable follow-up action, pursuant to the judgment.

36. The present 482 Cr.P.C. application stands allowed.

(2021)02ILR A543
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 15.12.2020

BEFORE

THE HON'BLE VIVEK KUMAR SINGH, J.

Application U/S 482 Cr.P.C. No. 12062 of 2020

Cornel Vivek School ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Pavan Kishore, Sri Piyush Kishore Srivastava

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

(A) Criminal Law - Indian Penal Code, 1860 - Sections 323 - punishment for voluntry causing hurt , Sections 504 - Intentional insult with intent to provide breach of the peace , Sections 506 - punishment for criminal intimidation , Sections 354 - Assault or criminal force to woman with intent to outrage her modesty - Judicial process, no doubt, should not be an instrument of oppression or needless harassment - Court should be circumspect and judicious in exercising discretion - should take all relevant facts and circumstances into consideration before issuing process, lest it would be an instrument in the hands of a private complainant to unleash vendetta to harass any person needlessly.(Para - 9)

Application filed for quashing summoning order passed by Additional Chief Judicial Magistrate and the proceedings of Complaint Case under Sections 323, 504, 506, 354 I.P.C. - on 13.9.2018 at about 01:00 P.M. in afternoon the opposite party no.2 had gone to Wheler Club - accused-applicant met him in inebriated condition where scuffle took place between the applicant and complainant - whereafter complainant went to his home - however, the accused chases him upto his home - started abusing and threatened to kill him - wife of the complainant tried to save the applicant - applicant misbehaved with his wife also and tried to outrage the modesty - statements of complainant (Opp Party No.2) recorded under Section 200 Cr.P.C. - supported the version of the complainant - statement of wife of opposite party no.2 recorded under Section 202 Cr.P.C.(Para - 3,4,5)

HELD:- The factual scenario set forth herein above clearly shows that the proceedings were initiated as a counter blast to the proceedings initiated by the applicant, hence the same are liable to be quashed. The proceedings of Complaint Case under Sections 323, 504, 506, 354 I.P.C., pending in the Court of learned Additional Chief Judicial Magistrate, as well as the summoning order passed by learned Additional Chief Judicial Magistrate, are hereby quashed. (Para -11,12)

Application u/s 482 Cr.P.C. allowed. (E-6)

List of Cases cited:-

St.of Har.Vs Bhajan Lal ,1992 Supp (1) SCC 335

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

1. Heard Sri Pavan Kishore and Sri Piyush Kishore Srivastava, learned counsel for the applicant and Sri Abhinav Prasad, learned A.G.A. and perused the material available on record.

2. Office report dated 3.11.2020 shows that notices issued to opposite party no.2 has been served personally, but no one has put in appearance on his behalf even in the revised reading of the list.

3. The present 482 Cr.P.C. application has been filed for quashing the summoning order dated 2.12.2019 passed by learned Additional Chief Judicial Magistrate, Court No.5, Meerut and the proceedings of Complaint Case No.6297 of 2018 (Lt. Colonel Devendra Singh Multani Vs. Vivek Sood), under Sections 323, 504, 506, 354 I.P.C., Police Station Lalkurti, District Meerut, pending in the Court of learned Additional Chief Judicial Magistrate, Court No.5, Meerut.

4. To go over the facts briefly, in the complaint it is stated that on 13.9.2018 at about 01:00 P.M. in afternoon the opposite party no.2 had gone to Wheler Club, where accused-applicant met him in inebriated condition where scuffle took place between the applicant and complainant, whereafter the complainant went to his home, however, the accused chases him upto his home and started abusing and threatened to

kill him. It has further been stated that wife of the complainant tried to save the applicant however, the applicant misbehaved with his wife also and tried to outrage the modesty.

5. The statements of complainant (Opp Party No.2) namely Lt. Colonel Devendra Singh Multani was recorded under Section 200 Cr.P.C. on 17.12.2018 in which he supported the version of the complainant. Further the statement of wife of opposite party no.2 namely Smt. Indra Kaur was recorded under Section 202 Cr.P.C. on 7.2.2019, a copy of which has been collectively filed as annexure nos.2 and 3 to the affidavit accompanying this 482 Cr.P.C. application.

6. It is further averred that an inquiry under Section 202(1) Cr.P.C. was also conduced by the Sub-Inspector, Police Station Sadar Bazar, District Meerut, a copy of which has been annexed as annexure-4 to the affidavit accompanying this 482 Cr.P.C. application. Thereafter, the applicant was summoned by the concerned Court below.

7. Learned counsel appearing on behalf of the applicant forcefully argued that:-

On the basis of complaint, and statements recorded during investigation, no offence, even *prima facie*, is made out against the applicant.

No recovery of the alleged snatched spectacle has been made from the applicant.

The applicant is a retired Colonel of Indian Army and opposite party no.2 is also a retired Lt. Colonel of Indian Army and both were the members of Wheler Club, Meerut Cantt. Meerut. On 13.9.2018 at 12:30 P.M. applicant went to Whelers Club, where he met Col. M.P. Singh and Col Bist, thereafter, opposite party no.2 arrived there and started leveling malicious allegations, on which the applicant raised objections, on which opposite party no.2 started abusing applicant and used derogatory averments against him and threatened him for which applicant made complaint to the Chairman of Whelers Club, Meerut on 14.9.2018 and 15.9.2018, a copy of which has been annexed as annexure-6 to the affidavit accompanying this 482 Cr.P.C. application. On the complaint of the applicant after preliminary investigation membership of Whelers Club of opposite party no.2 was suspended vide order dated 17.9.2020, a copy of which has been annexed as annexure-7 to the affidavit accompanying this bail application. It is further averred that during the course of investigation by Management of Whelers Club, explanation was submitted by opposite party no.2 regarding which response was called from the applicant mentioning the extracts of the letters written by opposite party no.2 by letter dated 3.10.2018, a copy of which has been annexed as annexure-8 to the affidavit accompanying this bail application. It is further averred that after proper enquiry and investigation, Management of Wheler's Club terminated the membership of opposite party no.2 w.e.f. 17.11.2018 and suspended the membership of the applicant for a period of three months, vide notice dated 16.11.2018 issued by Secretary of Wheler's Club, a copy of which has been annexed as annexure-9 to the affidavit accompanying this bail application.

In the facts and circumstances of the case as noted herein above it clearly shows that the present proceedings initiated against the applicant is a counter blast to the proceedings initiated by the applicant, which is bad in law.

The other witness whose statements were recorded during

investigation i.e. the wife of opposite party no.2 under Section 200 Cr.P.C. is a interested witness. Moreover, other witnesses who were present their i.e. the Chowkidar and tenets as has been mentioned in complaint, their statements were not recorded, which creates doubt on the complaint.

The learned counsel for the applicant submitted that ingredients of Section 354 I.P.C. are not discernible from the bare perusal of the complaint.

8. Per contra, learned A.G.A. submitted that from the materials placed before the learned court below, prima facie case is made out against the applicant under section 354 I.P.C. and the Court has rightly taken cognizance. Inherent power of the High Court should be exercised sparingly and only in exceptional circumstances.

9. It is trite law that the Court while exercising its jurisdiction under Section 482 of the Code, the Court would not ordinarily embark upon an enquiry whether the evidence in question is reliable or not or whether on a reasonable appreciation of it accusation would not be sustained. That is an issue which is in the domain of the Trial Court. However, Judicial process, no doubt, should not be an instrument of oppression or needless harassment. Court should be circumspect and judicious in exercising discretion and should take all relevant facts and circumstances into consideration before issuing process, lest it would be an instrument in the hands of a private complainant to unleash vendetta to harass any person needlessly.

10. The scope of exercise of power under Section 482 of the Code and the categories of cases where the High Court may exercise its power under it relating to cognizable offences to prevent abuse of process of any court or otherwise to secure the ends of justice were set out in some detail by Hon'ble Apex Court in ***State of Haryana v. Bhajan Lal [1992 Supp (1) SCC 335]***. A note of caution was, however, added that the power should be exercised sparingly and that too in the rarest of the rare cases. The illustrative categories indicated by the Hon'ble Apex Court are as follows:-

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

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

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

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

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

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

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

11. In view of above, the case in hand squarely falls within the guidelines indicated in category nos. (e) & (g) of Bhajan Lal's Case (Supra). The factual scenario set forth herein above clearly shows that the proceedings were initiated as a counter blast to the proceedings initiated by the applicant, hence the same are liable to be quashed.

12. The application is allowed. The proceedings of Complaint Case No.6297 of 2018 (Lt. Colonel Devendra Singh Multani Vs. Vivek Sood), under Sections 323, 504, 506, 354 I.P.C., Police Station Lalkurti, District Meerut, pending in the Court of learned Additional Chief Judicial Magistrate, Court No.5, Meerut as well as the summoning order dated 2.12.2019 passed by learned Additional Chief Judicial Magistrate, Court No.5, Meerut, are hereby quashed.

(2021)02ILR A547
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 18.12.2020

BEFORE

THE HON'BLE RAVI NATH TILHARI, J.

Application U/S 482 Cr.P.C. No. 14434 of 2020

Rajkumar Kapoor ...Applicant
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Applicant:
Sri Sunil Kumar Tiwari

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

(A) Criminal Law - Code of criminal procedure, 1973 - Section 154 - Information in cognizable cases , Section 156 - Police officer' s power to investigate cognizable case, Section 156(3) - Any magistrate empowered under section 190 may order such an investigation, Section 190 - cognizance of offence by Magistrates, Section 200 - Examination of complainant, Section 202 - Postponement of issue of process, Section 203 - Dismissal of complaint, Section 204 - Issue of process - case where the Magistrate declined for police investigation under Section 156(3) Cr.P.C. and had taken cognizance treating the application as a complaint case - that would not come in the way of the Magistrate in passing the order for police investigation under Section 202(1) Cr.P.C. - Any observation in the order of the Magistrate while taking cognizance of application under Section 156(3) Cr.P.C. as a complaint case - that there is no need of police investigation and directing the complainant to get the statement recorded under Section 200 Cr.P.C. - shall only mean that no police investigation was needed for the purpose of taking cognizance.(Para - 38)

Some property dispute between the applicant and opposite party nos. 2 to 8 - forged sale deed of the property in question - applicant moved an application before the concerned police station as well as the SSP concerned, to lodge the FIR against the opposite party nos.2 to 6 - did nothing - applicant moved an

application under Section 156(3) Cr.P.C. in the court - treated as complaint case - with direction to the applicant for recording of his statement under Section 200 Cr.P.C. - which is under challenge in the present application.**(Para - 3)**

(B) Criminal Law - Code of criminal procedure, 1973 - magistrate recorded - all the facts and circumstances of the case are in the knowledge of the applicant - applicant is well acquainted with the accused persons - all the evidence that can be led is in control of the applicant - Neither any fact is required to be investigated by police nor any recovery is needed - applicant/complainant is competent to adduce evidence - no need of investigation of the case by the police. (Para - 42)

HELD:- No legal infirmity in the order under challenge. The order is speaking one and has been passed on judicious application of mind to the facts of the case and the law applicable thereto.**(Para - 43)**

Application u/s 482 Cr.P.C. dismissed. (E-6)

List of Cases cited:-

1. Lalita Kumari Vs Govt. of U.P. & ors. , 2014 (2) SCC 1

2. Jitendra Kumar Vs St. of U.P. & 2 ors., Criminal Revision No.1768 of 2018

3. Shiv Mangal Singh Vs St. of U.P. & ors., Cril.Rev. No.715 of 2019

4. Sukhwasi Vs St. of U.P. & ors. , 2007 (59) ACC 739 (Allahabad) (D.B.)

5. Gopal Das Sindhi Vs St. of Assam , AIR 1961 SC 986

6. Fakruddin Ahmed Vs St.of Uttaranchal, (2008) 17 SCC 157

7. Suresh Chand Jain & ors. Vs St. of M.P. & anr. , (2001) 2 SCC 628

8. Mohd. Yousuf Vs Smt. Afaq Jahan & anr. , (2006) 1 SCC 627

9. Ram Babu Gupta & ors. Vs St. of U.P. & ors. , 2001(43) ACC 50 (F.B.)

10. Sukhwasi Vs St. of U.P. & ors. , 2007 (9) ADJ 1 (DB)

11. Anil Kumar Vs M.K. Aiyappa & anr. , (2013) 10 SCC 705

12. Lalita Kumari Vs Govt. of U.P. , (2014) 2 SCC 1

13. Jagannath Verma' & ors. Vs St.of U.P. & anr. , 2014 (8) ADJ 439(F.B.)

14. Madhu Bala Vs Suresh Kumar , (1997) 8 SCC 476.

15. Sakiri Vasu Vs St. of U.P. , (2008) 2 SCC 409

16. Samaj Parivartan Samudaya Vs St. of Karn., (2012) 7 SCC 407

17. Anil Kumar Vs M K Aiyappa , (2013) 10 SCC 705

18. Ram Dev Food Products Pvt. Ltd. Vs St.of Guj. , (2015) 6 SCC 439

19. Amrutbhai Shambhubhai Patel Vs Sumanbhai Kantibhai Patel & ors. , (2017) 4 SCC 177

20. Gulab Chand Upadhyaya Vs St. of U.P. & ors. , 2002 Criminal Law Journal 2907(Alld)

21. Sukhwasi Vs St. of U.P. , 2007(6) ALJ 424

22. Suresh Chand Jain Vs St. of M.P. , reported in AIR 2001 SC 571

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

1. Heard Sri Sunil Kumar Tiwari, learned counsel for the applicant and learned AGA appearing for the State and perused the material brought on record.

2. This application/petition under Section 482 Code of Criminal Procedure (Cr.P.C.) has been filed challenging the order dated 28.08.2020, passed by learned Additional Civil Judge (Senior Division), Meeerut, in Case No.43/11 of 2020(Rajkumar Vs. Ashok Kapoor and others), and for a direction to the court below to reconsider the application of the applicant under Section 156(3) Cr.P.C. and register the FIR against the opposite party nos. 2 to 6.

3. Briefly stated facts of the case as per the application/petition are that there is some property dispute between the applicant and opposite party nos. 2 to 8. According to the applicant the opposite party nos. 2 to 6 have made forged sale deed of the property in question. In this respect the applicant has moved an application before the concerned police station as well as the SSP concerned, to lodge the FIR against the opposite party nos.2 to 6, but when they did nothing, then the applicant moved an application under Section 156(3) Cr.P.C. in the court of learned Additional Civil Judge (Senior Division), Meerut, which was treated as complaint case, with direction to the applicant for recording of his statement under Section 200 Cr.P.C., by order dated 28.08.2020, which is under challenge in the present application under Section 482 Cr.P.C.

4. Learned counsel for the applicant has submitted that the order under challenge does not secure the ends of justice, in as much as the learned Magistrate has registered the application under Section 156 (3) Cr.P.C. as a complaint case and has directed the applicant/complainant to record his statement under Section 200 Cr.P.C. His submission is that the learned Magistrate must have directed the police to register the FIR and make investigation and submit report under Section 173(2) Cr.P.C., as the averments in the complaint/application under Section 156(3) Cr.P.C. disclosed commission of a cognizable offence, and if the application disclosed commission of a cognizable offence, the Magistrate must have directed for investigation by police before taking cognizance and must not have taken upon himself to inquire into the matter after taking cognizance by registering the application as a complaint case.

5. Learned counsel for the applicant has submitted that in view of the nature of the averments and the offence disclosed in the application, without any police investigation the matter could not be resolved. He has submitted that the order passed by the Magistrate suffers from non-application of mind to the facts of the case and the law applicable therein.

6. Learned counsel for the applicant has placed reliance on the judgment of the Constitution Bench of the Hon'ble Supreme Court in ***''Lalita Kumari Vs. Government of U.P. and others', 2014(2) SCC 1***, and the judgments of this Court in ***''Jitendra Kumar Vs. State of U.P. and 2 others'***, Criminal Revision No.1768 of 2018, decided on 29.05.2018; **''Shiv Mangal Singh Vs. State of U.P. and others',** Criminal Revision No.715 of 2019, decided on 25.02.2019.

7. Learned AGA has submitted that the Magistrate has the jurisdiction to direct the police to register the F.I.R. and make investigation without taking cognizance. But, he has also the jurisdiction to take cognizance and proceed to inquire the

matter by himself, registering the application as a complaint case. In such circumstance he has to follow the procedure prescribed for complaint case. He has submitted that the Magistrate while proceeding as a complaint case has still the power to direct for police investigation, in view of Section 202(1) Cr.P.C. If the Magistrate in his discretion has adopted the option of registering the application as a complaint case, no illegality has been committed by the Magistrate. Learned A.G.A. has placed reliance on the case of **''Sukhwasi Vs. State of U.P. and others'** 2007 (59) ACC 739 (Allahabad) (D.B.) in support of his contention that it is in the discretion of the Magistrate to direct for police investigation before taking cognizance under Section 156(3) Cr.P.C., or after taking cognizance to proceed with the application as a complaint case.

8. With respect to the case of **''Lalita Kumari (Supra)'**, learned A.G.A. has submitted that the said case is not on the powers of the Magistrate under Section 156(3) Cr.P.C.; but it has been laid down therein that whenever an application submitted to the police discloses commission of a cognizable offence, the FIR must be registered by the police authorities and they can not refuse registration of FIR.

9. In reply the learned counsel for the applicant has submitted that in the course of inquiry by the Magistrate in a complaint case he has the power to call for the police report of the investigation under Section 202(1) Cr.P.C., but that investigation by the police would be different and distinct than the investigation directed under Section 156(3) Cr.P.C.

10. I have considered the submissions as advanced by the learned counsel for the applicant, the learned AGA and perused the material brought on record.

11. The points which arise for consideration are:-

i) Whether in each and every case, where an application under Section 156(3) Cr.P.C. is made to the Magistrate disclosing commission of a cognizable offence, the

Magistrate is legally bound to direct registration of the FIR and investigation by police or the Magistrate has also the power and jurisdiction to pass order for registration of the application as a complaint case.?

ii) On what considerations the Magistrate should take decision for investigation by police or to proceed with as a complaint case?

iii) What is the nature of an investigation by the police in pursuance of the direction of the Magistrate issued under Section 156(3) Cr.P.C. and the investigation by the police in pursuance of the direction of the Magistrate issued under Section 202(1) Cr.P.C. ?

iv) Whether the order passed by the Magistrate in the present case deserves to be maintained or not?

12. All the aforesaid points i), ii) and iii) are interrelated and therefore are being considered simultaneously. It would be appropriate to consider the legal provisions and the law on the subject at this very stage.

13. Crime detection and the adjudication are two inseparable wings of justice delivery system. While crime detection is the exclusive function of the police, judiciary is the final arbiter of the guilt or otherwise of the persons charged

with the offence. To sustain the faith of the people in the efficacy of the whole system investigative agency should work efficiently, impartially and uninfluenced by any outside agency, however, powerful it may be. For an orderly society, importance of the police cannot be denied. But, many times there have been serious comments on their functioning. It is very often complained that when a person having suffered at the hands of others, goes to the police to ventilate his grievance and to bring the offenders to book, his report is not accepted. The Code of Criminal Procedure takes care of this position. While it provides for information to the police and the investigation by the police, it also provides for the judicial surveillance by the Magistrate in cases where the reports are not registered by the police.

14. The duties of the police and their power to investigate are enumerated in Chapter XII of the Code, under caption "information to the police and their powers to investigate." It would be appropriate to reproduce Sections 154 and 156 Cr.P.C. as under:-

*"**Section 154**. Information in cognizable cases.*

(1) Every information relating to the commission of a cognizable offence, if given orally to an officer in charge of a police station, shall be reduced to writing by him or under his direction, and be read Over to the informant; and every such information, whether given in writing or reduced to writing as aforesaid, shall be signed by the person giving it, and the substance thereof shall be entered in a book to be kept by such officer in such form as the State Government may prescribe in this behalf.

(2) A copy of the information as recorded under sub- section (1) shall be given forthwith, free of cost, to the informant.

(3) Any person aggrieved by a refusal on the part of an officer in charge of a police station to record the information referred to in subsection (1) may send the substance of such information, in writing and by post, to the Superintendent of Police concerned who, if satisfied that such information discloses the commission of a cognizable offence, shall either investigate the case himself or direct an investigation to be made by any police officer subordinate to him, in the manner provided by this Code, and such officer shall have all the powers of an officer in charge of the police station in relation to that offence."

*"**Section 156** Police officer' s power to investigate cognizable case.*

(1) Any officer in charge of a police station may, without the order of a Magistrate, investigate any cognizable case which a Court having jurisdiction over the local area within the limits of such station would have power to inquire into or try under the provisions of Chapter XIII.

(2) No proceeding of a police officer in any such case shall at any stage be called in question on the ground that the case was one which such officer was not empowered under this section to investigate.

(3) Any Magistrate empowered under section 190 may order such an investigation as above- mentioned."

15. Cognizance and procedure of complaint case is provided under Chapter XIV and XV, respectively of which Sections 190, 200, 202 and 203 Cr.P.C. are being reproduced as under:-

*"**Section 190 cognizance of offence by Magistrates-(1)** Subject to the provisions of this Chapter, any Magistrate*

of the first class, and any Magistrate of the second class specially empowered in this behalf under Sub-Section (2), may take cognizance of any offence--

(a). upon receiving a complaint of facts which constitute such offence;

(b). upon a police report of such facts;

(c). upon information received from any person other than a police officer, or upon his own knowledge, that such offence has been committed.

(2) The Chief Judicial Magistrate may empower any Magistrate of the second class to take cognizance under Sub-Section (1) of such offences as are within his competence to inquire into or try."

*"**Section 200. Examination of complainant.***

Magistrate taking cognizance of an offence on complaint shall examine upon oath the complainant and the witnesses present, if any, and the substance of such examination shall be reduced to writing and shall be signed by the complainant and the witnesses, and also by the Magistrate;

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

(a) if a public servant acting or purporting to act in the discharge of his official duties or a Court has made the complaint; or

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

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

*"**Section 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.

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

***Section 203:- Dismissal of complaint.** If, after considering the statements on oath (if any) of the complainant and of the witnesses and the result of the inquiry or investigation (if any) under section 202, the Magistrate is of*

opinion that there is no sufficient ground for proceeding, he shall dismiss the complaint, and in every such case he shall briefly record his reasons for so doing,

16. From the bare perusal of the Scheme of Chapter XII of the Code it is clear that when a report either on oral or written is made to the officer-in-charge of the police station which discloses commission of a cognizable offence, it is obligatory of him to register a case and proceed with the investigation. In the event, he refuses to receive the report and shows indifference to perform statutory duties, the person aggrieved by such refusal may approach the Superintendent of Police giving substance of the information in writing and by post. The Superintendent of Police on being satisfied that the information discloses the commission of a cognizable offence shall investigate the case either himself or direct an investigation to be made by any police officer subordinate to him. If F.I.R. is not being lodged or the investigation is not being done the alternative course available to the aggrieved person is to approach the court of law, by making an application giving detail narration of the incident fulfilling the requirements of a complaint under Section 156(3) Cr.P.C. or a regular complaint.

17. Where the Magistrate receives a complaint or an application under Section 156(3) and the facts alleged therein disclose commission of an offence, he "may take cognizance' which in the context in which these words occur in Section 190 of the Code, cannot be equated with "must take cognizance.' The word "may' gives a discretion to the Magistrate in the matter. Two, of the available, courses to the Magistrate under Section 190, are that he may either take cognizance under Section 190 or may forward the complaint to the police under Section 156(3) Cr.P.C., for investigation by the police.

18. If the Magistrate takes cognizance, he is required to embark upon the procedure embodied in Chapter XV "Complaints to Magistrate", by directing the complainant to get the statement recorded under Section 200 Cr.P.C. The Magistrate may make further enquiry as per Section 202(1) Cr.P.C. Where the accused is residing at a place beyond the area of exercise of jurisdiction of the Magistrate concerned, he has to postpone the issue of process and make inquiry or he may direct an investigation to be made by a police officer or by such other person as he may think fit. Thereafter, if the Magistrate is of the opinion that there is no sufficient ground for proceeding, he shall dismiss the complaint under Section 203 Cr.P.C. briefly recording the reasons for such dismissal. On the other hand, if the Magistrate is of the opinion that there is sufficient ground for proceeding, he would issue process by following Section 204 Cr.P.C.

19. If the Magistrate on a reading of the complaint finds that the allegations therein clearly disclose commission of a cognizable offence and forwarding of the application/complaint under Section 156(3) Cr.P.C. to the police for investigation, will be conducive to justice and valuable time of the Magistrate will be saved in inquiring into the matter which is the primary duty of the police to investigate, he will be justified in adopting that course as an alternative to take cognizance of the offence himself. An order under Section 156(3), Cr.P.C. directing the police to investigate is in the nature of a reminder or intimation to the

police to exercise their full powers of investigation. Such an investigation begins with the collection of evidence and ends with a report under Section 173(2) Cr.P.C.

20. In ***Gopal Das Sindhi versus State of Assam AIR 1961 SC 986***, the Hon'ble Supreme Court, referring to earlier judgments held that the provisions of Section 190 cannot be read to mean that once a complaint is filed, a Magistrate is bound to take cognizance if the facts stated in the complaint disclose the commission of any offence. The word "may' in Section 190 cannot mean as "must'. The reason is obvious. A complaint disclosing cognizable offences may well justify a Magistrate in sending the complaint, under Section 156(3) to the police for investigation. There is no reason why the time of the Magistrate should be wasted when primarily the duty to investigate in cases involving cognizable offences is with the police. On the other hand, there may be occasions when the Magistrate may exercise his discretion and take cognizance of a cognizable offence. If he does so then he would have to proceed in the manner [provided by Chapter XV of the Code.

It is relevant to reproduce paragraph no.7 of **Gopal Das Sindhi (supra)** as under:-

*"**7.**In support of the first submission it was urged that the Additional District Magistrate had on August 3, 1957, transferred under Section 192 of the Cr PC the complaint to Mr Thomas for disposal. In these circumstances, it must be assumed that the Additional District Magistrate had taken cognizance of the offences mentioned in the complaint and Mr Thomas had no authority to refer the case to the police for investigation. He was bound to have examined the complainant on oath and then proceeded in accordance with the provisions of the Code of Criminal Proceedure which applied to disposal of complaints. Mr Thomas had no authority in law to send the complaint under Section 156(3) to the police for investigation. It was urged that Section 190 of the Cr PC sets out how cognizance may be taken of an offence. Section 190(1)(a) authorizes a Presidency Magistrate, District Magistrate or a Sub-Divisional Magistrate and any other Magistrate specially empowered in this behalf, to take cognizance of an offence upon receiving a complaint stating facts which constitute such offence. Once a complaint is filed before a Magistrate empowered to take cognizance of an offence he was bound to take cognizance and the word ''may' in this sub-section must be read as ''shall'. Thereafter the proceedings with reference to the complaint must be under Chapter XVI and the procedure stated in the various sections under that Chapter must be followed. Consequently, it was not open to Mr Thomas to direct the police to investigate the case under Section 156(3) of the Code."*

It was further held that before it can be said that any magistrate has taken cognizance of any offence under Section 190(1)(a) Criminal Procedure Code, he must not only have applied his mind to the contents of the petition but he must have done so for the purpose of proceeding in a particular way as per the provisions of Cr.P.C.

21. In ***Fakruddin Ahmed versus State of Uttaranchal (2008) 17 SCC 157*** it has been held that on receipt of a complaint the Magistrate has more than one course open to him to determine the procedure and

the manner to be adopted for taking cognizance of the offence. It would be relevant to reproduce paragraph nos. 9 to 12 as under:-

*"**9.**Before examining the rival contentions, we may briefly refer to some of the relevant provisions in the Code. Chapter XIV of the Code, containing Sections 190 to 199 deals with the statutory conditions requisite for initiation of criminal proceedings and as to the powers of cognizance of a Magistrate. Sub-section (1) of Section 190 of the Code empowers a Magistrate to take cognizance of an offence in the manner laid therein. It provides that a Magistrate may take cognizance of an offence either (a) upon receiving a complaint of facts which constitute such offence; or (b) upon a police report of such facts; or (c) upon information received from any person other than a police officer, or upon his own knowledge that such offence has been committed.*

***10.**Chapter XV containing Sections 200 to 203 deals with "Complaints to Magistrates" and lays down the procedure which is required to be followed by the Magistrate taking cognizance of an offence on complaint. Similarly, Chapter XVI deals with "Commencement of Proceedings before Magistrates". Since admittedly, in the present case, the Magistrate has taken cognizance of the complaint in terms of Section 190 of the Code, we shall confine our discussion only to the said provision. We may, however, note that on receipt of a complaint, the Magistrate has more than one course open to him to determine the procedure and the manner to be adopted for taking cognizance of the offence.*

***11.**One of the courses open to the Magistrate is that instead of exercising his discretion and taking cognizance of a cognizable offence and following the procedure laid down under Section 200 or Section 202 of the Code, he may order an investigation to be made by the police under Section 156(3) of the Code, which the learned Magistrate did in the instant case. When such an order is made, the police is obliged to investigate the case and submit a report under Section 173(2) of the Code. On receiving the police report, if the Magistrate is satisfied that on the facts discovered or unearthed by the police there is sufficient material for him to take cognizance of the offence, he may take cognizance of the offence under Section 190(1)(b) of the Code and issue process straightaway to the accused. However, Section 190(1)(b) of the Code does not lay down that a Magistrate can take cognizance of an offence only if the investigating officer gives an opinion that the investigation makes out a case against the accused. Undoubtedly, the Magistrate can ignore the conclusion(s) arrived at by the investigating officer.*

***12.**Thus, it is trite that the Magistrate is not bound by the opinion of the investigating officer and he is competent to exercise his discretion in this behalf, irrespective of the view expressed by the police in their report and decide whether an offence has been made out or not. This is because the purpose of the police report under Section 173(2) of the Code, which will contain the facts discovered or unearthed by the police as well as the conclusion drawn by the police therefrom is primarily to enable the Magistrate to satisfy himself whether on the basis of the report and the material referred therein, a case for cognizance is made out or not."*

22. In ***Suresh Chand Jain & others versus State of M.P. & another, (2001) 2***

SCC 628 the Hon'ble Supreme Court held that any Magistrate empowered under Section 190 may order an investigation by police, but a Magistrate need not order any such investigation, if he proposes to take cognizance of the offence. Once he takes cognizance of the offence he has to follow the procedure envisaged in Chapter XV of the Code. It was further held that Chapter XII of the Code contains provisions relating to information to the police and their powers to investigate, whereas Chapter XV, which contains Section 202 deals with provisions relating to the steps which a Magistrate has to adopt while and after taking cognizance of any offence on a complaint. The Investigation referred to in Section 202 is the same investigation and the various steps to be adopted for it have been elaborated in Chapter XII of the Code. Such investigation would start with making the entry in a book to be kept by the officer-in-charge of a police station, of the substance of the information relating to the commission of a cognizable offence. The investigation started thereafter can end up only with the report filed by the police as indicated in Section 173 of the Code. The investigation contemplated in that Chapter can be commenced by the police even without the order of a Magistrate. But, that does not mean that when a Magistrate orders an investigation under Section 156(3) it would be a different kind of investigation, such investigation must also end up only with the report contemplated in Section 173 of the code. But when a Magistrate orders investigation under Chapter XII he does so before he takes cognizance of the offence. A Magistrate need not order any such investigation if he proposes to take cognizance of the offence. The direction for investigation under Section 202 (1) is after taking cognizance of the offence and is only for helping the Magistrate to decide whether or not there is sufficient ground for him to proceed further. It is relevant to reproduce paragraph nos. 8 and 10 of **Suresh Chand Jain (supra)** as under:-

*"**8.**The investigation referred to therein is the same investigation, the various steps to be adopted for it have been elaborated in Chapter XII of the Code. Such investigation would start with making the entry in a book to be kept by the officer in charge of a police station, of the substance of the information relating to the commission of a cognizable offence. The investigation started thereafter can end up only with the report filed by the police as indicated in Section 173 of the Code. The investigation contemplated in that chapter can be commenced by the police even without the order of a Magistrate. But that does not mean that when a Magistrate orders an investigation under Section 156(3) it would be a different kind of investigation. Such investigation must also end up only with the report contemplated in Section 173 of the Code. But the significant point to be noticed is, when a Magistrate orders investigation under Chapter XII he does so before he takes cognizance of the offence.*

***10.**The position is thus clear. Any Judicial Magistrate, before taking cognizance of the offence, can order investigation under Section 156(3) of the Code. If he does so, he is not to examine the complainant on oath because he was not taking cognizance of any offence therein. For the purpose of enabling the police to start investigation it is open to the Magistrate to direct the police to register an FIR. There is nothing illegal in doing so. After all registration of an FIR involves only the process of entering the substance of the information relating to the*

commission of the cognizable offence in a book kept by the officer in charge of the police station as indicated in Section 154 of the Code. Even if a Magistrate does not say in so many words while directing investigation under Section 156(3) of the Code that an FIR should be registered, it is the duty of the officer in charge of the police station to register the FIR regarding the cognizable offence disclosed by the complaint because that police officer could take further steps contemplated in Chapter XII of the Code only thereafter."

23. In ***Mohd. Yousuf Vs. Smt. Afaq Jahan and another, (2006) 1 SCC 627*** the Hon'ble Supreme Court reiterated that the clear position is that any Judicial Magistrate before taking cognizance of the offence can order investigation under Section 156(3) of the Code. If he does so, he is not to examine the complainant on oath because he is not taking cognizance of any offence therein. For the purpose of enabling the police to start investigation, it is open to the Magistrate to direct the police to register an FIR. There is nothing illegal in doing so. A Magistrate need not order any such investigation if he proposes to take cognizance of the offence. Once he takes cognizance of the offence he has to follow the procedure envisaged in Chapter XV of the Code. It would be appropriate to reproduce paragraph nos. 6 to 11 of **"Mohd. Yousuf (supra)"** as under:-

"6. Section 156 falling within Chapter XII, deals with powers of police officers to investigate cognizable offences. Investigation envisaged in Section 202 contained in Chapter XV is different from the investigation contemplated under Section 156 of the Code.

7.Chapter XII of the Code contains provisions relating to "information to the police and their powers to investigate", whereas Chapter XV, which contains Section 202, deals with provisions relating to the steps which a Magistrate has to adopt while and after taking cognizance of any offence on a complaint. Provisions of the above two chapters deal with two different facets altogether, though there could be a common factor i.e. complaint filed by a person. Section 156, falling within Chapter XII deals with powers of the police officers to investigate cognizable offences. True, Section 202, which falls under Chapter XV, also refers to the power of a Magistrate to "direct an investigation by a police officer". But the investigation envisaged in Section 202 is different from the investigation contemplated in Section 156 of the Code.

8. The various steps to be adopted for investigation under Section 156 of the Code have been elaborated in Chapter XII of the Code. Such investigation would start with making the entry in a book to be kept by the officer in charge of a police station, of the substance of the information relating to the commission of a cognizable offence. The investigation started thereafter can end up only with the report filed by the police as indicated in Section 173 of the Code. The investigation contemplated in that chapter can be commenced by the police even without the order of a Magistrate. But that does not mean that when a Magistrate orders an investigation under Section 156(3) it would be a different kind of investigation. Such investigation must also end up only with the report contemplated in Section 173 of the Code. But the significant point to be noticed is, when a Magistrate orders investigation under Chapter XII he does so before he takes cognizance of the offence.

9.But a Magistrate need not order any such investigation if he proposes to

take cognizance of the offence. Once he takes cognizance of the offence he has to follow the procedure envisaged in Chapter XV of the Code. A reading of Section 202(1) of the Code makes the position clear that the investigation referred to therein is of a limited nature. The Magistrate can direct such an investigation to be made either by a police officer or by any other person. Such investigation is only for helping the Magistrate to decide whether or not there is sufficient ground for him to proceed further. This can be discerned from the culminating words in Section 202(1) i.e. "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".

10.This is because he has already taken cognizance of the offence disclosed in the complaint, and the domain of the case would thereafter vest with him.

11.The clear position therefore is that any Judicial Magistrate, before taking cognizance of the offence, can order investigation under Section 156(3) of the Code. If he does so, he is not to examine the complainant on oath because he was not taking cognizance of any offence therein. For the purpose of enabling the police to start investigation it is open to the Magistrate to direct the police to register an FIR. There is nothing illegal in doing so. After all registration of an FIR involves only the process of entering the substance of the information relating to the commission of the cognizable offence in a book kept by the officer in charge of the police station as indicated in Section 154 of the Code. Even if a Magistrate does not say in so many words while directing investigation under Section 156(3) of the Code that an FIR should be registered, it is the duty of the officer in charge of the police station to register the FIR regarding the cognizable offence disclosed by the complaint because that police officer could take further steps contemplated in Chapter XII of the Code only thereafter."

24. The law laid down in Mohd Yousuf (supra) was reaffirmed in Hemant Yashwant Dhage versus State of Maharashtra (2016) 6 SCC 273. It was held by Hon'ble the Apex Court that registration of an F.I.R. involves only the process of recording the substance of information relating to commission of any cognizable offence in a book kept by the officer in charge of the police station concerned. It is open to the Magistrate to direct the police to register an FIR and even where a Magistrate does not do so in explicit words but directs for investigation under Section 156(3) Cr.P.C. the police should register an FIR because Section 156 falls within Chapter XII of the Code which deals with powers of the police officers to investigate cognizable offences, the police office concerned would always be in a better position to take further steps contemplated in Chapter XII once FIR is registered in respect of the cognizable offence concerned.

25. In **''Ram Babu Gupta and others Vs. State of U.P. and others', 2001(43) ACC 50 (F.B.)** the full Bench of this Court had formulated two questions of which first was as follows :-

"(1) Should the Magistrate while exercising powers under Section 156(3) Cr.P.C. be left to write criptic orders "register and investigate," or "register and do the needful" or "he has to investigate," or the like? or the Magistrate's order should prima-facie indicate application of mind.?"

The Full Bench answered the first question by holding that on receiving a complaint, the Magistrate has to apply his mind to the allegations in the complaint upon which he may not at once proceed to take cognizance and may order it to go to the police station for being registered and investigated. But, if the Magistrate takes cognizance, he proceeds to follow the procedure provided in Chapter XV of Cr.P.C. It was further held that the order of the Magistrate must indicate application of mind. Paragraph 17 of Ram Babu Gupta (supra) is being reproduced as under:-

"17.In view of the aforesaid discussion on the legal provisions and decisions of the Supreme Court as on date, it is hereby held that on receiving a complaint, the Magistrate has to apply his mind to the allegations in the complaint upon which he may not at once proceed to take cognizance and may order it to go to the police station for being registered and investigated. The Magistrate's order must indicate application of mind. If the Magistrate takes cognizance, he proceeds to follow the procedure provided in Chapter XV of Cr.P.C. The first question stands answered thus."

26. In **"Sukhwasi Vs. State of U.P. & others" 2007 (9) ADJ 1 (DB)**, the following question was referred for consideration to the Division Bench:-'

"Whether the Magistrate is bound to pass an order on each and every application under Section 156 (3) Cr.P.C. containing allegations of commission of a cognizable offence for registration of the F.I.R. and its investigation by the police, even if those allegations, prima-facie, do not appear to be genuine and do not appeal to reason, or he can exercise judicial discretion in the matter and can pass order for treating it as 'complaint' or to reject it in suitable cases?"

The Division Bench answered the reference by holding that it cannot be said that the Magistrate is bound to order registration of a First Information Report in all cases, where a cognizable offence is disclosed. It is not incumbent upon a Magistrate to allow an application under Section 156(3) Cr.P.C. and there is no such legal mandate. The Magistrate may or may not allow the application in his discretion. He has a discretion to treat an application under Section 156(3) Cr.P.C. as a complaint. Paragraph nos. 9, 11 and 23 of **"Sukhwasi (Supra)"** are being reproduced as under:-

"9. The use of the word 'Shall' in Section 154(3) Cr.P.C. and the use of word 'May' in Section 156(3) Cr.P.C. should make the intention of the legislation clear. If the legislature intended to close options for the Magistrate, they could have used the word 'Shall' as has been done in Section 154(3) Cr.P.C. Instead, use of the word 'May' is, therefore, very significant, and gives a very clear indication, that the Magistrate has the discretion in the matter, and can, in appropriate cases, refuse to order registration."

"11. Let us take an example to make things clear. If somebody wants to file a First Information Report, that the District Judge of the concerned District came to his house at 1.20 O'clock in the day, and fired upon him, with the country made pistol and he ducked and escaped being hurt, and the District Judge is, therefore, liable for an offence under Section 307 Indian Penal Code. The Magistrate knows that the District Judge was in his court room, at that time, and the

concerned staff also knows that. Is the Magistrate still bound to order registration of a First Information Report because the application discloses a cognizable offence? It is obvious that the answer has to be in negative and it cannot, therefore, be said that the Magistrate is bound to order registration of a First Information Report in all cases, where a cognizable offence is disclosed."

"23. The reference is, therefore, answered in the manner that it is not incumbent upon a Magistrate to allow an application under Section 156(3) Cr.P.C. and there is no such legal mandate. He may or may not allow the application in his discretion. The second leg of the reference is also answered in the manner that the Magistrate has a discretion to treat an application under Section 156 (3) Cr.P.C. as a complaint."

27. In **"Anil Kumar versus M.K. Aiyappa and another (2013) 10 SCC 705** the Hon'ble Supreme Court also examined if the Magistrate, while exercising powers under Section 156 (3) Cr.P.C. could act in a mechanical or casual manner and go on with the complaint after getting the reports and held that where jurisdiction is exercised on a complaint filed in terms of Section 156(3) or Section 200 CrPC, the Magistrate is required to apply his mind and the application of mind by the Magistrate should be reflected in the order. The Mere statement that he had gone through the complaint, documents and heard the complainant, as such, as reflected in the order, will not be sufficient. After going through the complaint, documents and hearing the complainant, what weighed with the Magistrate to order investigation under Section 156(3) CrPC, should be reflected in the order, though a detailed expression of his views is neither required nor warranted.

28. In **"Lalita Kumari versus Govt. of U.P., (2014) 2 SCC 1**, a Constitution Bench of Hon'ble the Supreme Court has given the following conclusion/directions, which as contained in paragraph no.120 are being reproduced as under:-

"120.) In view of the aforesaid discussion, we hold:

120.1) The Registration of FIR is mandatory under Section 154 of the Code, if the information discloses commission of a cognizable offence and no preliminary inquiry is permissible in such a situation.

120.2) If the information received does not disclose a cognizable offence but indicates the necessity for an inquiry, a preliminary inquiry may be conducted only to ascertain whether cognizable offence is disclosed or not.

120.3) If the inquiry discloses the commission of a cognizable offence, the FIR must be registered. In cases where preliminary inquiry ends in closing the complaint, a copy of the entry of such closure must be supplied to the first informant forthwith and not later than one week. It must disclose reasons in brief for closing the complaint and not proceeding further.

120.4) The police officer cannot avoid his duty of registering offence if cognizable offence is disclosed. Action must be taken against erring officers who do not register the FIR if information received by him discloses a cognizable offence.

120.5) The scope of preliminary inquiry is not to verify the veracity or otherwise of the information received but

only to ascertain whether the information reveals any cognizable offence.

120.6) As to what type and in which cases preliminary inquiry is to be conducted will depend on the facts and circumstances of each case. The category of cases in which preliminary inquiry may be made are as under:

a) Matrimonial disputes/ family disputes

b) Commercial offences

c) Medical negligence cases

d) Corruption cases

e) Cases where there is abnormal delay/laches in initiating criminal prosecution, for example, over 3 months delay in reporting the matter without satisfactorily explaining the reasons for delay.

The aforesaid are only illustrations and not exhaustive of all conditions which may warrant preliminary inquiry.

120.7) While ensuring and protecting the rights of the accused and the complainant, a preliminary inquiry should be made time bound and in any case it should not exceed 7 days. The fact of such delay and the causes of it must be reflected in the General Diary entry.

120.8) Since the General Diary/Station Diary/Daily Diary is the record of all information received in a police station, we direct that all information relating to cognizable offences, whether resulting in registration of FIR or leading to an inquiry, must be mandatorily and meticulously reflected in the said Diary and the decision to conduct a preliminary inquiry must also be reflected, as mentioned above."

29. In *"**Jagannath Verma' & others versus State of U.P. and another**, 2014 (8) ADJ 439(F.B.)* the Full Bench of this Court, on consideration of various judgments of the Hon'ble Supreme Court including the case of **"Lalita Kumari (Supra)** held that Section 190 empowers a Magistrate to take cognizance of any offence (i) upon receiving a complaint of facts which constitutes such offence; (ii) upon a police report of such facts; and (iii) upon information received from any person other than a police officer, or upon his own knowledge that such an offence has been committed under Section 190 when a written complaint disclosing a cognizable offence is made before a Magistrate, he may take cognizance and proceed in accordance with the provisions of Chapter XV. But Magistrate is not bound once a complaint is filed, to take cognizance if the facts stated in the complaint disclose the commission of any offences. Though a complaint may disclose a cognizable offence, a Magistrate may well be justified in sending the complaint under Section 156(3) to the police for investigation before taking cognizance.

It would be appropriate to refer as follows:-

*"15. When a written complaint disclosing a cognizable offence is made before a magistrate, he may take cognizance under Section 190 (1) (a) and proceed in accordance with the provisions of Chapter XV. The other option available to the magistrate is to transmit the complaint to the police station concerned under Section 156 (3), before taking cognizance, for investigation. Once a direction is issued by the magistrate under Section 156 (3), the police is required to investigate under sub-section (1) of that Section and to submit a report under Section 173 (2) on the complaint after investigation, upon which the magistrate may take cognizance under Section 190 (1)(b). (**Madhu Bala Vs Suresh Kumar**),(1997) 8 SCC 476.*

*16. In **Sakiri Vasu Vs State of Uttar Pradesh,** (2008) 2 SCC 409 , the Supreme Court followed the earlier decision in Mohd Yousuf (supra) and held that the power of the magistrate to order a further investigation under Section 156 (3) is an independent power and is wide enough to include all such powers in a magistrate which are necessary for ensuring a proper investigation and would include the power of registration of an FIR and of ordering a proper investigation if the magistrate is satisfied that the proper investigation has not been done or is not being done by the police. Section 156 (3) was construed to include all such incidental powers as are necessary for ensuring a proper investigation. The same principle has been adopted in the decision of the Supreme Court in Mona Panwar Vs High Court of Judicature at Allahabad (2011) 3 SCC 496.*

"18. When the complaint was presented before the appellant, the appellant had mainly two options available to her. One was to pass an order as contemplated by Section 156(3) of the Code and second one was to direct examination of the complainant upon oath and the witnesses present, if any, as mentioned in Section 200 and proceed further with the matter as provided by Section 202 of the Code. An order made under sub-section (3) of Section 156 of the Code is in the nature of a peremptory reminder or intimation to the police to exercise its plenary power of investigation under Section 156(1). Such an investigation embraces the entire continuous process which begins with the collection of evidence under Section 156 and ends with the final report either under Section 169 or submission of charge sheet under Section 173 of the Code. A Magistrate can under Section 190 of the Code before taking cognizance ask for investigation by the police under Section 156(3) of the Code. The Magistrate can also issue warrant for production, before taking cognizance. If after cognizance has been taken and the Magistrate wants any investigation, it will be under Section 202 of the Code.

19. The phrase "taking cognizance of" means cognizance of an offence and not of the offender. Taking cognizance does not involve any formal action or indeed action of any kind but occurs as soon as a Magistrate applies his mind to the suspected commission of an offence. Cognizance, therefore, takes place at a point when a Magistrate first takes judicial notice of an offence. This is the position where the Magistrate takes cognizance of an offence on a complaint or on a police report or upon information of a person other than a police officer. Before the Magistrate can be said to have taken cognizance of an offence under Section 190(1)(b) of the Code, he must have not only applied his mind to the contents of the complaint presented before him, but must have done so for the purpose of proceeding under Section 200 and the provisions following that Section. However, when the Magistrate had applied his mind only for ordering an investigation under Section 156(3) of the Code or issued a warrant for the purposes of investigation, he cannot be said to have taken cognizance of an offence."

*The same principle has been reiterated in **Samaj Parivartan Samudaya Vs State of Karnataka, (2012) 7 SCC 407 at para 26, p 420**.*

"17. There is a fundamental distinction between the provisions of Chapter XII and of Chapter XV of the Code. This came up for consideration before the Supreme Court in Devarapalli Lakshminarayana Reddy Vs V Narayana

Reddy (supra). The Supreme Court noted that, whereas Section 156 (3) occurs in Chapter XII dealing with information to the police and the powers of the police to investigate, Section 202 forms part of Chapter XV which relates to complaints to magistrates. The Supreme Court observed that the power to order a police investigation under Section 156 (3) is distinct from the power to direct an investigation under Section 202 (1). Section 156 (3) is at the pre-cognizance stage, Section 202 is at the post-cognizance stage. Moreover, once a magistrate has taken cognizance and has adopted the procedure under Chapter XV, it is not open to him then to go back to the pre-cognizance stage and avail of Section 156 (3). Investigation by the police under Section 156 (3) is in exercise of the plenary power to investigate offences which begins with collection of evidence and ends with a report under Section 173 (2). The investigation, on the other hand, which Section 202 contemplates, is of a different nature and is for the purpose of enabling the magistrate to decide whether or not there is sufficient ground for proceeding. The Supreme Court observed as follows:

"Section 156(3) occurs in Chapter XII, under the caption: "Information to the Police and their powers to investigate"; while Section 202 is in Chapter XV which bears the heading "Of complaints to Magistrates". The power to order police investigation under Section 156(3) is different from the power to direct investigation conferred by Section 202(1). The two operate in distinct spheres at different stages. The first is exercisable at the pre cognizance stage, the second at the post-cognizance stage when the magistrate is in seisin of the case. That is to say in the case of a complaint regarding the commission of a cognizable offence, the power under Section 156(3) can be invoked by the Magistrate before he takes cognizance of the offence under Section 190(1)(a). But if he once takes such cognizance and embarks upon the procedure embodied in Chapter XV, he is not competent to switch back to the pre-cognizance stage and avail of Section 156(3). It may be noted further that an order made under sub-section (3) of Section 156, is in the nature of a peremptory reminder or intimation to the police to exercise their plenary powers of investigation under Section 156(1). Such an investigation embraces the entire continuous process which begins with the collection of evidence under Section 156 and ends with a report or charge-sheet under Section 173. On the other hand, Section 202 comes in at a stage when some evidence has been collected by the magistrate in proceedings under Chapter XV, but the same is deemed insufficient to take a decision as to the next step in the prescribed procedure. In such a situation, the magistrate is empowered under Section 202 to direct, within the limits circumscribed by that section, an investigation "for the purpose of deciding whether or not there is sufficient ground for proceeding ". Thus the object of an investigation under Section 202 is not to initiate a fresh case on police report but to assist the magistrate in completing proceedings already instituted upon a complaint before him." (emphasis supplied).

18. Noting the distinction between an investigation under Chapter XII and proceedings under Chapter XV, the Supreme Court in Samaj Parivartan Samudaya (supra), held as follows:

"... In the former case, it is upon the police report that the entire investigation is conducted by the

investigating agency and the onus to establish commission of the alleged offence beyond reasonable doubt is entirely on the prosecution. In a complaint case, the complainant is burdened with the onus of establishing the offence and he has to lead evidence before the court to establish the guilt of the accused. The rule of establishing the charges beyond reasonable doubt is applicable to a complaint case as well." (emphasis supplied)

19. The same principle was enunciated in Madhao Vs State of Maharashtra (2013) 5 SCC 615:

"When a Magistrate receives a complaint he is not bound to take cognizance if the facts alleged in the complaint disclose the commission of an offence. The Magistrate has discretion in the matter. If on a reading of the complaint, he finds that the allegations therein disclose a cognizable offence and the forwarding of the complaint to the police for investigation under Section 156(3) will be conducive to justice and save the valuable time of the magistrate from being wasted in enquiring into a matter which was primarily the duty of the police to investigate, he will be justified in adopting that course as an alternative to taking cognizance of the offence itself. As said earlier, in the case of a complaint regarding the commission of cognizable offence, the power under Section 156(3) can be invoked by the Magistrate before he takes cognizance of the offence under Section 190(1)(a). However, if he once takes such cognizance and embarks upon the procedure embodied in Chapter XV, he is not competent to revert back to the pre-cognizance stage and avail of Section 156(3)."

20. In ***Anil Kumar Vs M K Aiyappa,*** *(2013) 10 SCC 705 this distinction is brought out in the following observations of the Supreme Court:*

"...When a Special Judge refers a complaint for investigation under Section 156(3) CrPC, obviously, he has not taken cognizance of the offence and, therefore, it is a pre-cognizance stage and cannot be equated with post-cognizance stage. When a Special Judge takes cognizance of the offence on a complaint presented under Section 200 CrPC and the next step to be taken is to follow up under Section 202 CrPC. Consequently, a Special Judge referring the case for investigation under Section 156(3) is at pre-cognizance stage."

30. In **Jagannath Verma (supra) the Full Bench further held as follows:-**

"21. Now it is in this background that it would be necessary for the Court to consider the import of an order passed by the magistrate declining to issue a direction under Section 156 (3) ordering an investigation as specified in sub-section (1). When a written complaint is made before a magistrate disclosing a cognizable offence, the magistrate may send the complaint to the concerned police station under Section 156 (3) for investigation. If this course of action is adopted, the police is required to investigate into the complaint. On the completion of the investigation, a report is submitted under Section 173 (2), upon which a magistrate may take cognizance under Section 190 (1) (b). Alternately, when a written complaint disclosing a cognizable offence is made before a magistrate, he may take cognizance under Section 190 (1) (a), in which event he has to proceed in accordance with the provisions of Chapter XV. The exercise of the power under Section 156 (3) is before the magistrate takes cognizance. Once the magistrate has

taken cognizance under Section 190, it is not open to him to switch back to Section 156 (3) for the purposes of ordering an investigation. Section 200 requires that the magistrate taking cognizance of an offence on a complaint shall examine upon oath the complainant and the witnesses, if any. Section 202 enables the magistrate to postpone the issuance of process against the accused on receipt of a complaint of an offence of which he is authorised to take cognizance, in which event he may follow one of the following courses:

(i) The magistrate may, either enquire into the case himself; or

(ii) The magistrate may direct an investigation to be made by a police officer or by such other person as he thinks fit, for the purposes of deciding whether or not there is sufficient ground for proceeding. However, the two provisos to Section 202 stipulate that no direction for investigation shall be made (i) where it appears that the offence complained of is triable exclusively by the Court of Session; or (ii) in a complaint which has not been made by a court, unless the complainant and the witnesses present, if any, have been examined on oath under Section 200. The proviso to sub-section (2) stipulates 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 the witnesses and examine them on oath. Under Section 203, upon considering the statements on oath, if any, of the complainant and of the witnesses and the result of the enquiry or investigation, if any, under Section 202, if the magistrate is of the opinion that there is no sufficient ground for proceeding, he shall dismiss the complaint recording brief reasons.

22. These provisions amply demonstrate that Chapter XII on the one hand and Chapter XV on the other, operate in two distinct spheres. The duty to investigate into offences is of the State and it is from that perspective that the provisions of Chapter XII including Sections 154 and 156 have been engrafted into legislation. The rejection of an application under Section 156 (3) closes the avenue of an investigation by the police under Chapter XII. For the informant or complainant who provides information in regard to the commission of a cognizable offence, an investigation by the police under Chapter XII is a valuable safeguard which sets in motion the criminal law and ensures that the offender is traced and is made answerable to the crime under the penal law of the land. Closing this avenue of ordering an investigation by the police under Section 156 (1) cannot be treated as a matter of no moment or a matter akin to a procedural direction. Depriving the person who provides information of the safeguard of an investigation under Chapter XII is a serious consequence particularly when we evaluate this in the context of the alternative remedy which is available under Chapter XV of the Code.

23. In Chapter XV of the Code, the complainant is subject to the burden of producing evidence before the court. This distinction between the procedure which is enunciated in Chapter XII and the provisions of Chapter XV has been noted in several decisions of the Supreme Court from Devarapalli Lakshminarayana Reddy (supra) to the more recent decision in Samaj Parivartan Samudaya (supra). A magistrate who takes cognizance under Section 200 has to examine the complainant and his witnesses on oath. Though, under Section 202 the magistrate may postpone the issuance of process and direct an investigation to be made by a police officer, it is well settled that this

investigation under Section 202 is for the purpose of deciding whether or not there is sufficient ground for proceeding. The object of an investigation under Section 202 is not to initiate a fresh case on a police report but to assist the magistrate in completing proceedings already instituted on a complaint before him."

31. In **Ram Dev Food Products Pvt. Ltd. Versus State of Gujarat, (2015) 6 SCC 439**, the Hon'ble Supreme Court framed the first question as to "(i) Whether discretion of the Magistrate to call for a report under Section 202 instead of directing investigation 156(3) is controlled by any defined parameters?," and answered it by holding that the direction under Section 156(3) is to be issued, only after application of mind by the Magistrate. When the Magistrate does not take cognizance and does not find it necessary to postpone instance of process and finds a case made out to proceed forthwith, direction under the said provision is issued. In other words, where on account of credibility of information available, or weighing the interest of justice it is considered appropriate to straightaway direct investigation, such a direction is issued. It is further held that the cases where Magistrate takes cognizance and postpones issuance of process are cases where the Magistrate has yet to determine "existence of sufficient ground to proceed". Category of cases falling under Para 120.6 in **Lalita Kumari (supra)** may fall under Section 202. Subject to these broad guidelines available from the scheme of the Code, exercise of discretion by the Magistrate is guided by interest of justice from case to case.

32. It would be appropriate to reproduce relevant paragraph nos. 19 to 22 of **''Ramdev Food Products Private Limited'** (Supra) as under:-

"19. Thus, this Court has laid down that while prompt registration of FIR is mandatory, checks and balances on power of police are equally important. Power of arrest or of investigation is not mechanical. It requires application of mind in the manner provided. Existence of power and its exercise are different. Delicate balance had to be maintained between the interest of society and liberty of an individual. Commercial offences have been put in the category of cases where FIR may not be warranted without enquiry.

20. It has been held, for the same reasons, that direction by the Magistrate for investigation under Section 156(3) cannot be given mechanically. In Anil Kumar vs. M.K. Aiyappa[5], it was observed :

"11. The scope of Section 156(3) CrPC came up for consideration before this Court in several cases. This Court in Maksud Saiyed case [(2008) 5 SCC 668] examined the requirement of the application of mind by the Magistrate before exercising jurisdiction under Section 156(3) and held that where jurisdiction is exercised on a complaint filed in terms of Section 156(3) or Section 200 CrPC, the Magistrate is required to apply his mind, in such a case, the Special Judge/Magistrate cannot refer the matter under Section 156(3) against a public servant without a valid sanction order. The application of mind by the Magistrate should be reflected in the order. The mere statement that he has gone through the complaint, documents and heard the complainant, as such, as reflected in the order, will not be sufficient. After going through the complaint, documents and hearing the complainant, what weighed with the Magistrate to order

investigation under Section 156(3) CrPC, should be reflected in the order, though a detailed expression of his views is neither required nor warranted. We have already extracted the order passed by the learned Special Judge which, in our view, has stated no reasons for ordering investigation."

The above observations apply to category of cases mentioned in Para 120.6 in Lalita Kumari (supra).

21. On the other hand, power under Section 202 is of different nature. Report sought under the said provision has limited purpose of deciding "whether or not there is sufficient ground for proceeding". If this be the object, the procedure under Section 157 or Section 173 is not intended to be followed. Section 157 requires sending of report by the police that the police officer suspected commission of offence from information received by the police and thereafter the police is required to proceed to the spot, investigate the facts and take measures for discovery and arrest. Thereafter, the police has to record statements and report on which the Magistrate may proceed under Section 190. This procedure is applicable when the police receives information of a cognizable offence, registers a case and forms the requisite opinion and not every case registered by the police.

22. Thus, we answer the first question by holding that the direction under Section 156(3) is to be issued, only after application of mind by the Magistrate. When the Magistrate does not take cognizance and does not find it necessary to postpone instance of process and finds a case made out to proceed forthwith, direction under the said provision is issued. In other words, where on account of credibility of information available, or weighing the interest of justice it is considered appropriate to straightaway direct investigation, such a direction is issued. Cases where Magistrate takes cognizance and postpones issuance of process are cases where the Magistrate has yet to determine "existence of sufficient ground to proceed". Category of cases falling under Para 120.6 in Lalita Kumari (supra) may fall under Section 202. Subject to these broad guidelines available from the scheme of the Code, exercise of discretion by the Magistrate is guided by interest of justice from case to case."

33. From the aforesaid judgment in Ramdev Food Product, (Supra) it is evident that the Magistrate may, where on account of credibility of information available or weighing the interest of justice considers it appropriate to straightaway direct investigation, such a direction may be issued, but in cases where the Magistrate takes cognizance and postpones issuance of process, are those cases where the Magistrate has yet to determine existence of sufficient ground to proceed against the offender by issuance of process if a prima-facie case is made out. A category of cases which fall under para 120.6 in "**Lalita Kumari**' (Supra) case, may fall under Section 202.

34. It is also very specific that the Magistrate has to apply his mind before exercising jurisdiction under Section 156(3) Cr.P.C. to decide if the case is one in which he should direct investigation by police under Section 156(3) Cr.P.C. or he should take cognizance, treat the application as a complaint case; and proceed as per the provisions of Sections 200, 202 Cr.P.C. etc. under Chapter XV. The application of mind should also be reflected in the order. Mere statement that the Magistrate has gone through the

complaint or/and the material accompanying the complaint and on hearing the complainant, is not sufficient. That would not be a reflection of application of judicial mind. Though, a detailed expression of his views is neither required nor warranted but reasons for decision, one way or the other, must be reflected from the order. Reasons have to be stated in the order as to why the Magistrate was passing an order for investigation by police under Sub Section (3) of Section 156 or as to why he was taking cognizance and then proceeding with the application as a complaint case and not directing for police investigation.

35. So far as the inquiry in pursuance of the direction under Section 202 Cr.P.C. is concerned, in **''Ramdev Food Products'** (Supra), the Hon'ble Supreme Court in paragraph no.34 held as follows:-

"34. We may now also refer to other decisions cited at the bar and their relevance to the questions arising in the case.

In Smt. Nagawwa vs. Veeranna Shivalingappa Konjalgi & Ors.[15], referring to earlier Judgments on the scope of Section 202, it was observed :

"3. In Chandra Deo Singh v. Prokash Chandra Bose [AIR (1963) SC 1430 this Court had after fully considering the matter observed as follows:

"The courts have also pointed out in these cases that what the Magistrate has to see is whether there is evidence in support of the allegations of the complainant and not whether the evidence is sufficient to warrant a conviction. The learned Judges in some of these cases have been at pains to observe that an enquiry under Section 202 is not to be likened to a trial which can only take place after process is issued, and that there can be only one trial. No doubt, as stated in sub-section (1) of Section 202 itself, the object of the enquiry is to ascertain the truth or falsehood of the complaint, but the Magistrate making the enquiry has to do this only with reference to the intrinsic quality of the statements made before him at the enquiry which would naturally mean the complaint itself, the statement on oath made by the complainant and the statements made before him by persons examined at the instance of the complainant."

Indicating the scope, ambit of Section 202 of the Code of Criminal Procedure this Court in Vadilal Panchal v. Dattatraya Dulaji Ghadigaonker [AIR (1960) SC 1113] observed as follows:

"Section 202 says that the Magistrate may, if he thinks fit, for reasons to be recorded in writing, postpone the issue of process for compelling the attendance of the person complained against and direct an inquiry for the purpose of ascertaining the truth or falsehood of the complaint; in other words, the scope of an inquiry under the section is limited to finding out the truth or falsehood of the complaint in order to determine the question of the issue of process. The inquiry is for the purpose of ascertaining the truth or falsehood of the complaint; that is, for ascertaining whether there is evidence in support of the complaint so as to justify the issue of process and commencement of proceedings against the person concerned. The section does not say that a regular trial for adjudging the guilt or otherwise of the person complained against should take place at that stage; for the person complained against can be legally called upon to answer the accusation made against him only when a process has issued and he is put on trial."

Same view has been taken in Mohinder Singh vs. Gulwant Singh[16], Manharibhai Muljibhai Kakadia & Anr. vs. Shaileshbhai Mohanbhai Patel & Ors.[17], Raghuraj Singh Rousha vs. Shivam Sunadaram Promoters Pvt. Ltd.[18], Chandra Deo Singh vs. Prokas Chandra Bose[19].

In Devrapalli Lakshminaryanan Reddy & Ors. vs. V. Narayana Reddy & Ors.[20], National Bank of Oman vs. Barakara Abdul Aziz & Anr.[21], Madhao & Anr. vs. State of Maharashtra & Anr.[22], Rameshbhai Pandurao Hedau vs. State of Gujarat[23], the scheme of Section 156(3) and 202 has been discussed. It was observed that power under Section 156(3) can be invoked by the Magistrate before taking cognizance and was in the nature of pre-emptory reminder or intimation to the police to exercise its plenary power of investigation beginning Section 156 and ending with report or chargesheet under Section 173. On the other hand, Section 202 applies at post cognizance stage and the direction for investigation was for the purpose of deciding whether there was sufficient ground to proceed."

36. In **"Amrutbhai Shambhubhai Patel Vs. Sumanbhai Kantibhai Patel & others'**, (2017) 4 SCC 177, the Hon'ble Supreme Court pointed out the distinction in the power to order police investigation under Section 156(3) and under Section 202(1) of the Cr.P.C. It was ruled that the two powers operate in separate distinct spheres at different stages, the former being exercisable at the pre-cognizance stage and the latter at the post-cognizance stage when the Magistrate is in seisin of the case. In the case of a complaint regarding the commission of a cognizable offence, the power under Section 156(3) could be invoked by the Magistrate before he takes cognizance of the offence under Section 190(1)(a), but once such cognizance is taken and he embarks upon the procedure embodied in Chapter XV, he would not be competent to revert to the pre-cognizance stage and avail Section 156(3). On the other hand, it was observed that Section 202 would be invocable at a stage when some evidence has been collected by the Magistrate in the proceedings under Chapter XV, but is deemed to be insufficient to take a decision as to the next step and in such an event, the Magistrate would be empowered under Section 202 to direct, within the limits circumscribed by that provision, an investigation for the purpose of deciding whether or not, there is sufficient ground for proceeding. It was thus exposited that the object of an investigation under Section 202 is not to initiate a fresh case on police report but to assist the Magistrate in completing the proceedings already instituted upon a complaint before him.

It is relevant to reproduce paragraph nos. 30 and 31 as under:-

"30. This Court also recounted its observations in Ram Lal Narang (supra) to the effect that on the Magistrate taking cognizance upon a police report, the right of the police to further investigate even under the 1898 Code was not exhausted and it could exercise such right often as necessary, when fresh information would come to light. That this proposition was integrated in explicit terms in sub-Section (8) of Section 173 of the new Code, was noticed. The desirability of the police to ordinarily inform the Court and seek its formal permission to make further investigation, when fresh facts come to light, was stressed upon to maintain the independence of the judiciary, the interest of the purity of administration of criminal justice and the interest of the comity of the

various agencies and institutions entrusted with different stages of such dispensation.

31. The pronouncement of this Court in Devarapalli Lakshminarayana Reddy and others v. V. Narayana Reddy and others, (1976) 3 SCC 252 emphasizing on the distinction in the power to order police investigation under Section 156(3) and under Section 202(1) of the Cr.P.C, was referred to. It was ruled that the two powers operate in separate distinct spheres at different stages, the former being exercisable at the pre-cognizance stage and the latter at the post-cognizance stage when the Magistrate is in seisin of the case. It was underlined that in the case of a complaint regarding the commission of a cognizable offence, the power under Section 156(3) could be invoked by the Magistrate before he takes cognizance of the offence under Section 190(1)(a), but once such cognizance is taken and he embarks upon the procedure embodied in Chapter XV, he would not be competent to revert to the pre-cognizance stage and avail Section 156(3). On the other hand, it was observed that Section 202 would be invocable at a stage when some evidence has been collected by the Magistrate in the proceedings under Chapter XV, but is deemed to be insufficient to take a decision as to the next step and in such an event, the Magistrate would be empowered under Section 202 to direct, within the limits circumscribed by that provision, an investigation for the purpose of deciding whether or not, there is sufficient ground for proceeding. It was thus exposited that the object of an investigation under Section 202 is not to initiate a fresh case on police report but to assist the Magistrate in completing the proceedings already instituted upon a complaint before him. It was thus concluded on an appraisal of the curial postulations above referred to, that the Magistrate of his own, cannot order further investigation after the accused had entered appearance pursuant to a process issued to him subsequent to the taking of the cognizance by him."

37. A reference deserves to be made to the case of **"Gulab Chand Upadhyaya Vs. State of U.P. and others"** 2002 Criminal Law Journal 2907(Alld), in which case this Court finding that no decision was cited to throw any light upon the considerations, which should weight with the Magistrate to guide his discretion, in adopting the courses open to him when an application under Section 156(3) Cr.P.C. is made to him, held that as per the scheme of the Cr.P.C. and the prevailing circumstances required that the option to direct the registration of the case and its "investigation' by the police should be exercised, where some "investigation' is required, which is of a nature that is not possible for a private complainant and which can only be done by the police upon whom statute has conferred, the powers essential for investigation, e.g., where the full details of the accused are not known to the complainant and the same can be determined only as a result of investigation; the recovery of abducted person or stolen property is required by raids or searches; where for the purpose of launching a successful prosecution of the accused evidence is required to be collected and preserved etc.

It is relevant to reproduce paragraph 22 & 23 of the **"Gulab Chand Upadhyaya"** (Supra) as under:-

"22. The scheme of Cr.P.C. and the prevailing circumstances require that the option to direct the registration of the case and its investigation by the police should be exercised where some "investigation" is required, which is of a

nature that is not possible for the private complainant, and which can only be done by the police upon whom statute has conferred the powers essential for investigation.

(1) where the full details of the accused are not known to the complainant and the same can be determined only as a result of investigation, or

(2) where recovery of abducted person or stolen property is required to be made by conducting raids or searches of suspected places or persons, or

(3) where for the purpose of launching a successful prosecution of the accused evidence is required to be collected and preserved. To illustrate by example cases may be visualised where for production before Court at the trail (a) sample of blood soaked soil is to be taken and kept sealed for fixing the place of incident; or (b) recovery of cases property is to be made and kept sealed; or (c) recovery under Section 27 of the Evidence Act; or (d) preparation of inquest report; or (e) witnesses are not known and have to be found out or discovered through the process of investigation."

23. But where the complainant is in possession of the complete details of all the accused as well as the witnesses who have to be examined and neither recovery is needed nor any such material evidence is required to be collected which can be done only by the police, no "investigation" would normally be required and the procedure of complaint case should be adopted. The facts of the present case given below serve as an example. It must be kept in mind that adding unnecessary cases to the diary of the police would impair their efficiency in respect of cases genuinely requiring investigation. Besides even after taking cognizance and proceeding under Chapter XV the Magistrate can still under Section 202(1) Cr.P.C. order investigation, even though of a limited nature {see para 7 of JT (2001)2 (SC) 81:(AIR 2001 SC 571)"

38. Power of the Magistrate to order investigation by police under Section 156(3) Cr.P.C. is at pre-cognizance stage whereas the power to order police investigation under Section 202(1) Cr.P.C. is at a post-cognizance stage. The police report of the investigation in pursuance of direction under Section 156(3) Cr.P.C. is for the purpose of taking cognizance whereas the report of the police investigation in pursuance of the direction under Section 202(1) Cr.P.C. is for the purposes of satisfying the Magistrate, if a case for proceeding further against the accused persons is made out or not After the Magistrate takes cognizance on the application under Section 156(3) Cr.P.C. without ordering for police investigation, he cannot return back to the stage of Section 156(3) Cr.P.C. as that is a pre-cognizance stage. But, if the Magistrate did not order for police investigation under Section 156(3) Cr.P.C. and took cognizance of the case, that would not be bar to the exercise of the power of the Magistrate for directing the police investigation under Section 202(1) Cr.P.C. which is with a different object of proceeding further in the matter. So, in a case where the Magistrate has declined for police investigation under Section 156(3) Cr.P.C. and had taken cognizance treating the application as a complaint case, that would not come in the way of the Magistrate in passing the order for police investigation under Section 202(1) Cr.P.C. Any observation in the order of the Magistrate while taking cognizance of application under Section 156(3) Cr.P.C. as a complaint case, that there is no need of police investigation and directing the

complainant to get the statement recorded under Section 200 Cr.P.C. shall only mean that no police investigation was needed for the purpose of taking cognizance.

39. From the aforesaid judgments, some of the following proposition of law, well settled, may be summarized as under:-

(39.01). Under Section 154 of the Code, if the information discloses commission of a cognizable offence it is the mandatory duty of the police officer in charge to register the FIR. He cannot avoid his duty of registering offence, if cognizable offence is made out.

(39.02). If FIR is not registered, the person aggrieved by a refusal to record the information has remedy to approach the Superintendent of Police by submitting an application in writing and by post to enable him to satisfy if such information discloses the commission of a cognizable offence and in case of such satisfaction, either to investigate himself or direct an investigation to be made by any police officer subordinate to him.

(39.03). If the person still feels aggrieved from inaction of the police authorities he has the remedy to approach the Magistrate by way of application under Section 156(3) Cr.P.C.,

(39.04). On such an application having been made, if, the Magistrate finds that a cognizable offence is made out, the Magistrate may direct the police to register the FIR and investigate the matter, without taking cognizance.

(39.05). The other option open to the Magistrate is to take cognizance on the complaint, register it as a complaint case and proceed as per the procedure prescribed under Chapter XV Cr.P.C. The Magistrate would record the statement of the complainant and the witnesses if any present, under Section 200 Cr.P.C. He may, if he thinks fit and shall in cases, where accused resides out side the area of exercise of jurisdiction of the Magistrate concerned, either enquire into the case himself or direct an investigation to be made by a police officer or by such other person as he thinks fit, under Section 202(1) Cr.P.C. Thereafter, he shall pass order, either under Section 203 dismissing the complaint, for brief reasons to be recorded, or he shall issue process under Section 204 Cr.P.C.

(39.06). In either case, i.e. issuing direction for investigation by the police officer under Section 156(3) Cr.P.C. or taking cognizance and registering it as a complaint case, the Magistrate has to apply judicial mind. There cannot be mechanical exercise of jurisdiction or exercise in a routine manner. Mere statement in the order that he has gone through the complaint, documents and heard the complainant will not be sufficient. What weighed with the Magistrate to order investigation or to take cognizance should be reflected in the order, although a detailed expression of his view is neither required nor warranted.

(39.07). The exercise of discretion by the Magistrate is basically guided by interest of justice, from case to case.

(39.08). However, where some investigation is required which is of a nature that is not possible for the private complainant and which can only be done by the police officer upon whom statute has conferred the powers essential for investigation, the option to direct the registration of the FIR and its investigation by the police officer should be exercised, for example:-

(i) where the full details of the accused are not known to the complainant

and the same can be determined only as a result of investigation, or

(ii) where recovery of abducted person or stolen property is required to be made by conducting raids or searches of suspected places or persons, or

(iii) where for the purpose of launching a successful prosecution of the accused evidence is required to be collected and preserved, and to illustrate this, by few example cases may be visualised where for production before Court at the trial

(a) sample of blood soaked soil is to be taken and kept sealed for fixing the place of incident; or

(b) recovery of case property is to be made and kept sealed; or

(c) recovery under Section 27 of the Evidence Act; or

(d) preparation of inquest report; or

(e) witnesses are not known and have to be found out or discovered through the process of investigation.

(39.09). Where the complainant is in possession of the complete details of all the accused and the witnesses who have to be examined and neither recovery is needed nor any such material evidence is required to be collected which can be done only by the police, no "investigation" would normally be required and the procedure of complaint case should be adopted.

(39 .10). Category of cases falling under para 120.6 in ***Lalita Kumari (Supra)*** *i.e.*

(a) Matrimonial disputes/family disputes

(b) Commercial offences

(c) Medical negligence cases,

(d) Corruption cases

(e) Cases where there is abnormal delay in filling criminal complaint etc. may fall under Section 202 Cr.P.C .

(39.11). The Magistrate should also keep in view that primarily, it is the duty of the State/police to investigate the cases involving cognizable offence. Generally, the burden of proof to bring the guilt of the accused is on the State and this burden is a heavy burden to prove the guilt beyond all reasonable doubts. This burden should not unreasonably be shifted on an individual/complainant from the State by treating the application under Section 156(3) Cr.P.C. as a complaint case.

(39.12). The investigation which the police officer or such other person makes in pursuance of the direction of the Magistrate under Section 202(1) Cr.P.C. is the same kind of investigation as is required to be conducted by police officer, under Chapter XII Cr.P.C. which ends with submission of the report as per Section 173(2) Cr.P.C.

(39.13). The distinction between the investigation by the police officer under Section 156(3) and under Section 202(1) Cr.P.C. is that the former is at the pre-cognizance stage and the latter is at post cognizance stage, when the Magistrate is seisin of the case. The investigation under Section 202(1) Cr.P.C. is for the purpose of ascertaining the truth or false hood of the complaint for helping the Magistrate to decide, whether or not there is sufficient ground, for him to proceed further against the accused by issuing process, whereas, the inquiry report under Section 173(2) Cr.P.C. of the investigation made by the police of its own or under the directions of the Magistrate under Section 156(3) Cr.P.C. is for the purpose of enabling the Magistrate to take cognizance of an offence under Section 190(1)(a) Cr.P.C.

(39.14). Once cognizance is taken on the application under Section 156(3) Cr.P.C. by the Magistrate and he embarks upon the procedure embodied in Chapter

XV, he would not be competent to revert to the pre-cognizance stage under Section 156(3) Cr.P.C.

(39.15). If the Magistrate did not order for police investigation under Section 156(3) Cr.P.C. and took cognizance of the case, that would not be bar to the exercise of the power of the Magistrate for directing the police investigation under Section 202(1) Cr.P.C.

40. Point nos. 1, 2 and 3 as framed in para 11 of this judgment stands answered as per para no.39 above.

41. In **''Jitendra Kumar'** (Supra) and **''Shiv Mangal Singh'** (Supra), relied upon by the learned counsel for the applicant also it was held that the Magistrate shall pass order with due application of judicious mind.

42. Now coming to the point no.4, as regards the order under challenge the learned Magistrate while passing the impugned order has considered and placed reliance on the cases of **'Suresh Chand Jain Vs. State of M.P.'**, reported in AIR 2001 SC 571 and **'Sukhwasi Vs. State of U.P.'**, 2007(6) ALJ 424. The learned magistrate has recorded that all the facts and circumstances of the case are in the knowledge of the applicant. The applicant is well acquainted with the accused persons and all the evidence that can be led is in control of the applicant. Neither any fact is required to be investigated by police nor any recovery is needed, and in this regard the applicant/complainant is competent to adduce evidence, so there is no need of investigation of the case by the police.

43. Learned counsel for the applicant could not demonstrate any legal infirmity in the order under challenge. The order is speaking one and has been passed on judicious application of mind to the facts of the case and the law applicable thereto.

44. I do not find any illegality in the order passed by the learned magistrate. The same is in conformity with lsaw.

45. However, it is clarified that if on the course of proceedings of the complaint case the learned Magistrate finds it a fit case for investigation by the police or such other person as he thinks fit under Section 202(1) Cr.P.C. for the limited purpose of satisfying himself for proceeding further against the accused persons for their summoning, the dismissal of this petition or the order under challenge herein, would not come in the way of exercise of such power under Section 202(1) Cr.P.C. by the learned Magistrate.

46. This petition lacks merit and is hereby **dismissed,** with the aforesaid observations.

47. No orders as to costs.

(2021)02ILR A574
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 29.01.2021

BEFORE

THE HON'BLE SAURABH SHYAM SHAMSHERY, J.

Application U/S 482 Cr.P.C. No. 15395 of 2020

Vatan Gaur ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Ms. Somya Chaturvedi, Sri Gopal Swaroop Chaturvedi (Senior Adv.)

Counsel for the Opposite Parties:
G.A., Mrs. Anjali Upadhya

(अ) फौजदारी कानून - भारतीय दंड संहिता १८६० - धारा १८८- लोक सेवक द्वारा सम्यक् रूप से प्रख्यापित आदेश की अवज्ञा, धारा २८८ - किसी निर्माण को गिराने या उसकी मरम्मत करने के संबंध में उपेक्षा पूर्ण आचरण , धारा ४२० - छल करना और संपत्ति परिदत्त करने के लिए बेईमानी से उतप्रेरित करना , सार्वजनिक संपत्ति नुकसान निवारण अधिनियम 1984 - धारा 3 - लोक संपत्ति को नुकसान कार्य करने वाली रिष्टि के अपराध होने पर सजा का प्रावधान , आपराधिक कानून संशोधन अधिनियम 1932 - धारा 7 - किसी व्यक्ति को रोजगार या व्यवसाय के पूर्वाग्रह के लिए छेड़छाड़ करना - उच्चतम न्यायालय की शक्तियां का दायरा व्यापक है परंतु इनका उपयोग संयम एवं सावधानीपूर्वक ही किया जाना चाहिए - इसके उपयोग से किसी भी वैधानिक अभियोजन की आकस्मिक मृत्यु नहीं की जा सकती है। (परा - ६.०३)

आवेदक प्रश्नगत भूमि का भूस्वामी है - जिसमें सहअपराधियों के संग व सहमति उक्त भूमि पर बहुमंजिला भवन का निर्माण किया व करवाया - जिसके आवश्यक वैधानिक अनुमति प्राप्त नहीं की गयी - इस न्यायालय के यथा स्थिति के आदेश के होते हुए भी भवन निर्माण करके अवमानना का भी मामला बनता प्रतीत होता है। (परा - ८.०१)

निर्णय : उच्च न्यायालय को उसकी अन्तनिहित शक्तियों का उपयोग संयम व सावधानी पूर्वक ही करना चाहिये। अगर प्राथमिकी व विवेचना के दौरान एकत्र किये गये साक्ष्य अपराध के कृत्य को प्रथम दृष्तया प्रकट करते है तो ऐसी परिस्थितियों में किसी भी वैधानिक अभियोजन को आकस्मिक मृत्यु प्रदान नहीं की जानी चाहिए। वर्तमान प्रकरण में आवेदक के विरुद्ध लगाये गये सभी अपराधों में उसके सभी कारक प्रथम दृष्टया उपलब्ध है तथा आक्षेपित आदेश (आरोप पत्र का संज्ञान व आवेदक को सम्मन) अवर न्यायालय द्वारा न्यायिक विवेक का उपयोग करते हुए विधिनुत्तार पारित किये गये हैं, अतः वर्तमान प्रकरण में अन्तर्निहित शक्तियों का उपयोग नहीं किया जा सकता है। (परा- ९)

आवेदन निरस्त किया जाता है। (E-6)

उद्धृत मामलों की सूची :

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

अभियोजन कथानक:-

1.01 ग्रेटर नोएडा (संक्षेप में औ0वि0प्रा0ग्रे0नो0) औद्योगिक विकास प्राधिकरण, की ओर से शिकायतकर्ता डी0पी0 श्रीवास्तव, सहायक, प्रबन्धक, वर्क सर्किल 4 औ0वि0प्रा0ग्रे0नो0 ने एक प्रथम सूचना रिपोर्ट, मै0 एक्टिव इक्विपमेन्ट प्रा0लि0 द्वारा सोनित्य कुमार व अन्य के विरुद्ध भारतीय दंड संहिता 1860 की धारा 188, 288 व 420 व सार्वजनिक संपत्ति नुकसान निवारण अधिनियम 1984 की धारा 3 व आपराधिक कानून (संशोधन) अधिनियम 1932 की धारा 7 के अंतर्गत इस आशय से दर्ज कराई कि "ग्रेटर नोएडा औद्योगिक विकास प्राधिकरण के अधिसूचित क्षेत्र के अंतर्गत ग्राम शाहबेरी के खसरा संख्या 158अ, 207 कृषि

उपयोगी भूमि पर बिना मानचित्र स्वीकृति कराये अथवा ग्रेटर नोएडा प्राधिकरण की अनुमति प्राप्त किए बिना, असुरक्षित व भवन विनियमावली में दिए गए प्राविधानों के विरुद्ध बहुमंजिले भवनों/फ्लैट्स का निर्माण कर लिया गया है/किया जा रहा है, जो असुरक्षित है, जिसमें कभी भी दुर्घटना हो सकती है, जिससे जान-माल की भारी क्षति होने की संभावना है। उक्त निर्मित फ्लैट्स को आबादी में निर्मति फ्लैट्स बता कर भोली-भाली जनता को धोखाधड़ी कर विक्रय किया गया है/विक्रय किया जा रहा है। उक्त कार्य संगठित रुप से अपने अन्य साथियों के साथ आर्थिक लाभ हेतु कृषित भूमि को क्षति पहुँचाते हुए बड़े पैमाने पर निर्माण कराया जा रहा है, जिसे नगर के लोगों में भय एवं आतंक व्याप्त है तथा जिस कारण लोक व्यवस्था प्रभावित हो रही है तथा सुनियोजित विकास प्रभावित हो रहा है। अवैध निर्माणकर्ताओं का विवरण निम्न प्रकार है। क्र0सं0 ग्राम का नाम खसरा सं0 अवैध निर्माणकर्ता का नाम व पता 1. शाह बेरी 158अ, 207 मे0 एक्टिव इक्विपमेन्ट प्रा0लि0 द्वारा सोनित्य कुमार, पता-88 जयपुरिया एन्कलेव, कौशाम्बी, गाजियाबाद, अतः भोली-भाली जनता को धोखाधड़ी कर आर्थिक नुकसान से बचाये जाने एवं असुरक्षित अनाधिकृत निर्माण के कारण भारी जान-माल के नुकसान को रोके जाने हेतु उपरोक्त निर्माण कर्ताओं के विरुद्ध एफ0आई0आर0 दर्ज करते हुए आवश्यक कार्यवाही करने का कष्ट करें।"

1.02 विवेचना के उपरान्त, जांच अधिकारी द्वारा अभियुक्त दीपक कुमार उर्फ दीपक त्यागी, दिव्यांका होम्स प्रा0लि0 के विरुद्ध भा0दं0सं0 की धारा 288 व 420 के अंतर्गत आरोप पत्र 30.05.2019 को सक्षम न्यायालय को प्रेषित कर दिया गया।

1.03 पत्रावली के अवलोकन से यह विदित होता है कि इसी प्रकरण में प्रभारी पुलिस अधिकारियों द्वारा विवेचनात्मक कार्यवाही की समीक्षा किया जाने पर पुनः गहनता से विवेचना कराये जाने की आवश्यकता प्रतीत हुई, अतः वरिष्ठ पुलिस अधीक्षक, गौतम बुद्ध नगर ने अपने आदेश दिनांक 09.12.2019 के द्वारा प्रकरण में धारा 173(8) दं0प्र0सं0 के अन्तर्गत अग्रेतर विवेचना किसी कुशल विवेचक को आवंटित करने के आदेश, थाना प्रभारी विसरख, गौतम बुद्ध नगर को प्रेषित किया गया।

1.04 इस क्रम में विवेचक ने अग्रेतर विवेचना के उपरान्त अनुपूरक आरोप पत्र दिनांक 04.06.2020 को आवेदक वतन गौड़ व सोनित्य कुमार के

विरुद्ध भा0दं0सं0 की धारा 420, 188, 288 व सार्वजनिक संपत्ति नुकसान निवारण अधिनियम की धारा 3 आपराधिक कानून (संशोधन) अधिनियम 1932 के अंतर्गत साक्षम न्यायालय को प्रेषित किया गया।

1.05 सक्षम न्यायालय द्वारा उपरोक्त वर्णित अनुपूरक आरोप पत्र पर आदेश दिनांक 03.07.2020 द्वारा, अवलोकन के उपरान्त संज्ञान लिया व अभियुक्तगण/आवेदक के विरुद्ध सम्मन जारी करने का आदेश भी दिया।

आक्षेपित आदेश-

2. आवेदक वतन गौड़ द्वारा वर्तमान आवेदन जो दंड प्रक्रिया संहिता की धारा 482 के अन्तर्गत इस न्यायालय में दाखिल की गई, उपरोक्त वर्णित अनुपूरक आरोप पत्र दिनांक 04.06.2020 व आदेश दिनांक 03.07.2020 (संज्ञान व सम्मन आदेश) आक्षेपित किये गये हैं।

आवेदक के पक्ष में कथन:-

3. आवेदक के पक्ष में श्री गोपाल स्वरुप चतुर्वेदी, वरिष्ठ अधिवक्ता व सहायक कु0 सौम्या चतुर्वेदी अधिवक्ता ने पुर जोर बहस की व कथन किया-

3.01 आरोप पत्र में वर्णित अपराधों को आवेदक के द्वारा घटित होना विवेचक द्वारा की गयी विवेचना के द्वारा स्थापित नहीं होता है। आवेदक के विरुद्ध लगाये गये सभी आरोप अस्पष्ट व बेबुनियाद है। विवेचना अनौपचारिक ढंग से करी गई है व सक्षम न्यायालय ने न्यायिक विवेक का उपयोग किये बिना आरोप पत्र का संज्ञान लिया है व यांत्रिक रुप से आवेदक के विरुद्ध सम्मन का आदेश पारित किया है।

3.02 वरिष्ठ अधिवक्ता ने यह भी कथन किया है कि आवेदक के विरुद्ध धारा 420 भा0दं0सं0 के अन्तर्गत कोई अपराध नहीं बनता है। प्रकरण में ऐसा कोई भी साक्ष्य पत्रावली पर नहीं है कि आवेदक ने किसी के साथ कोई छल किया हो या आवेदक द्वारा किसी ऐसे प्रवंचित व्यक्ति को बेइमानी से उत्प्रेरित कर उक्त व्यक्ति द्वारा कोई संपत्ति का या किसी भी मूल्यवान प्रतिभूति का परिदत्त किया गया हो। वर्तमान प्रकरण में भा0दं0सं0 की धारा 420 के घटक उपस्थित नहीं है।

3.03 वरिष्ठ अधिवक्ता ने आगे यह भी कथन किया कि वर्तमान प्रकरण में न तो कोई निर्माण गिराया गया है न ही उसकी मरम्मत करी गई है अतः आवेदक ने धारा 288 भा0दं0सं0 के अंतर्गत कोई अपराध कारित नहीं किया है और न ही आवेदक ने लोक सेवक द्वारा सम्यक रुप से प्रख्यापित किसी आदेश की अवज्ञा ही

की है। आवेदक के विरुद्ध किसी लोक संपत्ति को नुकसान कारित करने के कृत का कोई भी साक्ष्य नहीं है।

3.04 वरिष्ठ अधिवक्ता से आगे कथन किया कि विवेचना की सामान्य दैनिकी विवरण में रोजनामचा दिनांक 29.05.2019 में विवेचक ने स्पष्ट रुप से व्यक्त किया है अभियोग में धारा 3 भा0सं0 नु0निवा0अधि0, धारा 7 सी एल ए एक्ट व धारा 188 भा0दं0सं0 का होना नहीं पाया गया तथा अग्रिम विवेचना धारा 288, 420 भा0दं0सं0 में संपादित की जायेगी। फिर भी विलोपित धाराओ में आरोप पत्र प्रेषित किया गया। इससे यह दृष्टि गोचर होता है कि वर्तमान प्रकरण में विवेचना सरसरी तौर पर की गयी है। अतः वर्तमान आवेदन स्वीकार किया जाये।

4. शिकायतकर्ता का पक्ष अंजली उपाध्याय अधिवक्ता ने रखा, उन्होंने कहा उत्तर प्रदेश सरकार ने शाहबेरी गाँव उत्तर प्रदेश औद्यौगिक क्षेत्र विकास अधिनियम के अन्तर्गत एक अधिसूचित गांव घोषित किया है। अतः कोई भी भवन निर्माण प्राधिकरण की पूर्व अनुमति के बिना नहीं हो सकता है। प्रकरण में पञ्चायती भूमि के सम्बन्ध में भूमि अधिकर्जन अधिनियम की धारा 4 व 6 के अन्तर्गत अधिसूचना जारी की जा चुकी है जिस पर इस न्यायालय द्वारा यथा स्थिति बनाये रखने का आदेश पारित किया है। अतः आवेदक द्वारा उक्त भूमि पर भवन निर्माण कराने का कृत न्यायालय की अपभावना का मामला भी है। प्राधिकरण ने आवेदक को भवन निर्माण करने के लिये कोई सहमति/अनुमति/स्वीकृत नहीं दी है। अतः आवेदन निरस्त किया जायें। अपने पक्ष से समर्थन में लिखित बहस भी दाखिल की है जो पूर्व में उल्लेखित कथन की पुनरावृत्ति है।

5. वैभव आनन्द, अतिरिक्त शासकीय अधिवक्ता ने कहा कि इस न्यायालय की अंतर्निहित शक्तियों का उपयोग असाधारण परिस्थितियों में ही किया जाना चाहिए। वर्तमान प्रकरण में आवेदक प्रश्नगत भूमि का स्वामी है उसके निर्देश पर ही उक्त भूमि पर भवन निर्माण किया गया है जो अवैधानिक है। प्रकरण में वर्णित धाराओं के अन्तर्गत अपराध घटित हुआ है तथा ऐसी परिस्थितियां नहीं है जहाँ दं0प्र0सं0 के अन्तर्गत किसी आदेश को प्रभावी कराना हो या किसी न्यायालय की कार्यवाही का दुरुपयोग निवारित करना हो या न्याय के उदेश्यों की प्राप्ति सुनिश्चित करने की आवश्यकता हो अतः वर्तमान आवेदन निरस्त किया जाना चाहिये।

<u>विश्लेषण:-</u>

6. **उच्च न्यायालय की अंतर्निहित शक्तियां**

6.01 भारतीय दंड प्रक्रिया संहिता, की धारा 482, उच्च न्यायालय की अन्तर्निहित शक्तियों की व्यावृत्ति के प्रावधान के सम्बंध में है जो निम्न है ;-

"इस संहिता की कोई बात उच्च न्यायालय की ऐसे आदेश देने की अन्तर्निहित शक्ति को सीमित या प्रभावित करने वाली न समझी जाएगी जैसे इस संहिता के अधीन किसी आदेश को प्रभावी करने के लिए या किसी न्यायालय की कार्यवाही का दुरुपयोग निवारित करने के लिए या किसी अन्य प्रकार से न्याय के उद्देश्यों की प्राप्ति सुनिश्चित करने के लिए आवश्यक हो।"

6.02. उच्च न्यायालय की अंतर्निहित शक्तियों को इस संहिता के किसी प्रावधान से सीमित नहीं किया जा सकता है। यह वो अंतर्निहित शक्तियां हैं, जो इस संहिता के तहत किसी भी आदेश को प्रभावी करने के लिए, या किसी न्यायालय की प्रक्रिया का दुरुपयोग रोकने के लिए या अन्यथा सुरक्षित करने के लिए या न्याय की प्राप्ति के लिए आवश्यक हों। यह शक्तियां इस संहिता के तहत उच्च न्यायालय को नहीं प्राप्त होती हैं, बल्कि यह शक्तियां उच्च न्यायालय में अन्तर्निहित हैं, जिसे मात्र संहिता के एक प्रावधान द्वारा घोषित किया गया है।

6.03. उच्चतम न्यायालय ने कई विधिक दृष्टांत में यह प्रतिपादित किया है , कि इन शक्तियाँ का दायरा व्यापक है, परंतु इनका उपयोग संयम एवम् सावधानीपूर्वक ही किया जाना चाहिए। इसके उपयोग से किसी भी वैधानिक अभियोजन की आकस्मिक मृत्यु नहीं की जा सकती है।

6.04. इस धारा के तहत निहित शक्तियों का उपयोग करते हुए ये जाँचने के लिये की कोई प्राथमिकी किसी प्रथमदृष्ट्या संज्ञेय अपराध को प्रकट करती है या नहीं , उच्च न्यायालय ना तो किसी जाँच संस्था और ना ही अपीलीय न्यायालय की तरह कार्य कर सकता है। इन शक्तियों के अन्तर्गत किसी साक्ष्य की प्रमाणिता की जाँच नहीं की जा सकती है, क्योंकि, इसका क्षेत्राधिकार उस न्यायालय का है, जिसके द्वारा परीक्षण किया जा रहा है या किया जायेगा ।अन्वेषण के दौरान या आरोप पत्र दायर होने पर उच्च न्यायालय इस पहलू को भी नहीं देख सकता है कि आरोपी की ओर से मामले में अपेक्षित मानसिक तत्त्व या आशय मौजूद था या उसका क्या बचाव

है और न ही धारा १६१ के तहत अभिलेखित बयानों का आँकलन कर आरम्भिक स्तर पर ही किसी परीक्षण को विफल कर सकता है।

6.05. उच्चतम न्यायालय ने बहुधा कहा है कि वो परिस्थितियॉ जिनके होने पर इन अन्तर्निहित शक्तियों का उपयोग किया जा सकता है, उसकी कोई संपूर्ण सूची तो नहीं बनायी जा सकती, परन्तु कुछ क्षेणियॉ उदाहरणार्थ निम्नलिखित है:-

क) जहां प्राथमिकी या शिकायत में लगाए गए आरोप को अगर उनके प्रत्यक्ष रुप में माना जाये और संपूर्णता में स्वीकार किया जाये, तब भी, अभियुक्त के विरुद्ध प्रथम दृष्टया कोई अपराध नहीं बनता है;

ख) जहां प्राथमिकी और संलग्न सामग्रियो (यदि कोई हो,), एक संज्ञेय अपराध को उद्दाटित नहीं करते हैं, तथा संहिता की धारा 156 (1) के तहत पुलिस अधिकारियों द्वारा अन्वेषण करने का कोई औचित्य साबित न होता हो;

ग) जहां प्राथमिकी या 'शिकायत में लगाए गए अविवादित आरोप और उसके समर्थन में एकत्र किए गए साक्ष्य किसी भी अपराध के कृत्य का होना प्रकट नहीं होता हैं और आरोपी के विरूद्ध कोई भी प्रकरण नहीं बनता हैं;

घ) जहां प्राथमिकी में आरोप संज्ञेय अपराध निर्मित नहीं करते हैं व केवल गैर-संज्ञेय अपराध निर्मित करते हैं, पुलिस अधिकारी द्वारा मजिस्ट्रेट के आदेश के बिना किसी भी जांच की अनुमति नहीं है जैसा कि संहिता की धारा 155 (2) के तहत परिकल्पित है;

ड) जहां प्राथमिकी या शिकायत में लगाए गए आरोप इतने असंगत और स्वाभाविक रूप से असंभव हैं जिनके आधार पर कोई भी विवेकशील व्यक्ति कभी भी न्यायसंगत निष्कर्ष पर नहीं पहुंच सकता है कि अभियुक्त के खिलाफ कार्यवाही के लिए पर्याप्त आधार मौजूद है;

च) जहां किसी संहिता या संबंधित अधिनियम (जिसके तहत आपराधिक कार्यवाही शुरू की गई है) के किसी भी प्रावधान के तहत कानूनी प्रक्रिया की शुरुआत या जारी रहने पर कानूनी निषेध लगाया गया हो, और/या जहां संहिता या संबंधित अधिनियम के प्रावधान,पीड़ित पक्ष की शिकायत के लिए प्रभावी प्रतिकार प्रदान करते हो ।

छ) जहां आपराधिक कार्यवाही स्पष्टतः दुर्भावनापूर्ण हो और/या जहां कार्यवाही विद्वेषपूर्ण रूप से आरोपी से अधिक प्रतिशोध लेने के लिए , परोक्ष उद्देश्य से की जाती है और जिसका लक्ष्य,

निजी और व्यक्तिगत शिकायत के कारण उसे अपमानित करना हो। आपराधिक शिकायत को तब भी समाप्त किया जा सकता है जब मामला अनिवार्य रूप से दीवानी प्रकृति का हो और उसे एक अपराधिक अपराध का रूप दिया गया हो यदि कथित अपराध के तत्व, शिकायत में प्रथम दृष्टया भी उपलब्ध न हो।क्योंकि इस तरह की कार्यवाही जारी रखने पर न्यायालय की प्रक्रिया का दुरुपयोग होगा।

7. प्रकरण में उल्लेखित अपराध के विवरण निम्न है

"420.-छल करना और संपत्ति परिदत्त करने के लिए बेईमानी से उत्प्रेरित करना- *जो कोई छल करेगा, या तद्द्वारा उस व्यक्ति को, जिसे प्रवंचित किया गया है, बेईमानी से उत्प्रेरित करेगा कि वह कोई संपत्ति किसी व्यक्ति को परिदत्त कर दे, या किसी भी मूल्यवान प्रतिभूति को या किसी चीज को, जो हस्ताक्षरित या मुद्रांकित है, और जो मूल्यवान प्रतिभूति में संपरिवर्तित किये जाने योग्य है पूर्णतः या अंशतः रच दे, परिवर्तित कर दे, या नष्ट कर दे, वह दोनो में से किसी भाँति के कारावास से, जिसकी अवधि सात वर्ष तक की हो सकेगी, दंडित किया जाएगा और वह जुर्माने से भी दंडनीय होगा।*

188. लोकसेवक द्वारा सम्यक् रुप से प्रख्यापित आदेश की अवज्ञा- *जो कोई यह जानते हुए कि वह ऐसे लोक-सेवक द्वारा प्रख्यापित किसी आदेश से, जो ऐसे आदेश को प्रख्यापित करने के लिए विधिपूर्वक सशक्त है, वह कोई कार्य करने से विरत रहने के लिए या अपने कब्जे में की, या अपने प्रबंधाधीन, किसी संपत्ति के बारे में कोई विशेष व्यवस्था करने के लिए निर्दिष्ट किया गया है, ऐसे निदेश की अवज्ञा करेगा ।*

यदि ऐसी अवज्ञा विधिपूर्वक नियोजित किन्ही व्यक्तियों को बाधा, क्षोभ, या क्षति, अथवा बाधा क्षोभ या क्षति की जोखिम, कारित करे, या कारित करने की प्रवृत्ति रखती हो, तो वह सादा कारावास से, जिसकी अवधि एक मास तक की हो सकेगी, या जुमार्ने से, जो दो सौ रुपये तक का हो सकेगा, या दोनो से ,दंडित किया जाएगा।

और यदि ऐसी अवज्ञा मानव जीवन, स्वास्थ्य, या क्षेम को संकट कारित करे, या कारित करने की प्रवृत्ति रखती हो, या बल्वा या दंगा कारित करती हो, या कारित करने की प्रवृत्ति रखती हो, तो वह दोनो में से किसी भाँति के कारावास से, जिसकी अवधि छः मास तक की हो सकेगी, या जुमार्ने से, जो एक हजार रूपये तक का

हो सकेगा, या दोनों से, दंडित किया जाएगा ।

स्पष्टीकरण- *यह आवश्यक नहीं है कि अपराधी का आशय अपहानि उत्पन्न करने का हो या उसके ध्यान में यह हो कि उसकी अवज्ञा करने से अपहानि होना संभाव्य है। यह पर्याप्त है कि जिस आदेश की वह अवज्ञा करता है उस आदेश का उसे ज्ञान है, और यह भी ज्ञान है कि उसके अवज्ञा करने से अपहानि उत्पन्न होती या होनी संभाव्य है।*

288. किसी निर्माण को गिराने या उसकी मरम्मत करने के सम्बध में उपेक्षापूर्ण आचरण- *जो कोई किसी निर्माण को गिराने या उसकी मरम्मत करने में उस निर्माण की ऐसी व्यवस्था करने का, जो उस निर्माण के या उसके किसी भाग के गिरने से मानव जीवन को किसी अधिसम्भाव्य संकट से बचाने के लिये पर्याप्त हो जानते हुये या उपेक्षापूर्वक लोप करेगा, वह दोनों में से किसी भाँति के कारावास से, जिसकी अवधि छह मास तक की हो सकेगी, या जुर्माने से जो एक हजार रुपये तक का हो सकेगा, या दोनों से दण्डित किया जायेगा।*

3. ***लोक संपत्ति को नुकसान कारित करने वाली रिष्टि-****(1) जो कोई उपधारा (2) में निर्दिष्ट प्रकार की लोक संपत्ति से भिन्न किसी लोक संपत्ति की बाबत कोई कार्य करके रिष्टि करेगा, वह कारावास से, जिसकी अवधि पांच वर्ष तक की हो सकेगी, और जुर्माने से, दण्डित किया जाएगा।*

(2) जो कोई ऐसी किसी संपत्ति की बाबत जो-

(क) कोई ऐसा भवन, प्रतिष्ठान या अन्य संपत्ति है, जिसका उपयोग जल, प्रकाश, शक्ति या ऊर्जा के उत्पादन, वितरण या प्रदान के संबंध में किया जाता है;

(ख) कोई तेल प्रतिष्ठान है;

(ग) कोई मल संकर्म है;

(घ) कोई खान या कारखाना है;

(ङ) लोक परिवहन या दूर-संचार का कोई साधन है या उसके संबंध में उपयोग किया जाने वाला कोई भवन, प्रतिष्ठान या अन्य संपत्ति है,

कोई कार्य करके रिष्टि करेगा, वह कठोर कारावास से, जिसकी अवधि छह मास से कम की नहीं होगी किन्तु पांच वर्ष तक की हो सकेगी, और जुर्माने से, दण्डित किया जाएगा:

परन्तु न्यायालय, ऐसे कारणों से जो उसके निर्णय में लेखबद्ध किए जाएंगे, छह मास से कम की किसी अवधि के कारावास का दण्डादेश दे सकेगा।"

8. प्रकरण में सर्वप्रथम यह विचार करना है कि तथ्यों व परिस्थितियों में आरोप पत्र में वर्णित अपराध क्या प्रथम दृष्टया प्रकट होते या नहीं?

8.01 पत्रावली पर उपस्थित दस्तावेज व प्रतिद्वंदी बहस से यह विदित है कि आवेदक प्रश्नगत भूमि का भूस्वामी है। जिसमें सहअपराधियों के संग व सहमति से उक्त भूमि पर बहुमंजिला भवन का निर्माण किया व करवाया है, जिसके लिए आवश्यक वैधानिक अनुमति प्राप्त नहीं की गयी है तथा इस न्यायालय के यथा स्थिति के आदेश के होते हुए भी भवन निर्माण करके अवमानना का भी मामला बनता प्रतीत होता है। आवेदक के वरिष्ठ अधिवक्ता पत्रावली पर भवन निर्माण के लिये आवश्यक अनुमति/सहमति/स्वीकृति दिखाने में असफल रहे हैं।

8.02 धारा 288 भा0दं0सं0 के अंतवस्तु का ध्यानपूर्वक अवलोकन से यह विदित है कि यह धारा किसी निर्माण को गिराने या उसकी मरम्मत करने के सम्बंध में किसी अधिसम्भाव्य संकट से बचाने की व्यवस्था में उपेक्षापूर्ण आचरण को अपराध बनाता है। वर्तमान प्रकरण में प्रश्नगत भवन की निर्माण सम्बन्धी कोई वैधानिक सहमति या स्वीकृति न होने के कारण उस निर्माण के गुणवत्ता की पुष्टि नहीं की जा सकती है। यह भी विदित है आवेदक ने सहअपराधी के साथ समझौता कर भवन का निर्माण कराया है। अतः यह कहा जा सकता है कि निर्माण के किसी भाग के गिरने की अधिसम्भाव्य संकट से बचाने की व्यवस्था की उपेक्षा की है। अब प्रश्न यह है कि क्या किसी 'निर्माण' की 'मरम्मत' करने में 'नवीन निर्माण' भी सम्मिलित है की नहीं। मरम्मत करवाने का तात्पर्य केवल मरम्मत करवाना नहीं हो सकता इसके अंतर्गत सभी प्रकार के नवीन निर्माण भी आवश्यक रुप से शामिल होते है, अतः आवेदक भूमि का स्वामी है और उसकी सहमति से ही सह अपराधियों द्वारा भवन का निर्माण कराया गया है तथा अधिसम्भाव्य संकट से बचाने के लिये कोई भी वैधानिक व आवश्यक स्वीकृति प्राप्त नहीं करी। अतः धारा 288 भा0दं0सं0 के अन्तर्गत उसके विरुद्ध भी प्रथम दृष्टया अपराध बनता है। वर्तमान प्रकरण में प्रथम दृष्टया धारा 288 भा0दं0सं0 के अन्तर्गत अपराध कारित किया जाना प्रदर्शित होता है।

8.03 पत्रावली पर उपस्थित दस्तावेज यह दर्शाते है कि भूमि पर निर्मित भवन में बने फ्लेट्स को ग्राहकों को बेचा गया है। उनके साथ पंजीकृत करारनामें का

भी उल्लेख है। अतः यह विदित है कि आवेदक ने यह जानते हुए भी कि भवन का निर्माण गैरकानूनी है, छल करके ग्राहकों को बेइमानी से फ्लेट्स की पंजीकरण, मूल्य लेकर लिया। इस अपराध के लिये शिकायतकर्ता का स्वयं पीड़ित होना आवश्यक नहीं है। आवेदक का आशय प्रारम्भ से ही छल करने का था। अतः वर्तमान प्रकरण में धारा 420 भा0दं0सं0 के अन्तर्गत भी प्रथम दृष्टया अपराध दृष्टिगत होता है।

8.04 धारा 415 भा0दं0सं0 "छल' को परिभाषित करती है, जिसके अनुसार यदि कोई किसी व्यक्ति को कपट पूर्वक या बेइमानी से उत्प्रेरित कर प्रवंचित करता है जिसके कारण ऐसा कार्य या लोप उस व्यक्ति को शारीरिक, मानसिक, ख्याति संबंधी या सांपत्तिक नुकसान या अपहानि कारित होनी संभाव्य भी हो तो वह व्यक्ति छल करता है। वर्तमान प्रकरण में आवेदक ने सह आपरिधियों के संग ऐसा भवन/फ्लैट्स का निर्माण किया या करवाया है, जिसकी न तो कोई स्वीकृति न सहमति और न ही कोई अनुमति है अतः निर्माण पूर्ण रुप से अवैध है, और ऐसी जानकारी होने के बावजूद आवेदक ने कपट पूर्वक और बेईमानी करके भोले भाले ग्राहकों से छल करके उन्हे ये अवैध फ्लैट्स मूल्य के बदले बेचे। अतः वर्तमान प्रकरण में धारा 415 भा0दं0सं0 के सभी घटक प्रथम दृष्टया उपस्थित है।

8.05 धारा 188 भा0दं0सं0 के अनुसार लोक सेवक द्वारा सम्यक रुप से प्रख्यापित आदेश की अवज्ञा अपराध है। आवेदक ने ऐसे भवन का निर्माण किया है। जिसके लिए कोई भी सहमति या अनुमति नहीं दी गई है तथा ऐसा करने से मानव जीवन को संकट हो सकता है। जो, लोकसेवक द्वारा समय-समय पर प्रख्यापित आदेशों का अवेज्ञा है, अतः आवेदक के विरुद्ध धारा 188 भा0दं0सं0 के अन्तर्गत भी प्रथम दृष्टया अपराध दृष्टि गोचर होता है।

8.06 सार्वजनिक संपत्ति नुकसान निवारण अधिनियम 1984 की धारा 3 के अंतर्गत लोक संपत्ति को नुकसान कारित करने वाली रिष्टि के अपराध होने पर सजा का प्रावधान वर्णित किया गया है। वर्तमान प्रकरण में प्रश्नगत भूमि शिकायतकर्ता ग्रेटर नोएडा प्राधिकरण के कब्जे/नियन्त्रण में है व उस पर यथा स्थिति बनाये रखे रहने का आदेश लंबित है, फिर भी आवेदक ने इस पर सह अपराधी के संग बिना किसी अनुमति से निर्माण किया अतः उपरोक्त धारा के अन्तर्गत भी प्रथमदृष्टया अपराध दृष्टिगत होता है।

9. जैसा पूर्व में उल्लेखित किया गया है कि उच्च न्यायालय को उसकी अन्तर्निहित शक्तियों का उपयोग संयम व सावधानी पूर्वक ही करना चाहिये। अगर प्राथमिकी व विवेचना के दौरान एकत्र किये गये साक्ष्य अपराध के कृत्य को प्रथम दृष्टतया प्रकट करते है तो ऐसी परिस्थितियों में किसी भी वैधानिक अभियोजन को आकस्मिक मृत्यु प्रदान नहीं की जानी चाहिए। पूर्व में विश्वेलषण किया गया है कि वर्तमान प्रकरण में आवेदक के विरुद्ध लगाये गये सभी अपराधों में उसके सभी कारक प्रथम दृष्टया उपलब्ध है तथा आक्षेपित आदेश (आरोप पत्र का संज्ञान व आवेदक को सम्मन) अवर न्यायालय द्वारा न्यायिक विवेक का उपयोग करते हुए विधिनुसार पारित किये गये हैं, अतः वर्तमान प्रकरण में अन्तर्निहित शक्तियों का उपयोग नहीं किया जा सकता है।

10. अतः आवेदन निरस्त किया जाता है।

(2021)02ILR A585
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 20.11.2020

BEFORE

THE HON'BLE SHAMIM AHMED, J.

Application U/S 482 Cr.P.C. No. 16458 of 2020

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

Counsel for the Applicants:
Sri Sanjay Kumar Pal, Sri Jai Prakash Singh

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

(A) Criminal Law - Indian Penal Code, 1860 - Section 504 - , Section 506 - Intentional insult with intent to provoce breach of peace , Section 395 - Punishment for dacoity, Code of criminal procedure, 1973 - Section 173 - Report of police officer on completion of investigation - Court can take cognizance of an offence only when condition requisite for initiation of proceedings before it as set out in Chapter XIV of the Code are fulfilled - Otherwise, the Court does not obtain jurisdiction to try the offences under section 190 (1) of the Cr.P.C.(Para -14)

First information report lodged against the applicants - charge-sheet submitted by the Investigating Officer under sections 504, 506 IPC - Magistrate had taken cognizance on the charge-sheet - cognizance was taken on the prined proforma by filling the sections of IPC, dates and number - in the said proforma the learned Magistrate without assigning any reason has mentioned the sections 504, 506 and 395 IPC - summoned the applicants for facing trial. (Para - 4,7)

HELD:- In view of the above, the conduct of the judicial officers concerned in passing orders on printed proforma by filling up the blanks without application of judicial mind is objectionable and deserves to be deprecated. The summoning of an accused in a criminal case is a serious matter and the order must reflect that Magistrate had applied his mind to the facts as well as law applicable thereto, whereas the impugned summoning order was passed in mechanical manner without application of judicial mind. (Para - 25)

Application u/s 482 Cr.P.C. allowed. (E-6)

List of Cases cited:-

1. Dilawar Vs St.of Har. , (2018) 16 SCC 521

2. Menka Gandhi Vs U.O.I. , AIR 1978 SC 597

3. Hussainara Khatoon (I) Vs St.of Bihar , (1980)1 SCC 81

4. Abdul Rehman Antulay Vs R.S. Nayak , (1992) 1 SCC 225

5. P. Ramchandra Rao Vs St.of Karn. , (2002) 4 SCC 578

6. H.N. Rishbud Vs St.of Delhi , AIR 1955 SC 196

7. Basaruddin & ors. Vs St. of U.P. & ors. , 2011 (1) JIC 335 (All)(LB)

8. Bhushan Kumar & anr. Vs St. (NCT of Delhi) & anr.. , AIR 2012 SC 1747

9. Sunil Bharti Mittal Vs C.B.I., AIR 2015 SC 923

10. Darshan Singh Ram Kishan Vs St. of Mah., (1971) 2 SCC 654

11. Ankit Vs St. of U.P. & anr. passed in Application U/S 482 No.19647 of 2009

12. Megh Nath Guptas & anr. V St. of U.P. & anr., 2008 (62) ACC 826,

13. Deputy Chief Controller Import & Export Vs Roshan Lal Agarwal, 2003 (4) ACC 686 (SC),

14. UP Pollution Control Board Vs Mohan Meakins , 2000 (2) JIC 159 (SC): AIR 2000 SC 1456 &

15. Kanti Bhadra Vs St. of W.B. , 2000 (1) JIC 751 (SC): 2000 (40) ACC 441 (SC)

16. Kavi Ahmad Vs St. of U.P. & anr.r passed in Criminal Revision No. 3209 of 2010

17. Abdul Rasheed & ors. Vs St. of U.P. & anr. , 2010 (3) JIC 761 (All)

(Delivered by Hon'ble Shamim Ahmed, J.)

1. Heard Sri Jai Prakash Singh, learned counsel for the applicants and learned A.G.A. for the State.

2. This application under Section 482 Cr.P.C. has been filed seeking for quashing of the charge sheet dated 4.09.2018 submitted in Case Crime No.70 of 2018, under Section 504, 506 IPC, Police Station Bhelupur, District Varanasi as well as cognizance order dated 29.04.2019 passed by A.C.J.M.-3, Varanasi in Misc. Case No.361 of 2019 (case crime no.70 of 2018), under section 504, 506, 395 IPC, Police Station Bhelupur, District Varanasi.

3. Learned counsel for the applicants submits that the opposite party no.2 has moved an application under section 156(3) Cr.P.C. against the applicant no.1 and six other unknown persons regarding the alleged incident dated 28.10.2017.

4. On the basis of application u/s 156(3) Cr.P.C. filed by opposite party no.2, the first information report was lodged against the applicants on 4.02.2018, which was being registered as case crime No.70 of 2018, under section 504, 506, 395 IPC, Police Station Bhelupur, District Varanasi.

5. As per prosecution version as alleged in the F.I.R, the informant was doing his business at shop No.201 known as Puja Enterprises, which is a Proprietor Firm situated at Smirit State Dharmsangh Durgakund, Varanasi. The applicants were demanding illegally gratification from the informant through different mobile numbers and they claimed themselves as members of some Mafia Gang. On 28.10.2017 at 1.30 hrs., the applicants along with six unknown persons entered in the office of the informant/ opposite party no.2 and started abusing him and their two companion caught hold the hand of the informant and snatched Rs.7,500/- in cash and golden chain by putting the

countrymade pistol on the head of the informant.

6. Learned counsel for the applicants further submits that the entire prosecution story is false, no such incident took place and applicants have been falsely implicated in this case.

7. Learned counsel for the applicants thereafter submits that before arguing the case on merits, he wants to draw the attention of the Court on the charge-sheet submitted by the Investigating Officer and submitted that the Investigating Officer had submitted the charge-sheet against the applicants, under sections 504, 506 IPC on 4.09.2018, copy of the same is filed as Annexure No.5 to the affidavit, whereas he further submits that on the charge-sheet, the learned Magistrate had taken cognizance on 29.04.2019 and the case was numbered as Misc. Case No.361 of 2019. The cognizance was taken on the prined proforma by filling the sections of IPC, dates and number and in the said proforma the learned Magistrate without assigning any reason has mentioned the sections 504, 506 and 395 IPC and summoned the applicants for facing trial. Copy of the same is annexed as Annexure No.6 to the affidavit.

8. Learned counsel for the applicants further submits that by the order dated 29.04.2019 cognizance taken by the learned Magistrae on printed proforma under sections 504, 506 and 395 IPC, without assignign any reason is abused of process of law. No reason has been given by the learned Magistrate why the cognizance has been taken under sections 504, 506 and 395 IPC, whereas the Investigating Officer has submitted the charge sheet only under sections 504, 506 IPC.

9. Learned counsel for the applicants further submits that after submission of charge sheet the applicants have been summoned mechanically by order dated 29.04.2019 and the court below while summoning the applicants has materially erred and did not follow the dictum of law as propounded by the Hon'ble Supreme Court in various cases that summoning in criminal case is a serious matter and the court below without dwelling into material and visualizing the case on the touch stone of probability should not summon accused person to face criminal trial. It is further submitted that the court below has not taken into consideration the material placed before the trial court along with charge sheet and, therefore, the trial court has materially erred in summoning the applicants. The court below has summoned the applicants through a printed order, which is wholly illegal.

10. It is vehemently urged by learned counsel for the applicants that the impugned summoning order dated 29.04.2019 is not sustainable in the eye of law, as the same has been passed in mechanical manner without applying the judicial mind, because on the face of record itself it is apparent that impugned summoning order dated 29.04.2019 has been passed by the Magistrate concerned on printed proforma by filling up the gaps, therefore the same is liable to be quashed by this Court.

11. Learned counsel for the applicant has given much emphasis that if the cognizance has been taken on the printed proforma, the same is not sustainable.

12. Per contra, learned AGA for the State submitted that considering the material evidences and allegations against

the applicant on record, as on date, as per prosecution case, the cognizable offence against the applicants is made out, therefore, application is liable to be dismissed but has not denied that the leaned Magistrate has taken cognizance on the printed proforma. This case is being finally decided at this stage without issuing notice to opposite party no.2 and without calling for a counter affidavit.

13. I have heard the learned counsel for the parties and perused the record.

14. The main issue for consideration before this Court is that whether the learned Magistrate may summon the accused person on a printed proforma without assigning any reason and take cognizance on police report filed under Sections 173 of Cr.P.C. In this regard, it is relevant to mention here that a Court can take cognizance of an offence only when condition requisite for initiation of proceedings before it as set out in Chapter XIV of the Code are fulfilled. Otherwise, the Court does not obtain jurisdiction to try the offences under section 190 (1) of the Cr.P.C. provided that "subject to the provisions of this Chapter, any Magistrate of the first class, and any Magistrate of the second class specially empowered in this behalf under sub-section (2), may take cognizance of any offence-

(a) upon receiving a complaint of facts which constitute such offence,

(b) upon a police report of such facts;

(c) upon information received from any person other than a police officer, or upon his own knowledge, that such offence has been committed.

(2) The Chief Judicial Magistrate may empower any Magistrate of the second class to take cognizance under sub-section (1) of such offences as are within his competence to inquire into or try."

15. At this juncture, it is fruitful to have a look so far as the law pertaining to summoning of the accused persons, by taking cognizance on a police report filed under section 173 of the Cr.P.C., is concerned and the perusal of the case law mentioned herein below would clearly reveal that cognizance of an offence on complaint is taken for the purpose of issuing process to the accused. Since, it is a process of taking judicial notice of certain facts which constitute an offence, there has to be application of mind as to whether the material collected by the Investigating Officer results in sufficient grounds to proceed further and would constitute violation of law so as to call a person to appear before the criminal court to face trial. This discretion puts a responsibility on the magistrate concerned to act judiciously keeping in view the facts of the particular case as well as the law on the subject and the orders of Magistrate does not suffers from non-application of judicial mind while taking cognizance of the offence.

16. Fair and proper investigation is the primay duty of the Investigating Officer. No investigating agency can take unduly long time in completing investigation. There is implicit right under Article 21 for speedy trial which in turn encompasses speedy investigation, inquiry, appeal, revision and retrial. There is clear need for time line in completing investigation for having in-house oversight mechanism wherein accountability for adhering to lay down timeline, can be fixed at different levels in the hierarchy, vide **Dilawar vs. State of Haryana, (2018) 16**

SCC 521, Menka Gandhi vs. Union of India, AIR 1978 SC 597, Hussainara Khatoon (I) vs. State of Bihar, (1980)1 SCC 81, Abdul Rehman Antulay vs. R.S. Nayak, (1992) 1 SCC 225 and **P. Ramchandra Rao vs. State of Karnatka, (2002) 4 SCC 578.**

17. For the purposes of investigation, offences are divided into two categories "cognizable" and "non-cognizable". When information of a cognizable offence is received or such commission is suspected, the proper police officer has the authority to enter in the investigation of the same but where the information relates to a non-cognizable offence, he shall not investigate it without the order of the competent Magistrate. **Investigation includes all the proceedings under the Cr.P.C. for the collection of evidence conducted by a police officer or by any person other than a Magistrate** (who is authorised by a Magistrate in his behalf). **Investigation consists of steps, namely (i) proceeding to spot, (ii) ascertainment of the facts and circumstances of the case**, (iii) discovery and arrest of the suspected offender, (iv) collection of evidence relating to the commission of the offence and (v) formation of opinion as to whether on the material collected therein to place the accused before a Magistrate for trial and if so to take necessary steps for the same by filing a chargesheet under Section 173, Cr.P.C., vide **H.N. Rishbud vs. State of Delhi, AIR 1955 SC 196**. Thereafter, the learned Magistrate has to take cognizance after application of judicial mind and by reasoned order and not in mechanical manner.

18. In the case of **Basaruddin & others Vs. State of U.P. and others, 2011 (1) JIC 335 (All)(LB)**, the Hon'ble Court was pleased to obserave as under:-

"From a perusal of the impugned order, it appears that the learned Magistrate on the complaint filed by the complainant has summoned the accused in a mechanical way filling the date in the typed proforma. Learned Magistrate while taking cognizance of the offence on complaint was expected to go through the allegations made in the complaint and to satisfy himself as to which offences were prima facies, being made out against the accused on basis of allegations made in the complaint. It appears that the learned Magistrate did not bother to go through the allegations made in the complaint and ascertain as to what offences were, prima facie, being made out against the accused on the basis of allegations made in the complaint. Apparently, the impugned order passed by the learned Magistrate suffers from non-application of mind while taking cognizance of the offence. The impugned order is not well reasoned order, therefore, the same is liable to be quashed and the petition deserves to be allowed and the matter may be remanded back to the learned Chief Judicial Magistrate, Lakhimpur Kheri with direction to him to go through the allegations made in the complaint and ascertain as to what offences against the accused were prima facie being made out against the accused on the basis of allegations made in the complaint and pass fresh order, thereafter, he will proceed according to law."

19. In the case of **Bhushan Kumar and Anr. v. State (NCT of Delhi) and Anr., AIR 2012 SC 1747**, the Hon'ble Apex Court was pleased to observe that section 204 of the Code does not mandate the Magistrate to explicitly state the reasons for issuance of summons. It clearly states that if in the opinion of a Magistrate taking cognizance of an offence, there is

sufficient ground for proceeding, then the summons may be issued. This section mandates the Magistrate to form an opinion as to whether there exists a sufficient ground for summons to be issued but it is nowhere mentioned in the section that the explicit narration of the same is mandatory, meaning thereby that it is not a pre-requisite for deciding the validity of the summons issued.

20. In the case of **Sunil Bharti Mittal v. Central Bureau of Investigation, AIR 2015 SC 923**, the Hon,ble Apex Court was pleased to observe in paragraph no.47 of the judgment as under:

"47. However, the words "sufficient grounds for proceeding" appearing in the Section are of immense importance. It is these words which amply suggest that an opinion is to be formed only after due application of mind that there is sufficient basis for proceeding against the said accused and formation of such an opinion is to be stated in the order itself.."

21. In the case of ***Darshan Singh Ram Kishan v. State of Maharashtra* , (1971) 2 SCC 654**, the Hon'ble Court was pleased to observe that the process of taking cognizance does not involve any formal action, but it occurs as soon as the Magistrate applies his mind to the allegations and, thereafter, takes judicial notice of the offence. As provided by Section 190 of the Code of Criminal Procedure, a Magistrate may take cognizance of an offence either, (a) upon receiving a complaint, or (b) upon a police report, or (c) upon information received from a person other than a police officer or even upon his own information or suspicion that such an offence has been committed. As has often been held, taking cognizance does not involve any formal action or indeed action of any kind but occurs as soon as a Magistrate applies his mind to the suspected commission of an offence. Cognizance, therefore, takes place at a point when a Magistrate first takes judicial notice of an offence. This is the position whether the Magistrate takes cognizance of an offence on a complaint, or on a police report, or upon information of a person other than a police officer. Therefore, when a Magistrate takes cognizance of an offence upon a police report, prima facie he does so of the offence or offences disclosed in such report."

22. In the case of **Ankit Vs. State of U.P. And another** passed in Application U/S 482 No.19647 of 2009 decided on 15.10.2009, this Court was pleased to observe in paragraph No.8 of the judgment as under:-

"8. In the beginning, the name of the court, case number, state vs. ..... under section ..... P.S. ..... District ..... case crime No. ..... /2009 also have been printed and blanks have been filled up by mentioning the case number, name of the accused, section, P.S. District etc. by some employee. Below afore cited printed matter, the following sentence has been mentioned in handwriting "अभियुक्त अंकित की गिरफ्तारी मा0 उच्च न्यायायल द्वारा Crl. Writ No. 19559/08 अंकित बनाम राज्य में पारित आदेश दिनांक 5.11.08 द्वारा आरोप पत्र प्राप्त होने तक स्थगित थी।"

Below aforesaid sentence, the seal of the court containing name of Sri Talevar Singh, the then Judicial Magistrate-III, has been affixed and the learned magistrate has put his short signature (initial) over his name. The manner in

which the impugned order has been prepared shows that the learned magistrate did not at all apply his judicial mind at the time of passing this order and after the blanks were filled up by some employee of the court, he has put his initial on the seal of the court. This method of passing judicial order is wholly illegal. If for the shake of argument, it is assumed that the blanks on the printed proforma were filled up in the handwriting of learned magistrate, even then the impugned order would be illegal and invalid, because order of taking cognizance of any other judicial order cannot be passed by filling up blanks on the printed proforma. *Although as held by this Court in the case of* ***Megh Nath Guptas & Anr V State of U.P. And Anr****, 2008 (62) ACC 826, in which reference has been made to the cases of* ***Deputy Chief Controller Import and Export Vs Roshan Lal Agarwal, 2003 (4) ACC 686 (SC), UP Pollution Control Board Vs Mohan Meakins, 2000 (2) JIC 159 (SC): AIR 2000 SC 1456 and Kanti Bhadra Vs State of West Bengal, 2000 (1) JIC 751 (SC): 2000 (40) ACC 441 (SC)****, the Magistrate is not required to pass detailed reasoned order at the time of taking cognizance on the charge sheet, but it does not mean that order of taking cognizance can be passed by filling up the blanks on printed proforma. At the time of passing any judicial order including the order taking cognizance on the charge sheet, the Court is required to apply judicial mind and even the order of taking cognizance cannot be passed in mechanical manner. Therefore, the impugned order is liable to be quashed and the matter has to be sent back to the Court below for passing fresh order on the charge sheet after applying judicial mind."*

23. In the case of **Kavi Ahmad Vs. State of U.P. and another** passed in Criminal Revision No. 3209 of 2010, wherein order taking cognizance of offence by the Magistrate under Section 190(1)(b) on printed proforma without applying his judicial mind towards the material collected by the Investigating Officer has been held illegal.

24. In the case of **Abdul Rasheed and others Vs. State of U.P. and another** 2010 (3) JIC 761 (All). The relevant observations and findings recorded in the said case are quoted below:-

"6. Whenever any police report or complaint is filed before the Magistrate, he has to apply his mind to the facts stated in the report or complaint before taking cognizance. If after applying his mind to the facts of the case, the Magistrate comes to the conclusion that there is sufficient material to proceed with the matter, he may take cognizance. In the present case, the summoning order has been passed by affixing a ready made seal of the summoning order on a plain paper and the learned Chief Judicial Magistrate had merely entered the next date fixed in the case in the blank portion of the ready made order. Apparently the learned Magistrate had not applied his mind to the facts of the case before passing the order dated 20.12.2018, therefore, the impugned order cannot be upheld.

7. Judicial orders cannot be allowed to be passed in a mechanical manner either by filling in blank on a printed proforma or by affixing a ready made seal etc. of the order on a plain paper. Such tendency must be deprecated and cannot be allowed to perpetuate. This reflects not only lack of application of mind to the facts of the case but is also against the settled judicial norms. Therefore, this practice must be stopped forthwith."

25. In view of the above, the conduct of the judicial officers concerned in passing orders on printed proforma by filling up the blanks without application of judicial mind is objectionable and deserves to be deprecated. The summoning of an accused in a criminal case is a serious matter and the order must reflect that Magistrate had applied his mind to the facts as well as law applicable thereto, whereas the impugned summoning order was passed in mechanical manner without application of judicial mind.

26. In light of the judgments referred to above, it is explicitly clear that the order dated 29.04.2019 passed by Additional Chief Judicial Magistrate-3, Varanasi is cryptic and does not stand the test of the law laid down by the Hon'ble Apex Court. Consequently, the cognizance order dated 29.04.2019 cannot be legally sustained, as the Magistrate failed to exercise the jurisdiction vested in him resulting in miscarriage of justice.

27. Accordingly, the present Criminal Misc. Application U/S 482 Cr.P.C succeeds and is allowed. The impugned cognizance order dated 29.04.2019 passed by Additional Chief Judicial Magistrate-3, Varanasi in Misc. Case No.361 of 2019, under Sections 504, 506, 395 IPC, Police Station Bhelupur, District Varanasi is, hereby, quashed.

28. The Additional Chief Judicial Magistrate 3, Varanasi is directed to decide afresh the issue for taking cognizance and summoning the applicants and pass appropriate orders in accordance with law keeping in view the observations made by this Court as well as the direction contained in the judgments referred to above within a period of three months from the date of production of a certified copy of this order.

29. With the above direction, the application filed U/S 482 Cr.P.C. stands **allowed**.

(2021)02ILR A592
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 14.12.2020

BEFORE

THE HON'BLE SHAMIM AHMED, J.

Application U/S 482 Cr.P.C. No. 18120 of 2020

Bharat Singh @ Jitendra Singh ...Applicant
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Applicant:
Sri Lakshman Singh, Sri M.K. Singh

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

(A) Criminal Law - Code of Criminal Procedure, 1973 - Section 107 - Security for keeping the peace in other cases , Section 116 - Inquiry as to truth of information .

Application filed for quashing the notice/order passed by the respondent no.3, Sub Divisional Magistrate, under section 107/116 Cr.P.C.

HELD:- It appears that the substance of allegations against the applicant has not been mentioned in the impugned notice issued under Section 107/116 Cr.P.C. The said notice appears to be vague and, hence, is liable to be quashed. (Para - 7)

Application u/s 482 Cr.P.C. disposed of. (E-6)

List of Cases cited:-

1. Aurangzeb & ors. Vs. St. of U.P. & anr. , 2004 (5) ACC, 734

2. Ranjeet Kumar & ors. Vs. St. of U.P. & ors. , 2002 (45) ACC 627

3. Har Charan Vs. St. of U.P. & anr. , 2008 (61) ACC 540

(Delivered by Hon'ble Shamim Ahmed, J.)

1. This application under section 482 Cr.P.C. has been filed for quashing the notice/order dated 16.08.2020 passed by the respondent no.3, Sub Divisional Magistrate, Jalaun, District Jalaun, under section 107/116 Cr.P.C. (Shyam Singh and others Vs. State of U.P. and others), Police Station Kuthond, District Jalaun.

2. Heard Shri M.K. Singh holding brief of Sri Lakshman Singh, learned counsel for the applicant and learned AGA for the State.

3. Learned counsel for the applicant has contended that the impugned notice does not contain the substance of allegations which have been made against the applicant and has been issued in a routine manner on a cyclostyled proforma. It is further contended that the impugned notice is illegal and is liable to be set aside.

4. In support of his contention, he placed reliance upon the judgment of this Court reported in ***2004(5) ACC, 734, Aurangzeb & others Vs. State of U.P. and another, 2002(45)ACC 627, Ranjeet Kumar & others Vs. State of U.P. & others and 2008(61) ACC 540, Har Charan Vs. Stae of U.P. & another.***

5. Learned A.G.A., on the other hand, submitted that there is no illegality in issuing the impugned notice as in compliance of the same, the applicant has to furnish bonds only.

6. Learned counsel for the applicant draw the attention of this Court in similar matter disposed of the Application under section 482 Cr.P.C No.1833 of 2013 vide order dated 29.01.2013, copy of the same is annexed as Annexure No.3 to the affidavit.

7. Having considered the aforesaid arguments and perused the impugned notice and all the material brought on record, it appears that the substance of allegations against the applicant has not been mentioned in the impugned notice issued under Section 107/116 Cr.P.C. The said notice appears to be vague and, hence, is liable to be quashed and is, accordingly, quashed.

8. However, it shall be open to the concerned Magistrate to issue fresh notice in accordance with law, if necessary.

9. With the aforesaid observations, the present application under Section 482 Cr.P.C. is finally **disposed of** only in respect of applicant.

(2021)02ILR A594
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 08.01.2021

BEFORE

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

Application U/S 482 Cr.P.C. No. 19584 of 2020

Kuldeep Agrawal @ Deepak Kumar Agrawal & Ors. ...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Sri Nitin Chandra Mishra

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

(A) Criminal Law - Indian Penal Code, 1860 - Sections 498-A - Husband or relative of a husband of a woman subjecting her to cruelty , Sections 323 - Punishment for voluntry causing hurt , Sections 506 - Punishment for criminal intimidation - at the stage of issuing process, the Magistrate is mainly concerned with the allegations made in the complaint or the evidence led in support of the same and he is only to be prima facie satisfied whether there are sufficient grounds for proceeding against the accused.(Para -10)

Application filed seeking quashing the cognizance/summoning order as well as the the entire proceedings of the Criminal Case - first information report lodged by opposite party no.2 - allegation - her marriage was solemnized with applicant no.1 - after some time husband and in-laws of opposite party no.2 started harassing her for additional demand of dowry - stripped her from their house - restitution of conjugal rights under Section 9 of the Hindu Marriage Act - pending consideration - After obtaining knowledge of filing of the aforesaid suit, opposite party no.2 has engineered the present case against the applicants as a counter blast to the same. (Para - 3,4)

HELD:- For issuing process of summon against the applicants, the concerned Magistrate has not applied his judicial mind at least on his prima facie satisfaction. The said order is like a routine order which has been passed in mechanical manner. At the time of passing any judicial order including the order taking cognizance on the charge sheet, the Court is required to apply judicial mind and even the order of taking cognizance cannot be passed in mechanical manner.(Para – 9)

Application u/s 482 Cr.P.C. allowed. (E-6)

List of Cases cited:-

1. U.P. Pollution Control Board Vs Dr. Bhupendra Kumar Modi & anr. , (2009) 2 SCC 147

2. M/s. Pepsi Food Ltd. & anr, Vs Special Judicial Magistrate & ors. , 1998 UPCrR 118

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

1. Heard Mr. Nitin Chandra Mishra, learned counsel for the applicant and Mr. Pankaj Srivastava, learned A.G.A. for the State as well as perused the entire material available on record.

2. This application under Section 482 Cr.P.C. has been filed seeking quashing the cognizance/summoning order dated 20th January, 2020 as well as the the entire proceedings of the Criminal Case No. 51 of 2020 (State Vs. Kuldeep Agrawal & Others), arising out of Case Crime No. 0048 of 2019,

under Sections 498-A, 323, 506 I.P.C., Police Station-Mahila Thana, District-Mathura, pending in the Court of Judicial Magistrate, Mathura.

3. Relevant facts for deciding the present application under Section 482 Cr.P.C. are as follows:

A first information report has been lodged by opposite party no.2, namely, Manisha Agarwal on 2nd March, 2019 at 1719 hours against six named accused persons including the present applicants alleging therein that her marriage was solemnized with applicant no.1, namely, Kuldeep Agrawal @ Deepak Kumar Agrawal on 18th June, 2005 but after some time i.e in the year 2018, the husband and in-laws of opposite party no.2 started harassing her for additional demand of dowry and on 27th June, 2018, they stripped her from their house. Against the lodging of the aforesaid first information report, all the named accused persons including the applicants approached this Court earlier by means of Criminal Misc. Writ Petition No. 7235 of 2019. A Division Bench of this Court vide order dated 15th March, 2019 referred the matter to the Allahabad High Court Mediation and Conciliation Centre for reconciliation/settlement of the dispute arose between the applicants and opposite party no.2 as well as granted interim protection to the applicants. Upon completion of statutory investigation under Chapter XII Cr.P.C., the Investigating Officer has submitted charge-sheet against the applicants under Sections 498-A, 323, 506 I.P.C. on 20th January, 2020. On submission of the aforesaid charge-sheet the concerned Magistrate by means of a common order has taken cognizance thereon and has also issued process of summons against the applicants. It is against this order and the entire proceedings of the aforesaid criminal case that the present application under Section 482 Cr.P.C. has been filed.

4. It has been submitted by learned counsel for the applicants that the first information report has been lodged with false and frivolous allegations. It is surprising that after more than 12 years of marriage of opposite party no.2 with applicant no.1, her husband and in-laws started harassing her for additional demand of dowry. The real fact is that she is a modern lady and did not want to live with her in-laws. She also does not take care her children. In order to build pressure on the applicant no.1 and his family members, she started hot talk and quarrel with the applicants and she also started beating her children. Applicant no.1 and his family members made all efforts so that she may live happily with them and take care of her children, but all efforts went in vain. Ultimately, when no option was left with applicants, applicant no.1 moved an application for restitution of conjugal rights under Section 9 of the Hindu Marriage Act before the Court by means of Suit No. 2871 of 2018, which is pending consideration. After obtaining knowledge of fling of the aforesaid suit, opposite party no.2 has engineered the present case against the applicants as a counter blast to the same.

5. Learned counsel for the applicants also submits that after submission of charge sheet the applicants have been summoned by order dated 20th January, 2020 and the court below while summoning the applicants has materially erred and did not follow the dictum of law as propounded by the Hon'ble Supreme Court in various cases that summoning in criminal case is a

serious matter and the court below without dwelling into material and visualising the case on the touch stone of probability should not summon accused person to face criminal trial. It is further submitted that the court below has not taken into consideration the material placed before the trial court along with charge sheet and, therefore, the trial court has materially erred in summoning the applicants. The court below has summoned the applicants through a routine/mechanical order, which is wholly illegal. It is next submitted that no offence as described in the F.I.R. or in the statement of the witnesses recorded during the course of investigation has taken place and the whole story as narrated in the F.I.R. as well as in the statement of the witnesses has been cooked and manufactured, therefore, the court below has materially erred in summoning the applicants, as such the orders are liable to be set aside.

6. Learned A.G.A., however, opposes the contention of learned counsel for the applicants on the ground that the court below keeping in view the charge sheet and material submitted therewith, after applying judicial mind and finding sufficient material on record, summoned the applicants to face trial and, therefore, there is nothing illegal so far as the order of summoning passed by the court below is concerned.

7. I have considered the submissions made by the learned counsel for the parties and have gone through the records of the present application under Section 482 Cr.P.C.

8. It would be worthwhile to reproduce the cognizance/summoning order passed by the concerned Magistrate dated 20th January, 2020, which reads as follows:

"20.01.2020---Aaj Thana Haja se aarope patray prapt hua. Pesh hokar aadesh hua ki darj register ho. Abhiyuktgan ke virudh aarope patra me ankit dharaon me prasangyan liya jata hai. Aarope patra me varnit abhiyuktgan ke virudh sommon dinank 10.03.2020 niyat kar jari ho. Nakal taiyar ho. Patravali vaaste dene ke liye. Aarope niyat dinank to pesh ho."

9. Perusal of the aforesaid order indicates that for issuing process of summon against the applicants, the concerned Magistrate has not applied his judicial mind at least on his prima facie satisfaction. The said order is like a routine order which has been passed in mechanical manner. At the time of passing any judicial order including the order taking cognizance on the charge sheet, the Court is required to apply judicial mind and even the order of taking cognizance cannot be passed in mechanical manner.

10. In **U.P. Pollution Control Board vs. Dr. Bhupendra Kumar Modi & Anr.,** reported in (2009) 2 SCC 147, this Court, in paragraph 23, held as under:

"23. It is a settled legal position that at the stage of issuing process, the Magistrate is mainly concerned with the allegations made in the complaint or the evidence led in support of the same and he is only to be prima facie satisfied whether there are sufficient grounds for proceeding against the accused."

11. In ruling **M/s. Pepsi Food Ltd. & another vs. Special Judicial Magistrate**

& others, *reported in 1998 UPCrR 118*" Hon'ble Supreme Court held :-

"Summoning of an accused in a criminal case is a serious matter. Criminal law cannot be set into motion as a matter of course. It is not that the complainant has to bring only two witnesses to support his allegations in the complaint to have the criminal law set into motion. The order of the Magistrate summoning the accused must reflect that he has applied his mind to the facts of the case and the law applicable thereto. He has to examine the nature of allegations made in the complaint and the evidence both oral and documentary in support thereof and would that be sufficient for the complainant to succeed in bringing charge home to the accused. It is not that the Magistrate is a silent spectator at the time of recording of preliminary evidence before summoning the accused. Magistrate had to carefully scrutinize the evidence brought on record and may even himself put questions to the complainant and his witnesses to elicit answers to find out the truthfulness of the allegations or otherwise and then examine if any offence is prima facie committed by all or any of the accused."

12. In light of the judgments referred to above, it is explicitly clear that the order dated 20th January, 2020 passed by the concerned Magistrate is cryptic and does not stand the test of the law laid down by the Apex Court. Consequently, the order dated 20th January, 2020 cannot be legally sustained, as the Magistrate failed to exercise the jurisdiction vested in him/her resulting in miscarriage of justice.

13. Accordingly, the present criminal misc. application succeeds and is **allowed** at the admission stage without issuing notice to the prospective opposite parties, as opposite party no.2 has no right to be heard at pre-cognizance stage. Order dated 20th January, 2020 is, hereby, quashed.

14. The Judicial Magistrate, Mathura is directed to exercise his discretionary power and decide afresh the application for summoning the applicants and pass appropriate orders in accordance with law keeping in view the observations made by this Court as well as the direction contained in the judgments referred to above within a period of two months from the date of production of a certified copy of this order.

(2021)02ILR A597
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 08.01.2021

BEFORE

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

Application U/S 482 Cr.P.C. No. 19600 of 2020

Alakhram ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Virpratap Singh, Sri Rajat Agarwal

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

(A) Criminal Law - Code of Criminal Procedure, 1973 - Section 125 - Order for maintenance of wives , children and parents - Section 125 of the Code of Criminal Procedure enacted to achieve a social purpose - primary object - to render social justice to the woman, child and infirm parents so as to prevent destitution and vagrancy compelling those who can support those who are unable to support themselves but have a moral

claim for support. - aims to provide a speedy remedy to the women, children and destitute parents who are in distress.(Para -12)

An application under Section 125 moved by the opposite party no. 2 (wife) - order passed, allowing the said application - directing payment of maintenance - breach of the aforesaid order - an application*(paper no. 14 kha)* under Section 125(3) was moved by the opposite party no. 2, upon which the order dated 18.11.2019, has been passed - applicant herein claims to have filed an application dated 6.1.2020 *(paper no. 17 kha)* for recall of the said order and the said application is stated to be pending.(Para - 3,5)

HELD:- The liability to pay maintenance under Section 125 Cr.P.C. being in the nature of continuing liability; accordingly, in case of a default in complying with an order passed under Section 125(1) for payment of maintenance or for any breach thereof, the invocation of the exercise of power under Section 125(3) by the Magistrate, cannot be faulted with - In the event the applicant has made any payment in respect of arrears of maintenance, as claimed by him, and in regard to which, he has filed a recall application *(paper no. 17 kha)*, it is always open to him to pursue the aforesaid application before the court below.(Para -15,16)

Application u/s 482 Cr.P.C. dismissed. (E-6)

List of Cases cited:-

1. Shantha & ors. Vs B.G. Shivananjappa , (2005) 4 SCC 468

2. Poongadi & ors. vs Thangavel , (2013) 10 SCC 618

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

1. Heard Sri Virpratap Singh, learned counsel for the applicant and Sri Vinod Kant, learned Additional Advocate General, assisted by Sri Arvind Kumar, learned A.G.A., for the State- opposite party no.1.

2. The present application has been filed seeking to quash the order dated 18.11.2019 passed by Principal Judge, Family Court, Mahoba, as well as entire proceedings of Case No. 189 of 2019 (Smt. Uma Devi vs. Alakhram), stated to be pending before Family Court, Mahoba.

3. The aforementioned order dated 18.11.2019 has been passed upon an application *(paper no. 14 kha)* under Section 125(3) Cr.P.C. The applicant herein claims to have filed an application dated 6.1.2020 *(paper no. 17 kha)* for recall of the said order and the said application is stated to be pending.

4. Learned Additional Advocate General has raised an objection with regard to the maintainability of the present application filed under Section 482 Cr.P.C. on the ground that the order dated 18.11.2019 passed by the Family Court is in exercise of powers under Section 125(3) Cr.P.C. on account of default made by the applicant in complying with the earlier order dated 20.10.2016 directing payment of maintenance to the opposite party no. 2, and that the applicant having already filed a recall application before the court below, and the court below being seized with the matter, it is open to the applicant to pursue the matter before the family court.

5. The admitted facts of the case are that in proceedings under Section 125 initiated upon an application moved by the opposite party no. 2 (wife), an order dated 20.10.2016 was passed, allowing the said application and directing payment of maintenance. Alleging breach of the aforesaid order, an application under Section 125(3) was moved by the opposite party no. 2, upon which the order dated 18.11.2019, has been passed.

6. In order to appreciate the controversy in the present case, the relevant statutory provisions may be adverted to.

7. Section 125 Cr.P.C. falls under Chapter IX of the Code of Criminal Procedure, 1973 and it contains provisions whereunder, an order for maintenance of wives, children and parents can be made. The object of the provisions contained under Chapter IX is to provide a speedy and effective remedy against persons, who neglect or refuse to maintain their dependant wives, children and parents.

8. The provisions contained under Section 125 Cr.P.C., as they stand today, are extracted below :-

125. Order for maintenance of wives, children and parents.-

(1) If any person having sufficient means neglects or refuses to maintain-

(a) his wife, unable to maintain herself, or

(b) his legitimate or illegitimate minor child, whether married or not, unable to maintain itself, or

(c) his legitimate or illegitimate child (not being a married daughter) who has attained majority, where such child is, by reason of any physical or mental abnormality or injury unable to maintain itself, or

(d) his father or mother, unable to maintain himself or herself, a Magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, father or mother, at such monthly rate, as such Magistrate thinks fit, and to pay the same to such person as the Magistrate may from time to time direct: Provided that the Magistrate may order the father of a minor female child referred to in clause (b) to make such allowance, until she attains her majority, if the Magistrate is satisfied that the husband of such minor female child, if married, is not possessed of sufficient means :

Provided further that the Magistrate may, during the pendency of the proceeding regarding monthly allowance for the maintenance under this sub- section, order such person to make a monthly allowance for the interim maintenance of his wife or such child, father or mother, and the expenses of such proceeding which the Magistrate considers reasonable, and to pay the same to such person as the Magistrate may from time to time direct:

Provided also that an application for the monthly allowance for the interim maintenance and expenses for proceeding under the second proviso shall, as far as possible, be disposed of within sixty days from the date of the service of notice of the application to such person.

Explanation.- For the purposes of this Chapter,-

(a) " minor" means a person who, under the provisions of the Indian Majority Act, 1875 (9 of 1875); is deemed not to have attained his majority;

(b) " wife" includes a woman who has been divorced by, or has obtained a divorce from, her husband and has not remarried.

(2) Any such allowance for the maintenance or interim maintenance and expenses of proceeding shall be payable from the date of the order, or, if so ordered, from the date of the application for maintenance or interim maintenance and expenses of proceeding, as the case may be.

(3) If any person so ordered fails without sufficient cause to comply with the order, any such Magistrate may, for every

breach of the order, issue a warrant for levying the amount due in the manner provided for levying fines, and may sentence such person, for the whole, or any part of each month's allowance for the maintenance or the interim maintenance and expenses of proceeding, as the case may be, remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to one month or until payment if sooner made:

Provided that no warrant shall be issued for the recovery of any amount due under this section unless application be made to the Court to levy such amount within a period of one year from the date on which it became due:

Provided further that if such person offers to maintain his wife on condition of her living with him, and she refuses to live with him, such Magistrate may consider any grounds of refusal stated by her, and may make an order under this section notwithstanding such offer, if he is satisfied that there is just ground for so doing.

Explanation.- If a husband has contracted marriage with another woman or keeps a mistress, it shall be considered to be just ground for his wife' s refusal to live with him.

(4) No Wife shall be entitled to receive an allowance for the maintenance or the interim maintenance and expenses of proceeding, as the case may be, from her husband under this section if she is living in adultery, or if, without any sufficient reason, she refuses to live with her husband, or if they are living separately by mutual consent.

(5) On proof that any wife in whose favour an order has been made under this section is living in adultery, or that without sufficient reason she refuses to live with her husband, or that they are living separately by mutual consent, the Magistrate shall cancel the order."

9. The procedure for enforcement of an order passed under Section 125 Cr.P.C. with regard to maintenance, is provided for under sub-section (3) of Section 125. A perusal of the provisions contained under Section 125(3) indicates that if any person ordered to pay monthly allowance for maintenance under Section 125(1) fails without sufficient cause to comply with the order, the Magistrate is empowered for every breach of the order to issue a warrant for levying the amount due in the manner provided for levying fines, and is further empowered to sentence such person, for the whole, or any part of each month's allowance for the maintenance or the interim maintenance and expenses of proceeding, as the case may be, remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to one month or until payment if sooner made.

10. The proceedings for maintenance under Section 125 Cr.P.C. are of a summary nature and the purpose and object of the same is to provide immediate relief to the applicant. The object of the provision being to prevent vagrancy and destitution, the hardship faced by the wife in having to wait for several years before being granted maintenance, was taken note of in the Statement of Objects and Reasons of the Code of Criminal Procedure (Amendment) Act, 20011 [w.e.f. 24.9.2001] whereunder, the provision relating to interim maintenance allowance was introduced.

11. In terms of the Amendment Act, 2001, the word 'allowance' occurring in sub-section (3) of Section 125 Cr.P.C. has been given a wider meaning, so as to mean

"allowance for the maintenance or the interim maintenance and expenses of proceeding."

12. Section 125 of the Code of Criminal Procedure, has been enacted to achieve a social purpose with the primary object to render social justice to the woman, child and infirm parents so as to prevent destitution and vagrancy compelling those who can support those who are unable to support themselves but have a moral claim for support. It aims to provide a speedy remedy to the women, children and destitute parents who are in distress.

13. In **Shantha and Ors. vs B.G. Shivananjappa**2, Section 125 Cr.P.C. has been held to be a measure of social legislation which has to be construed liberally for the welfare and benefit of the persons referred therein and the liability to pay the maintenance as per the order passed under Section 125(1) has been held to be a continuing liability.

14. The provisions contained under Section 125(3) and the first proviso thereto came up for consideration in **Poongadi and Ors. vs Thangavel**3, and it was held that the proviso to Section 125(3) signifies that it is a mode of enforcement and does not create any bar or affects rights to claim arrears of maintenance. It lays down the procedure for recovery of maintenance by construing maintenance to be a levy of fine.

15. The liability to pay maintenance under Section 125 Cr.P.C. being in the nature of continuing liability; accordingly, in case of a default in complying with an order passed under Section 125(1) for payment of maintenance or for any breach thereof, the invocation of the exercise of power under Section 125(3) by the Magistrate, cannot be faulted with.

16. In the case at hand, in the event the applicant has made any payment in respect of arrears of maintenance, as claimed by him, and in regard to which, he has filed a recall application *(paper no. 17 kha)*, it is always open to him to pursue the aforesaid application before the court below.

17. With the aforesaid observations, the present application filed under Section 482 Cr.P.C. stands dismissed.

(2021)02ILR A601
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 08.01.2021

BEFORE

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

Application U/S 482 Cr.P.C. No. 19612 of 2020

Mithilesh Maurya ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Aradhana Singh, Sri Moti Lal Yadav

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

(A) Criminal Law - Code of Criminal Procedure, 1973 - Section 125 - Order for maintenance of wives, children and parents - Object - To provide a speedy and effective remedy against persons, who neglect or refuse to maintain their dependant wives, children and parents - proceedings for maintenance under Section 125 Cr.P.C. are of a summary nature. (Para - 6,13)

Present application filed , seeks quashing of an order passed by the Additional Principal Judge, Family Court , filed under Section 125 of Cr.P.C. - order which is sought to be quashed, the application *(paper no. 18Kha)* filed by the opposite party no.2 seeking interim maintenance, has been allowed.(Para -2,3)

HELD:- An order granting interim maintenance is subject to final adjudication on the main petition and the interim maintenance granted during the pendency of the proceedings is only a provisional maintenance subject to final determination to be made on the conclusion of the proceedings. **T**his Court is not inclined to exercise its inherent jurisdiction under Section 482 of the Code of Criminal Procedure, 1973, in respect of the reliefs prayed for.(Para - 19,20)

Application u/s 482 Cr.P.C. dismissed. (E-6)

List of Cases cited:-

1. Bhuwan Mohan Singh Vs. Meena & ors. , (2015) 6 SCC 353

2. Smt. Dukhtar Jahan Vs Mohammed Farooq , (1987) 1 SCC 624

3. Vimala (K.) Vs Veeraswamy (K.) , (1991) 2 SCC 375

4. Kirtikant D. Vadodaria Vs St. of Guj. , (1996) 4 SCC 479

5. Smt. Dukhtar Jahan Vs Mohammed Farooq , (1987) 1 SCC 624

6. Vimala (K.) Vs Veeraswamy (K.) , (1991) 2 SCC 375

7. Kirtikant D. Vadodaria Vs St. of Guj. , (1996) 4 SCC 479

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

1. Heard Sri Moti Lal, learned counsel for the applicant and Sri Vinod Kant, learned Additional Advocate General, assisted by Sri Arvind Kumar, learned A.G.A., for the State-opposite party no.1.

2. The present application filed under Section 482 Cr.P.C., seeks quashing of an order dated 15.10.2020, passed by the Additional Principal Judge, Family Court No. 1, Azamgarh, in proceedings in Case No. 56 of 2018 (Drumlata Maurya vs. Mithlesh Maurya) filed under Section 125 of Cr.P.C., Police Station- Deedarganj, District Azamgarh.

3. In terms of the order dated 15.10.2020, which is sought to be quashed, the application *(paper no. 18Kha)* filed by the opposite party no.2- Smt. Drumlata Maurya, seeking interim maintenance, has been allowed.

4. Learned Additional Advocate General appearing for the State respondents, has raised an objection with regard to the maintainability of the present petition on the ground that the order dated 15.10.2020, which is sought to be challenged, relates to grant of interim maintenance, which is subject to final adjudication on the main petition filed under Section 125 Cr.P.C. It is submitted that it is open to the applicant to raise all his objections before the Family Court, and the present application under Section 482 Cr.P.C., is not liable to be entertained.

5. In order to appreciate rival contentions, the relevant statutory provisions relating to maintenance of wives, children and parents under the Code of Criminal Procedure, 1973, may be referred to.

6. Section 125 Cr.P.C. falls under Chapter IX of the Code of Criminal Procedure, 1973 and it contains provisions whereunder, an order for maintenance of wives, children and parents can be made. The object of the provisions contained under Chapter IX is to provide a speedy and effective remedy against persons, who neglect or refuse to maintain their dependant wives, children and parents.

7. The provisions contained under Section 125 Cr.P.C., as they stand today, are extracted below :-

125. Order for maintenance of wives, children and parents.-

(1) If any person having sufficient means neglects or refuses to maintain-

(a)his wife, unable to maintain herself, or

(b) his legitimate or illegitimate minor child, whether married or not, unable to maintain itself, or

(c) his legitimate or illegitimate child (not being a married daughter) who has attained majority, where such child is, by reason of any physical or mental abnormality or injury unable to maintain itself, or

(d) his father or mother, unable to maintain himself or herself, a Magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, father or mother, at such monthly rate, as such Magistrate thinks fit, and to pay the same to such person as the Magistrate may from time to time direct: Provided that the Magistrate may order the father of a minor female child referred to in clause (b) to make such allowance, until she attains her majority, if the Magistrate is satisfied that the husband of such minor female child, if married, is not possessed of sufficient means :

Provided further that the Magistrate may, during the pendency of the proceeding regarding monthly allowance for the maintenance under this sub- section, order such person to make a monthly allowance for the interim maintenance of his wife or such child, father or mother, and the expenses of such proceeding which the Magistrate considers reasonable, and to pay the same to such person as the Magistrate may from time to time direct:

Provided also that an application for the monthly allowance for the interim maintenance and expenses for proceeding under the second proviso shall, as far as possible, be disposed of within sixty days from the date of the service of notice of the application to such person.

Explanation.- For the purposes of this Chapter,-

(a) " minor" means a person who, under the provisions of the Indian Majority Act, 1875 (9 of 1875); is deemed not to have attained his majority;

(b) " wife" includes a woman who has been divorced by, or has obtained a divorce from, her husband and has not remarried.

(2) Any such allowance for the maintenance or interim maintenance and expenses of proceeding shall be payable from the date of the order, or, if so ordered, from the date of the application for maintenance or interim maintenance and expenses of proceeding, as the case may be.

(3) If any person so ordered fails without sufficient cause to comply with the order, any such Magistrate may, for every breach of the order, issue a warrant for levying the amount due in the manner provided for levying fines, and may sentence such person, for the whole, or any part of each month's allowance for the maintenance or the interim maintenance and expenses of proceeding, as the case may be, remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to one month or until payment if sooner made:

Provided that no warrant shall be issued for the recovery of any amount due under this section unless application be made to the Court to levy such amount

within a period of one year from the date on which it became due:

Provided further that if such person offers to maintain his wife on condition of her living with him, and she refuses to live with him, such Magistrate may consider any grounds of refusal stated by her, and may make an order under this section notwithstanding such offer, if he is satisfied that there is just ground for so doing.

Explanation.- If a husband has contracted marriage with another woman or keeps a mistress, it shall be considered to be just ground for his wife' s refusal to live with him.

(4) No Wife shall be entitled to receive an allowance for the maintenance or the interim maintenance and expenses of proceeding, as the case may be, from her husband under this section if she is living in adultery, or if, without any sufficient reason, she refuses to live with her husband, or if they are living separately by mutual consent.

(5) On proof that any wife in whose favour an order has been made under this section is living in adultery, or that without sufficient reason she refuses to live with her husband, or that they are living separately by mutual consent, the Magistrate shall cancel the order."

8. The second proviso to Section 125 Cr.P.C. was inserted by the Code of Criminal Procedure (Amendment) Act, 20011 [w.ef. 24.9.2001] and in terms thereof, the Magistrate may, during the pendency of the proceedings regarding monthly allowance for the maintenance under sub-section (1) of Section 125, order such person to make a monthly allowance for the interim maintenance of his wife or his child, father or mother and the expenses of such proceeding, which the Magistrate considers reasonable, and to pay the same to such person as the Magistrate may from time to time direct.

9. In terms of the third proviso, an application for the monthly allowance for the interim maintenance and expenses of proceeding under the second proviso shall, as far as possible, be disposed of within sixty days from the date of the service of notice of the application to such person.

10. The aforementioned provision with regard to interim maintenance was inserted taking into consideration that an applicant, after filing application in a Court under Section 125 Cr.P.C., had to wait for several years for getting relief from the Court and for the said reason, the provision for grant of interim maintenance was considered necessary to obviate the difficulties.

11. The Statement of Objects and Reasons appended to the Bill in terms of which the amendment was made, reads as follows :-

"It has been observed that an applicant, after filing application in a court under section 125 of the Code of Criminal Procedure, 1973, has to wait for several years for getting relief from the Court. It is, therefore, felt that express provisions should be made in the said Code for interim maintenance allowance to the aggrieved person under said section 125 of the Code. Accordingly, it is proposed that during the pendency of the proceedings, the Magistrate may order payment of interim maintenance allowance and such expenses of the proceedings as the Magistrate considers reasonable, to the aggrieved person. It is also proposed that this order be

made ordinarily within sixty days from the date of the service of the notice."

12. Chapter IX of the Code of Criminal Procedure, 1973 contains provisions for making orders for maintenance of wives, children and parents. The subject matter of the provisions contained under the chapter though essentially of a civil nature, the justification for their inclusion in the Cr.P.C., is to provide a more speedy and economical remedy than that available in civil courts for the benefit of the persons specified therein. The provision for grant of interim maintenance in terms of the second proviso to Section 125 Cr.P.C. is for providing a simple and speedy remedy, and to ensure that the neglected wife, children and parents are not left destitute and without any means for subsistence.

13. The proceedings for maintenance under Section 125 Cr.P.C. are of a summary nature and the purpose and object of the same is to provide immediate relief to the applicant. An application under Section 125 Cr.P.C. can be moved by the wife on fulfilment of two conditions :- a) the husband has sufficient means and; (b) he neglects or refuses to maintain his wife, who is unable to maintain herself. The Magistrate, in such a case, may direct the husband to pay such monthly sum of the money, as deemed fit taking into consideration the financial capacity of the husband and other relevant factors.

14. The object of the provision being to prevent vagrancy and destitution, the hardship faced by the wife in having to wait for several years before being granted maintenance, was taken note of in the Statement of Objects and Reasons of the Amendment Act, 2001 and an express provision was introduced for grant of interim maintenance. In terms of the second proviso inserted by means of Amendment Act, 2001 the Magistrate has been vested with the power to order the husband to make a monthly allowance towards interim maintenance during the pendency of the proceedings.

15. The third proviso of Section 125 mandates that the application for grant of interim maintenance must be disposed of as far as possible within 60 days from the date of service of notice of the application on the husband.

16. The provisions with regard to grant of maintenance under Section 125 Cr.P.C. and the duty of the husband towards the wife in regard thereof, came up for consideration in the case of **Bhuwan Mohan Singh vs. Meena & others**2, and referring to the earlier decisions in **Smt. Dukhtar Jahan v. Mohammed Farooq3, Vimala (K.) v. Veeraswamy (K.)4 and Kirtikant D. Vadodaria v. State of Gujarat**5 it was held that the proceedings are summary in nature and they intend to provide a speedy remedy and achieve a social purpose. The observations made in the judgement in this regard are as follows :-

"7. We are obliged to reiterate the principle of law how a proceeding under Section 125 of the Code has to be dealt with by the court, and what is the duty of a Family Court after establishment of such courts by the Family Courts Act 1984. In *Smt. Dukhtar Jahan v. Mohammed Farooq (1987) 1 SCC 624*, the Court opined that: (SCC p. 631, para 16)

"16. .....Proceedings under Section 125 of the Code, it must be remembered, are of a summary nature and

are intended to enable destitute wives and children, the latter whether they are legitimate or illegitimate, to get maintenance in a speedy manner."

8. A three-Judge Bench in *Vimala (K.) v. Veeraswamy (K.) (1991) 2 SCC 375*, while discussing about the basic purpose under Section 125 of the Code, opined that: (SCC p. 378, para 3)

"3. Section 125 of the Code of Criminal Procedure is meant to achieve a social purpose. The object is to prevent vagrancy and destitution. It provides a speedy remedy for the supply of food, clothing and shelter to the deserted wife.

9. A two-Judge Bench in *Kirtikant D. Vadodaria v. State of Gujarat (1996) 4 SCC 479*, while adverting to the dominant purpose behind Section 125 of the Code, ruled that: (SCC p. 489, para 15)

"15. ... While dealing with the ambit and scope of the provision contained in Section 125 of the Code, it has to be borne in mind that the dominant and primary object is to give social justice to the woman, child and infirm parents etc. and to prevent destitution and vagrancy by compelling those who can support those who are unable to support themselves but have a moral claim for support. The provisions in Section 125 provide a speedy remedy to those women, children and destitute parents who are in distress. The provisions in Section 125 are intended to achieve this special purpose. The dominant purpose behind the benevolent provisions contained in Section 125 clearly is that the wife, child and parents should not be left in a helpless state of distress, destitution and starvation."

17. It is, therefore, seen that Section 125 Cr.P.C. is in the nature of a benevolent provision having a social purpose with the primary object to ensure social justice to the wife, child and parents, who are unable to support themselves so as to prevent destitution and vagrancy.

18. The third proviso to Section 125 Cr.P.C. gives a timeframe by providing that the proceedings for interim maintenance, shall, as far as possible, be disposed of within 60 days' from the date of service of notice on the husband. This is in conformity with the object of the provision, which is in the nature of a social legislation providing for a summary and speedy relief by way of grant of maintenance to a wife, who is unable to maintain herself and her children.

19. An order granting interim maintenance is subject to final adjudication on the main petition and the interim maintenance granted during the pendency of the proceedings is only a provisional maintenance subject to final determination to be made on the conclusion of the proceedings.

20. Having regard to the aforesaid, this Court is not inclined to exercise its inherent jurisdiction under Section 482 of the Code of Criminal Procedure, 1973, in respect of the reliefs prayed for.

21. Counsel for the applicant at this stage, makes a prayer that he may be permitted to withdraw the present application and states that applicant would contest the proceedings before the court below.

22. The present application filed under Section 482 Cr.P.C. stands, accordingly, dismissed.

(2021)02ILR A607
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 21.01.2021

BEFORE

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

Application U/S 482 Cr.P.C. No. 25059 of 2019

Ashok Ram Dular Vishwakarma @ Ashok Kumar Vishwakarma ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Ram Manohar Mishra, Smt. Ushma Mishra, Ms. Monika Jaiswal, Sri Sarveshwari Prasad

Counsel for the Opposite Parties:
A.G.A., Sri Ganesh Shanker Srivastava, Sri Om Prakash Kannaujia

(A) Criminal Law - Negotiable Instrument Act - Sections 118 - Presumptions as to negotiable instruments , Sections 138 - Dishonour of cheque for insufficiency, etc., of funds in the account , Sections 139 - Presumption in favour of holder - Complainant being holder of cheque and the signature appended on the cheque having not been denied by the Bank - presumption shall be drawn that cheque was issued for the discharge of any debt or other liability - Presumption under Section 139 is a rebuttable presumption (Para - 13)

Present matter relates to dishonour of cheque - accused-applicant caused wrongful loss to the complainant - failed to make payment of cheques as demanded by the legal notice - hence a case for the offence punishable under Section 138 N.I. Act is made out against him - Application filed for quashing the summoning order as well as the entire proceedings of the Complaint Case under Section 138 of Negotiable Instrument Act, pending in the Court of Additional Chief Judicial Magistrate.

HELD:- This Court does not deem it proper to have a pre-trial before the actual trial begins . The perusal of the complaint case filed by opposite party no.2 and the statements of the complainant and her witnesses under Sections 200 and 202 Cr.P.C. makes out a prima facie case against the accused at this stage and there appear to be sufficient ground for proceeding against the accused. No justification to quash the summoning order and the entire proceedings of the aforesaid complaint case initiated against the applicant.(Para -33)

Application u/s 482 Cr.P.C. rejected. (E-6)

List of Cases cited:-

1. Kali Ram Vs St. of H.P. , (1973) 2 SCC 808

2. Bharat Barrel & Drum Manufacturing Company Vs Amin Chand Pyarelal , (1999) 3 SCC 35

3. M.S. Narayana Menon @ Mani Vs St. of Kerala & anr. , (2006) 6 SCC 39

4. Krishna Janardhan Bhat Vs Dattatraya G. Hegde , (2008) 4 SCC 54

5. Kumar Exports Vs Sharma Carpets , (2009) 2 SCC 513

6. Rangappa Vs Sri Mohan , (2010) 11 SCC 441

7. Dashrath Rupsingh Rathod Vs St. of Mah. , MANU/SC/0655/2014

8. R.P. Kapur Vs. St. of Punj. , AIR 1960 SC 866

9. St. of Har. & ors. Versus Ch. Bhajan Lal & ors. , 1992 Supp.(1) SCC 335

10. St.of Bihar & anr. Vs. P.P. Sharma & anr. , 1992 Supp (1) SCC 222

11. Zandu Pharmaceuticals Works Ltd. & ors. Vs. Mohammad Shariful Haque & anr. , 2005 (1) SCC 122

12. M. N. Ojha Vs Alok Kumar Srivastava , 2009 (9) SCC 682

13. Mohd. Allauddin Khan Vs The St. of Bihar & ors. , 2019 0 Supreme (SC) 454

14. Nallapareddy Sridhar Reddy Vs The St. of A.P. & ors. , 2020 0 Supreme (SC) 45

15. Rajeev Kaurav Vs Balasahab & ors. , 2020 0 Supreme (SC) 143

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

1. This application U/S 482 Cr.P.C. has been filed for quashing the summoning order dated 13th March, 2019 as well as the entire proceedings of the Complaint Case No. 14 of 2019 (Smt. Gyan Devi Vs. Ashok Ram Dular Vishwakarma) under Section 138 of Negotiable Instrument Act, Police Station-Aurai, District-Bhadohi, pending in the Court of Additional Chief Judicial Magistrate, Bhadohi, Gyanpur. Further it has been prayed that during the pendency of the present application, the further proceedings of the aforesaid criminal case be stayed.

2. On 28th June, 2019, a Coordinate Bench of this Court passed following order:

"Heard learned counsel for the applicant and learned A.G.A. for the State.

It is submitted by learned counsel for the applicant that the present matter relates to dishonour of cheque and the said matter can be well considered by Mediation Centre of this Court.

It is directed that applicant shall deposit a sum of Rs. 15,000/- within two weeks from today with the Mediation Centre of which 50% shall be paid to the opposite party no. 2 for appearance before the Mediation Centre.

The matter is remitted to the Mediation Centre with the direction that same may be decided after giving notices to both the parties.

It is directed that Mediation Centre shall decide the matter expeditiously preferably within a period of three months. Thereafter the case shall be listed before appropriate Bench in the second week of September, 2019.

Till the next date of listing, arrest of the applicant in Complaint Case No.14 of 2019, (Smt. Gyan Devi Vs. Ashok Ram Dular Vishwakarma), under Section 138 of Negotiable Instrument Act, Police Station Auraiya, District Bhadhoi, pending in the Court of the Additional Chief Judicial Magistrate, Bhadohi, Gyanpur, shall be kept in abeyance.

After depositing the amount, aforesaid, notice shall be issued to the parties and in the case the aforesaid amount is not deposited within the aforesaid period, the interim protection granted above shall automatically be vacated."

3. On 3rd September, 2020, this Bench passed following order:

"A mention has been made by Ms. Monika Jaiswal, Advocate holding brief of Smt. Ushma Mishra, learned counsel for the applicant to pass over the case.

Learned counsel for the opposite party no.2 states that on 28.06.2019, the matter was referred to Mediation Centre, however, the mediation between the parties has failed as is also clear from the Mediation Report dated 04.12.2019. Learned counsel for the opposite party no.2 further states that he has served a copy of counter affidavit to the learned counsel for the applicant on 09.12.2019.

Two weeks' time is granted to the learned counsel for the applicant to file rejoinder affidavit.

Put up on 18th September, 2020 in the additional cause list.

Interim order, if any, is extended till the next date of listing.

It is made clear that on the next date, the case will not be adjourned on any ground."

On 3rd November, 2020, following order was passed by this Bench:

"By order dated 28.06.2019, matter was referred to Mediation Centre.

As per the report of Mediation Centre dated 04.12.2019, mediation has failed, after which, matter was listed on 03.09.2020. However, a mention was made on behalf of Smt. Ushma Mishra on that date to pass over the case for the day and two weeks' time was granted to the learned counsel for the applicant to file rejoinder affidavit and it was made clear that on the next date, the case will not be adjourned on any ground and the matter was posted for 18th September, 2020.

On 29.09.2020 again a request was made for further time on behalf of the applicant to file rejoinder affidavit and two weeks' further time was granted to file rejoinder affidavit.

Mr. Sarveshwari Prasad, Advocate informs that he has been instructed by the husband of Smt. Ushma Mishra, learned counsel for the applicant to get the matter adjourned. Counsel is standing here and requesting for adjournment without the file and is not aware of the earlier orders as well as brief facts of the case.

Learned counsel for opposite party no. 2 has pointed out that on earlier occasions also just to linger on the matter, a request has been made on behalf of the applicant to pass over the case.

In such a situation, though the case is passed over but the interim order granted earlier on 28.06.2019 stands vacated.

The concerned court below may proceed with the case in accordance with law.

List this matter on 25th November, 2020. "

4. This Bench heard Mr. Sarveshwari Prasad, Advocate assisted by Mrs. Ushma Mishra, learned counsel for the applicant, Sri Ganesh Shanker Srivastava, learned counsel for complainant/opposite party no.2 and Mr. Pankaj Srivastava, learned A.GA. for the State as well as perused the entire material available on record.

5. The relevant facts, as are borne out from the records of the present application are as follows:

"A complaint case has been moved by opposite party no.2, namely, Mrs. Gyan Devi Brijlal Bharti on on 3rd January, 2019 before the Court of Additional Chief Judicial Magistrate, Bhadohi at Gyanpur under Section 138 of the Negotiable Instruments Act, 1881 (hereinafter referred to as the "N.I. Act"). In the said complaint case, it has been alleged by the complainant that the accused-applicant was running a business in the name and style of "M/s. Vishwakarma Dish Ends Work" (for short "firm"), which was a partnership firm having its address at 81-B, General Block, MIDC, Bhosari, Pune. The accused-applicant was also running another business in the name and style of " M/s. Proficient Industries India Private Ltd." (for short "company") at the aforesaid place, which was a private limited company. The accused-applicant was a partner of the said

firm and company having the post of Director and another partner of the said firm and company was Mr. Phunairam Chandrikaprasad Vishwakarma. The accused-applicant needed money to expand his business. The complainant being family friend was well known to the accused-applicant. The accused-applicant approached the complainant and requested her to invest money in the business of the aforesaid firm/company. The accused-applicant assured the complainant that if she invested Rs. 80,00,000/- (rupees eighty lacs only) in the said firm, he would make her co-partner in the said firm and give her 50% of the profit of the said firm on yearly basis. Apart from the above, the accused-applicant also assured the complainant that he will give her 25% share in the land which was owned by the said firm and 25% profit of every financial year of the said firm. The complainant was also assured by the accused-applicant that entire investment made by the complainant will also be refunded to her without any deduction at the time of her retirement from the said company. On believing the aforesaid proposal and assurance given by the accused-applicant, the complainant invested Rs. 80,00,000/- in the said company through the accused-applicant for the month September, 2013 to July, 2016. In the meantime, the business of the said firm was heavily affected, therefore, all the transactions and work of the said firm was stopped thereafter. Henceforth, the accused-applicant assured the complainant that she should have no worry, as he will include her name as director of the said company and ultimately on 8th November, 2016, the accused-applicant included her name as director of the said company for which a Memorandum of Understanding dated 17th August, 2017 was introduced, which was duly signed by the complainant and accused-applicant. The said memorandum of understanding was also notarized by Advocate and Notary, namely, Mr. Bhalachandra Anandrao Patil on 17th August, 2017.

It has further been alleged in the aforesaid complaint that due to financial hardship faced by the said company for the year 2016-2017, the accused-applicant also promised the complainant that he would pay her Rs. 1,00,000/- (rupees one lac only) per month from April, 2016 but the accused-applicant failed to pay the aforesaid money. Further the accused-applicant was not loyal in disclosing the day to day working towards complainant, hence she used to request the accused-applicant to disclose the books of accounts, balance-sheet, profit but he always refused to disclose the same to her and also used to abuse her with wrong words. The accused-applicant had also refused to give 25% share in the land of the firm and value of the machinery of the said firm, due to which a dispute was arisen between the complainant and accused-applicant. Thereafter due to non-fulfillment of the terms and conditions of the memorandum of understanding so introduced between them, the complainant threatened the accused-applicant that she will file police complaint against him and she will also go to the court for the wrongful acts and cheating done by him.

It has further been alleged that for settling the disputes, which had arisen between the accused-applicant and the complainant, the accused-applicant promised the complainant that he will return initially investment of Rs. 80,00,000/-. He further promised her that he will also pay Rs. 87,00,000/- towards shares against the investment made by the complainant to the accused-applicant. In consideration of profit, four cheques

bearing nos. 041564 dated 7th September, 2018, 041565 dated 14th September, 2018, 041566 dated 21st September, 2018 and 041567 dated 28th September, 2018m amounting to Rs. 80,00,000/- drawn on Dena Bank, Bhosari Branch-Pune, which had been duly signed by the accused-applicant, were issued in favour of the complainant and he also requested the complainant to deposit the same in her bank accounts for withdrawal. It is also alleged that the accused-complainant accepted his legal liability of Rs. 87,00,000/- to complainant towards legal debt and for the said liability, the accused-applicant issued and handed over various cheques amounting to Rs. 87,00,000/- to complainant for discharging his legal liability to the complainant. On 21st October, 2018, the complainant deposited the aforesaid four cheques, which were issued by the accused-applicant, in Kashi Gomti Sanyukt Gramin Bank, Branch-Ugapur, District Bhadohi, wherein the saving bank account of the complainant was maintained, for withdrawal of the money, but same have been dishonoured and returned from her bank with a remark "FUNDS INSUFFICIENT" as on 31st October, 2018 and an intimation of the same has duly been received by the complainant on 16th November, 2018 from her Bank. Thereafter the complainant had issued legal notice to the accused-applicant through her Advocate on 22nd November, 2018 at his official address i.e. 81-B/11, General Block, MIDC, Bhosari, Pune-411026, which has also been received on 26th November, 2018. A notice has also been sent to the accused-applicant at his residential address i.e. Negla Pagaria Plaza, Flat No. 43, Pune Nashik Road Bhosari, Pune-411039, which has been returned with a remark "unclaimed" R/S dated 10th December, 2018. It is further alleged that despite the aforesaid legal notice, the accused-applicant has not made any payment to the complainant in respect of aforesaid dishonoured cheques. Therefore such intention of the accused-applicant is to commit and perpetuate a fraud upon the complainant and indulge into cheating and criminal misappropriation. The accused-applicant caused wrongful loss to the complainant. The accused-applicant has failed to make payment of cheques as demanded by the legal notice, hence a case for the offence punishable under Section 138 N.I. Act is made out against him.

After filing of the aforesaid complainant in the court of Additional Chief Judicial Magistrate, Bhadohi at Gyanpur under Section 138 N.I. Act, complainant/opposite party no.2 filed an affidavit under Section 200 Cr.P.C. on 2nd January, 2019. Thereafter, witnesses, namely, Devashish Bharti and Sant Lal, in support of the aforesaid complaint, have also filed their affidavits under Section 202 Cr.P.C. on 28th January, 2019. The said complaint case has been registered as Complaint Case No. 14 of 2019 (Smt. Gyan Devi Vs. Ashok Ram Dular Vishwakarma) under Section 138 of Negotiable Instrument Act, Police Station-Aurai, District-Bhadohi, pending in the Court of Additional Chief Judicial Magistrate, Bhadohi, Gyanpur. Considering the complaint and the affidavits of the complainant and her witnesses under Sections 200 and 202 Cr.P.C. respectively, the concerned Magistrate has taken cognizance and summoned the applicant to face trial under Section 138 N.I. Act vide order dated 13th March, 2019. It is against the summoning order dated 13th March, 2019 as well as the entire proceedings of the aforesaid complaint case that the present application under Section 482 Cr.P.C. has been filed.

It is the case of the applicant that complainant/opposite party no.2 has also filed a complaint under Section 138 N.I. Act on 6th December, 2018 at Pune (Maharashtra) in the court of Judicial Magistrate, First Class-Pinpri at Pinpri for dishonour of cheque of the accused-applicant issued in favour of the complainant for a sum of Rs. 7,00,000/- (rupees Seven lacs only). The applicant has also filed a civil suit on 30th April, 2019 in the court of Civil Judge (Senior Division), Pune seeking a direction upon the complainant/opposite party no.2 to pay the amount of Rs. 38 lacs to the accused-applicant at the rate of 18% per annum, a copy of the plaint dated 30th April, 2019 has been enclosed as Annexure-6 to the affidavit accompanying the present application.

6. Following contentions have been raised on behalf of the applicants:

I. The applicant had cordial relations with opposite party no.2 and in the guise of investment, she had tried by way of investment to interfere not only in the business of the applicant but also demanded 25% in the land and values of the machinery of M/s. Vishwakarma Dish Ends Work and M/s. Proficient Industries (India) Pvt. Ltd. both situated at 81-B, General Block, MIDC BHOSARI, Pune-411026.

II. Even though the amount is not contested but it may be reverted by the statement of Mr. Devashish Bharti as well as Shiv Lal in the statements filed under Section 202 Cr.P.C. Opposite party no.2 has been continuously threatening that she will file police complaint and will go to the courts of law, even after receiving the amount due from the applicant between the period 7th March, 2018 to 10th August, 2018.

III. Opposite party no.2 filed the *res judicata* proceedings in Complaint Case No. 14 of 2019 before the Additional Chief Judicial Magistrate, Bhadohi at Gyanpur, U.P. on 3rd January, 2019 on false, frivolous and mala fide allegations that on the assurance of the applicant, opposite party no.2 has agreed to invest a sum of Rs. 80,00,000/- from the month of September, 2013 to July, 2016.

IV. Opposite party no.2 had threatened the applicant to return not only the principle amount due but also added Rs. 7 lacs over and above the principle amount (which has already been paid) to which a parallel proceedings were initiated by her against the applicant by means of Complaint Case No. 2917 of 2018 before the Judicial Magistrate, First Class Pimpri at Pimpri, Pune (Maharashtra).

V. Prior to even establishing the right to recovery from the cheques in contention, it is disclosed that the entire amount of Rs. 80 lacs had already been paid to opposite party no.2 by the applicant through four cheques i.e. (i) cheque no. 111185 amounting to Rs. 14,00,000/-, (ii) cheque no. 36963 amounting to Rs. 25,00,000/-, cheque no. 36974 amounting to Rs. 16,00,000/- and cheque no. 123523 amounting to Rs. 25,00,000/-, which were issued from Dena Bank.

(VI) The agreement in the form of memorandum of understanding dated 16/17th August, 2017 entered into between the applicant and opposite party no.2, which has been so heavily relied upon by opposite party no.2 in support of her case is mere a waste paper and has no relevance in the eyes of law, as the same is an unregistered document. The opposite no.2 has not been appointed as a Director of the company either by any registered document or by the minutes of the meeting of the Board of Directors of the Company.

(VII) Even if it is accepted that opposite party no.2 invested the money in the company, the two parallel proceedings

initiated by opposite party no.2 against the applicant in two parallel jurisdiction only substantiate that she is not only trying to threat the applicant but has also tried to extort money from the applicant and misuse the inhuman condition under which the company and proprietor are under going, by making various complaints before the Police and courts of law.

(VII) the validity of the legal notice sent by opposite party no.2 to the applicant is also in question as the same does not disclose the amount that has been received by opposite party no.2 prior to the issuance of cheques.

(VIII) A legal notice was sent to the applicant by opposite party no.2 through her advocate at his residence at Pune and thereafter she filed a complaint on 6th December, 2018 in the court of Judicial Magistrate, First Class, Pinpri, Maharashtra under Section 138 N.I. Act and subsequent to the same, for the similar contentions, which have been made in the aforesaid complaint, she filed a complaint in the Court of Additional Chief Judicial Magistrate, Bhadohi at Gyanpur (Uttar Pradesh), which is illegal in the eyes of law and the same should be quashed on the ground jurisdiction.

(IX) Opposite party no.2 has not been attentive in the legal proceedings prior to the involvement of the Hon'ble High Court. Either opposite party no.2 has to admit that she had granted personal loan to the applicant, which is not legal subject to such heavy amount or else accept, as per her own unregistered agreement which is treated as Memorandum of Understanding to be a financial creditor. If she is to be treated as financial creditor and the money was invested in the company situated at Pune, she has alternative remedy, which is available under Insolvency and Bankruptcy Code.

Learned counsel for the applicants, therefore, submitted that the present criminal proceedings initiated against the applicants are not only malicious but also amount to an abuse of the process of the Court.

On the cumulative strength of the aforesaid submissions, it is submitted by learned counsel for the applicants that the proceedings of the above mentioned complaint case are liable to be quashed by this Court.

7. Per contra, learned A.G.A. has opposed the contentions raised on behalf of the applicant by submitting that there is no illegality or infirmity in the impugned summoning order and the proceedings initiated by opposite party no.2 against the applicant under Section 138 N.I. Act. He, therefore, submits that the present application is liable to be rejected.

8. On the other-hand, learned counsel for opposite party no.2 raised following contentions for rejecting the present application under Section 482 Cr.P.C.:

(i) The accused-applicant is carrying business under the name and style of "M/s. Vishwakarma Dish Ends Works", which is a partnership firm and "M/s. Proficient Industries India Pvt. Ltd.", which is a private company. Both the firms are running at 81-B, General Block, MIDC Bhosari, Pune. The accused-applicant, who is one of the partner of the said firm and company, is a director and another director of the firm and company. The accused-applicant was in need of some finance for development of the said firm and company. Therefore, accused-applicant approached opposite party no.2, who was his family friend and well known to him. The accused-applicant requested opposite party

no.2 to invest money in the said firm and company. The accused-applicant promised opposite party no.2 that if she invests Rs. 80 lacs in the said firm, he will include her as one of the partner in the said firm and give her 50% profit of the said firm on yearly basis. The accused-applicant also promised opposite party no.2 that he will also give 25% share in the land owned by the said firm and 25% share in the value of the machinery of the firm. The accused-applicant also promised opposite party no.2 that he will refund entire investment made by opposite party no.2 without any deduction at the time of her retirement from the said firm. On believing the said promise made by the accused-applicant, opposite party no.2 invested Rs. 80 lacs from September, 2013 to July, 2016 in the firm through accused-applicant. In the meantime, the business of the said firm was hugely affected, hence all the transactions and work of the said firm were stopped thereafter. Seeing the down fall of the said firm, when opposite party no.2 asked the accused-applicant that now her money will be drowned, he assured her not to worry, as he will appoint her as one of the Director of the said company and thereafter on 8th November, 2016, accused-applicant appointed opposite party no.2 as director of the said company. All the terms and conditions were dully reduced in writing by both the accused-applicant and opposite party no.2 titled as "Memorandum of Understanding" dated 17th August, 2017. The accused-applicant had also assured that due to hardship faced by the said company, he would pay Rs. 1,00,000/- per month to opposite party no2. from April, 2016 but he has not paid any single penny to her till date. A dispute arose between the accused-applicant regarding disclosure of books of accounts and balance-sheet, profit of the company by the accused-applicant to her. He had also refused to give 25% share in the land and value of the machinery of the said firm. When opposite party no.2 exerted pressure upon the accused-applicant that she will file police complaint against him and will also go to court of laws praying for justice against the wrongful acts and cheating done by the accused-applicant, he again promised her that he will return initial investment of Rs. 80,00,000/- to her which she had invested and he further promised to pay Rs. 87, 00,000/- to her towards shares against investment made by opposite party no.2 on assurance of the accused-applicant. In consideration of the aforesaid assurance given by the accused-applicant, he gave four cheques to her amounting to Rs. 80,00,000/- which were duly signed and issued by the accused-applicant in favour of opposite party no.2 in the capacity of one of the Director of the said firm and company. The accused applicant also accepted his legal liability to Rs. 87,00,000/- to opposite party no.2 against legal debt and against the said liability, he had issued and handed over various cheques amounting to Rs. 87,00,000/- to opposite party no.2 for discharging his legal liability. When the aforesaid four cheques amounting to Rs. 80,00,000/- were deposited by opposite party no.2 on **20th October, 2018** for encashment of the same in Kashi Gomti Smyut Gramin Bank, Branch Ugapur, Bhadohi where her bank account was maintained, the aforesaid four cheques were dishonoured and returned from the said bank with reasons "Funds Insufficient" as on **31st October, 2018** and intimation in that regard was duly received by opposite party no.2 on **16th November, 2018** from the said bank. Thereafter, on 2**2nd November, 2018**, opposite party no.2 had issued legal notice through her advocate by registered A.D. to the accused-

applicant at his official address as mentioned above, which was duly received by the accused-applicant on **26th November, 2019**, a copy of which has been enclosed as Annexure-C.A.-2 to the counter affidavit filed on behalf of opposite party no.2. A legal notice has also been sent to the accused-applicant at his residential address, which was returned with remark unclaimed. Despite the legal notice having been received by the accused-applicant, he has not made any effort to make payment in respect of the above four dishonored cheques. It is further submitted that the said intention of the accused-applicant is to commit and play a fraud upon opposite party no.2 and indulge into cheating and criminal misappropriation. Thus, the accused-applicant caused wrongful loss to opposite party no.2 and wrong gain to him. Hence the accused-applicant has committed an offence of cheating. He has also failed to make payment of four dishonoured cheques which were issued by him in favour of opposite party no.2 despite legal notice being received by him, which makes out a case for an offence punishable under Section 138 N.I. Act against the accused-applicant, due to which she filed a complaint under Section 138 N.I. Act in the Court of Additional Chief Judicial Magistrate, Bhadohi at Gyanpur on 3rd January, 2019.

(ii) The Additional Chief Judicial Magistrate, Bhadohi at Gyanpur has the jurisdiction to try the complaint made by opposite party no.2 under Section 138 N.I. Act, as the four cheques amounting to Rs. 80,00,000/- duly signed and issued by the accused-applicant in favour of opposite party no.2 have been deposited at Kashi Gomti Smyut Gramin Bank, Branch Ugapur, Bhadohi where her bank account was maintained and the same have been dishonoured and returned to her with a remark "Funds Insufficient" as on 31st October, 2018 and information in that regard has been received by her on 16th November, 2019 from the Bank.

(iii) The Additional Chief Judicial Magistrate, Bhadohi at Gyanpur, after recording statement of the complainant under Section 200 Cr.P.C. and her witnesses under Section 202 Cr.P.C., perusing the entire evidence and after hearing the learned counsel for the applicant, has found that a prima facie case under Section 138 N.I. Act is made out against the accused-applicant. Thereafter, the The Additional Chief Judicial Magistrate, Bhadohi at Gyanpur has issued process of law against the applicant vide order dated 13th March, 2019, which is legal and justifiable in the eyes of law.

(iv) Opposite party no.2 has also filed another complaint bearing Complaint Case No. 2917 of 2018 before Judicial Magistrate, First Class, Pimpri, at Pimpri, Pune for dishnouring of cheque no. 000015 dated 31st August, 2018 amounting to Rs. 7,00,000/- which was also duly signed and issued by accused-applicant in favour of opposite party no.2, a copy of the complaint no. 2917 of 2018 has been enclosed as Annexure No.-C.A-6 to the counter affidavit filed on her behalf. In the said complaint case, non-bailable warrant has also been issued against the accused-applicant by the Judicial Magistrate, First Class, Pimpri. The said complaint case has been filed by the complaint at Pimpri Pune because the cheque no. 000015 amounting to Rs. 7,00,000/- drawn on 4111485003 Kotak Mahindra Bank Ltd. and as per the Bank rules, the jurisdiction of the Kotak Mahindra Bank is limited to territory of Maharashtra. Kotak Mahindra Bank is a private Bank.

(v) After selling properties, opposite party no.2 invested Rs.

80,00,000/- in the firm and company of the accused-applicant on his promise and the total liability is of Rs.87,00,000/-. Therefore, opposite party no.2 filed the present complaint case for dishonouring of four cheques amounting to Rs. 80,00,000/- at Bhadohi at Gyanpur and filed another complaint at Pimpri, Pune for dishnouring a cheque amounting to Rs. 7,00,000/-. Both the proceedings are separate proceedings initiated by opposite party no.2 against the accused-applicant for different cause of action. Therefore, the plea of learned counsel for the applicant that opposite party no.2 has initiated res judicta proceedings by means of present complaint filed by opposite no.2 has no legs to stand.

(v) The accused-applicant did not give any reply to the legal notice sent by opposite party no.2 for dishonouring of aforesaid four cheques amounting to Rs. 80,00,000/-. He has neither paid the same nor gave any reason for the same. In filing of the present complaint, opposite party no.2 has adopted all procedures known to law.

On the cumulative strength of the aforesaid contentions, learned counsel for opposite party no.2 has lastly submitted that the court below has not committed any error in passing the impugned order, therefore, do not call for any interference by this Court. Hence, he submits that the present application is liable to be rejected.

9. I have considered the submissions made by the learned counsel for the applicants and have gone through the records of the present application.

10. Before expressing any opinion on the merits of the case set up by both the parties, it would be worthwhile to reproduce Sections 118, 138 and 139 of the Negotiable Instrument Act, which are quoted herein-below:

*"**118. Presumptions as to negotiable instruments.** --Until the contrary is proved, the following presumptions shall be made:--*

(a) of consideration --that every negotiable instrument was made or drawn for consideration, and that every such instrument, when it has been accepted, indorsed, negotiated or transferred, was accepted, indorsed, negotiated or transferred for consideration;

(b) as to date --that every negotiable instrument bearing a date was made or drawn on such date;

(c) as to time of acceptance --that every accepted bill of exchange was accepted within a reasonable time after its date and before its maturity;

(d) as to time of transfer --that every transfer of a negotiable instrument was made before its maturity;

(e) as to order of indorsements --that the indorsements appearing upon a negotiable instrument were made in the order in which they appear thereon;

(f) as to stamps --that a lost promissory note, bill of exchange or cheque was duly stamped;

(g) that holder is a holder in due course --that the holder of a negotiable instrument is a holder in due course:

Provided that, where the instrument has been obtained from its lawful owner, or from any person in lawful custody thereof, by means of an offence or fraud, or has been obtained from the maker or acceptor thereof by means of an offence or fraud, or for unlawful consideration, the burden of proving that the holder is a holder in due course lies upon him.

***138. Dishonour of cheque for insufficiency, etc., of funds in the account.** --Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of*

money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provisions of this Act, be punished with imprisonment for 19 [a term which may be extended to two years], or with fine which may extend to twice the amount of the cheque, or with both: Provided that nothing contained in this section shall apply unless--

(a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier;

(b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, 20 [within thirty days] of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and

(c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice.

Explanation.-- For the purposes of this section, "debt or other liability" means a legally enforceable debt or other liability.]

***139. Presumption in favour of holder.**--It shall be presumed, unless the contrary is proved, that the holder of a cheque received the cheque of the nature referred to in section 138 for the discharge, in whole or in part, of any debt or other liability."*

11. From the above, it is manifestly clear that a dishonour would constitute an offence only if the cheque is returned by the bank "unpaid' either because the amount of money standing to the credit of the drawer's account is insufficient to honour the cheque or that the amount exceeds the amount arranged to be paid from that account by an agreement with that bank. Now, for an offence under Section 138 NI Act, it is essential that the cheque must have been issued in discharge of legal debt or liability by accused on an account maintained by him with a bank and on presentation of such cheque for encashment within its period of validity, the cheque must have been returned unpaid. The payee of the cheque must have issued legal notice of demand within 30 days from the receipt of the information by him from the bank regarding such dishonor and where the drawer of the cheque fails to make the payment within 15 days of the receipt of the aforesaid legal demand notice, cause of action under Section 138 NI Act arises.

12. From the Chapter XVII comprising Sections 138 to 142 of the Negotiable Instruments Act, which was introduced in statute by Act 66 of 1988, it is also apparently clear that the object underlying the provision contained in the said Chapter was aimed at inculcating faith in the efficacy of banking operations and giving credibility to negotiable instruments in business and day to day transactions by making dishonour of such instruments an offence. A negotiable instrument, whether the same is in the form of a promissory note or a cheque is by its very nature a

solemn document that carries with it not only a representation to the holder in due course of any such instrument but also a promise that the same shall be honoured for payment. To that end Section 139 of the Act raises a statutory presumption that the cheque is issued in discharge of a lawfully recoverable debt or other liability. This presumption is no doubt rebuttable at trial but there is no gain saying that the same favours the complainant and shifts the burden to the drawer of the instrument (in case the same is dishonoured) to prove that the instrument was without any lawful consideration. It is also noteworthy that Section 138 while making dishonour of a cheque an offence punishable with imprisonment and fine also provides for safeguards to protect drawers of such instruments where dishonour may take place for reasons other than those arising out of dishonest intentions. It envisages service of a notice upon the drawer of the instrument calling upon him to make the payment covered by the cheque and permits prosecution only after the expiry of the statutory period and upon failure of the drawer to make the payment within the said period.

13. This Court having noticed the facts of the case and the evidence on the record needs to note the legal principles regarding nature of presumptions to be drawn under Section 139 of the Act and the manner in which it can be rebutted by an accused. Section 118 provides for presumptions as to negotiable instruments. The complainant being holder of cheque and the signature appended on the cheque having not been denied by the Bank, presumption shall be drawn that cheque was issued for the discharge of any debt or other liability. The presumption under Section 139 is a rebuttable presumption. Before this Court refers to various judgments of the Apex Court considering Sections 118 and 139, it is relevant to notice the general principles pertaining to burden of proof on an accused especially in a case where some statutory presumption regarding guilt of the accused has to be drawn.

14. A Three-Judge Bench of the Apex Court in the case of **Kali Ram Vs. State of Himachal Pradesh**, reported in (1973) 2 SCC 808 has laid down following:-

"23. .....One of the cardinal principles which has always to be kept in view in our system of administration of justice for criminal cases is that a person arraigned as an accused is presumed to be innocent unless that presumption is rebutted by the prosecution by production of evidence as may show him to be guilty of the offence with which he is charged. The burden of proving the guilt of the accused is upon the prosecution and unless it relieves itself of that burden, the courts cannot record a finding of the guilt of the accused. There are certain cases in which statutory presumptions arise regarding the guilt of the accused, but the burden even in those cases is upon the prosecution to prove the existence of facts which have to be present before the presumption can be drawn. Once those facts are shown by the prosecution to exist, the Court can raise the statutory presumption and it would, in such an event, be for the accused to rebut the presumption. The onus even in such cases upon the accused is not as heavy as is normally upon the prosecution to prove the guilt of the accused. If some material is brought on the record consistent with the innocence of the accused which may reasonably be true, even though it is not positively proved to be true, the accused would be entitled to acquittal."

15. Further the Apex Court in **Bharat Barrel & Drum Manufacturing Company Vs. Amin Chand Pyarelal**, reported in *(1999) 3 SCC 35* had considered Section 118(a) of the Act and held that once execution of the promissory note is admitted, the presumption under Section 118(a) would arise that it is supported by a consideration. Such a presumption is rebuttable and defendant can prove the non-existence of a consideration by raising a probable defence. In paragraph No.12 following has been laid down:-

"12. Upon consideration of various judgments as noted hereinabove, the position of law which emerges is that once execution of the promissory note is admitted, the presumption under Section 118(a) would arise that it is supported by a consideration. Such a presumption is rebuttable. The defendant can prove the non-existence of a consideration by raising a probable defence. If the defendant is proved to have discharged the initial onus of proof showing that the existence of consideration was improbable or doubtful or the same was illegal, the onus would shift to the plaintiff who will be obliged to prove it as a matter of fact and upon its failure to prove would disentitle him to the grant of relief on the basis of the negotiable instrument. The burden upon the defendant of proving the non-existence of the consideration can be either direct or by bringing on record the preponderance of probabilities by reference to the circumstances upon which he relies. In such an event, the plaintiff is entitled under law to rely upon all the evidence led in the case including that of the plaintiff as well. In case, where the defendant fails to discharge the initial onus of proof by showing the non-existence of the consideration, the plaintiff would invariably be held entitled to the benefit of presumption arising under Section 118(a) in his favour. The court may not insist upon the defendant to disprove the existence of consideration by leading direct evidence as the existence of negative evidence is neither possible nor contemplated and even if led, is to be seen with a doubt. The bare denial of the passing of the consideration apparently does not appear to be any defence. Something which is probable has to be brought on record for getting the benefit of shifting the onus of proving to the plaintiff. To disprove the presumption, the defendant has to bring on record such facts and circumstances upon consideration of which the court may either believe that the consideration did not exist or its non-existence was so probable that a prudent man would, under the circumstances of the case, shall act upon the plea that it did not exist……"

16. In **M.S. Narayana Menon Alias Mani Vs. State of Kerala and Another**, reported in (2006) 6 SCC 39, the Apex Court had considered Sections 118(a), 138 and 139 of the Act, 1881 and held that that presumptions both under Sections 118(a) and 139 are rebuttable in nature. Explaining the expressions "may presume" and "shall presume" referring to an earlier judgment, following was held in paragraph No.28:-

"28. What would be the effect of the expressions "may presume", "shall presume" and "conclusive proof" has been considered by this Court in Union of India v. Pramod Gupta, (2005) 12 SCC 1, in the following terms: (SCC pp. 30-31, para 52) "It is true that the legislature used two different phraseologies "shall be presumed' and "may be presumed' in Section 42 of the Punjab Land Revenue Act and furthermore

although provided for the mode and manner of rebuttal of such presumption as regards the right to mines and minerals said to be vested in the Government vis-à-vis the absence thereof in relation to the lands presumed to be retained by the landowners but the same would not mean that the words "shall presume' would be conclusive. The meaning of the expressions "may presume' and "shall presume' have been explained in Section 4 of the Evidence Act, 1872, from a perusal whereof it would be evident that whenever it is directed that the court shall presume a fact it shall regard such fact as proved unless disproved. In terms of the said provision, thus, the expression "shall presume' cannot be held to be synonymous with "conclusive proof'."

17. In view of the above, it is clear that the expression "shall presume" cannot be held to be synonymous with conclusive proof. Referring to definition of words "proved" and "disproved" under Section 3 of the Evidence Act, following was laid down by the Apex Court in paragraph No.30 of the aforesaid judgment:

"30. Applying the said definitions of "proved" or "disproved" to the principle behind Section 118(a) of the Act, the court shall presume a negotiable instrument to be for consideration unless and until after considering the matter before it, it either believes that the consideration does not exist or considers the non-existence of the consideration so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that the consideration does not exist. For rebutting such presumption, what is needed is to raise a probable defence. Even for the said purpose, the evidence adduced on behalf of the complainant could be relied upon."

18. The Apex Court has already held that what is needed is to raise a probable defence, for which it is not necessary for the accused to disprove the existence of consideration by way of direct evidence and even the evidence adduced on behalf of the complainant can be relied upon. Dealing with standard of proof, following was observed in paragraph No.32:-

"32. The standard of proof evidently is preponderance of probabilities. Inference of preponderance of probabilities can be drawn not only from the materials on record but also by reference to the circumstances upon which he relies."

19. In **Krishna Janardhan Bhat Vs. Dattatraya G. Hegde**, reported in *(2008) 4 SCC 54*, the Apex Court has held that an accused for discharging the burden of proof placed upon him under a statute need not examine himself. He may discharge his burden on the basis of the materials already brought on record. Following was laid down in Paragraph No.32:-

"32. An accused for discharging the burden of proof placed upon him under a statute need not examine himself. He may discharge his burden on the basis of the materials already brought on record. An accused has a constitutional right to maintain silence. Standard of proof on the part of an accused and that of the prosecution in a criminal case is different."

20. The Apex Court again reiterated that whereas prosecution must prove the guilt of an accused beyond all reasonable doubt, the standard of proof so as to prove a defence on the part of an accused is "preponderance of probabilities". In paragraph No.34, following was laid down:-

"34. Furthermore, whereas prosecution must prove the guilt of an accused beyond all reasonable doubt, the standard of proof so as to prove a defence on the part of an accused is "preponderance of probabilities". Inference of preponderance of probabilities can be drawn not only from the materials brought on record by the parties but also by reference to the circumstances upon which he relies."

21. In **Kumar Exports Vs. Sharma Carpets**, reported in (2009) 2 SCC 513, the Apex Court again examined as to when complainant discharges the burden to prove that instrument was executed and when the burden shall be shifted. In paragraph Nos. 18 to 20, following has been laid down:-

"18. Applying the definition of the word "proved" in Section 3 of the Evidence Act to the provisions of Sections 118 and 139 of the Act, it becomes evident that in a trial under Section 138 of the Act a presumption will have to be made that every negotiable instrument was made or drawn for consideration and that it was executed for discharge of debt or liability once the execution of negotiable instrument is either proved or admitted. As soon as the complainant discharges the burden to prove that the instrument, say a note, was executed by the accused, the rules of presumptions under Sections 118 and 139 of the Act help him shift the burden on the accused. The presumptions will live, exist and survive and shall end only when the contrary is proved by the accused, that is, the cheque was not issued for consideration and in discharge of any debt or liability. A presumption is not in itself evidence, but only makes a prima facie case for a party for whose benefit it exists.

19. The use of the phrase "until the contrary is proved" in Section 118 of the Act and use of the words "unless the contrary is proved" in Section 139 of the Act read with definitions of "may presume" and "shall presume" as given in Section 4 of the Evidence Act, makes it at once clear that presumptions to be raised under both the provisions are rebuttable. When a presumption is rebuttable, it only points out that the party on whom lies the duty of going forward with evidence, on the fact presumed and when that party has produced evidence fairly and reasonably tending to show that the real fact is not as presumed, the purpose of the presumption is over.

20. .....The accused may adduce direct evidence to prove that the note in question was not supported by consideration and that there was no debt or liability to be discharged by him. However, the court need not insist in every case that the accused should disprove the non-existence of consideration and debt by leading direct evidence because the existence of negative evidence is neither possible nor contemplated. At the same time, it is clear that bare denial of the passing of the consideration and existence of debt, apparently would not serve the purpose of the accused. Something which is probable has to be brought on record for getting the burden of proof shifted to the complainant. To disprove the presumptions, the accused should bring on record such facts and circumstances, upon consideration of which, the court may either believe that the consideration and debt did not exist or their non-existence was so probable that a prudent man would under the circumstances of the case, act upon the plea that they did not exist.....…"

22. A Three-Judge Bench of the Apex Court in **Rangappa Vs. Sri Mohan**, reported in *(2010) 11 SCC 441* had elaborately considered provisions of Sections 138 and 139. In the above case, trial court had acquitted the accused in a case relating to dishonour of cheque under Section 138. The High Court had reversed the judgment of the trial court convicting the accused. In the above case, the accused had admitted signatures on the cheque. This Court held that where the fact of signature on the cheque is acknowledged, a presumption has to be raised that the cheque pertained to a legally enforceable debt or liability, however, this presumption is of a rebuttal nature and the onus is then on the accused to raise a probable defence. In Paragraph No.13, following has been laid down:-

"13. The High Court in its order noted that in the course of the trial proceedings, the accused had admitted that the signature on the impugned cheque (No. 0886322 dated 8-2- 2001) was indeed his own. Once this fact has been acknowledged, Section 139 of the Act mandates a presumption that the cheque pertained to a legally enforceable debt or liability. This presumption is of a rebuttal nature and the onus is then on the accused to raise a probable defence. With regard to the present facts, the High Court found that the defence raised by the accused was not probable."

23. After referring to various other judgments of this Court, the Apex Court in that case held that the presumption mandated by Section 139 of the Act does indeed include the existence of a legally enforceable debt or liability, which, of course, is in the nature of a rebuttable presumption. In paragraph No.26, following was laid down:-

"26. In light of these extracts, we are in agreement with the respondent claimant that the presumption mandated by Section 139 of the Act does indeed include the existence of a legally enforceable debt or liability. To that extent, the impugned observations in Krishna Janardhan Bhat, (2008) 4 SCC 54 may not be correct. However, this does not in any way cast doubt on the correctness of the decision in that case since it was based on the specific facts and circumstances therein. As noted in the citations, this is of course in the nature of a rebuttable presumption and it is open to the accused to raise a defence wherein the existence of a legally enforceable debt or liability can be contested. However, there can be no doubt that there is an initial presumption which favours the complainant."

24. Elaborating further, the Apex Court has held that Section 139 of the Act is an example of a reverse onus and the test of proportionality should guide the construction and interpretation of reverse onus clauses on the defendant-accused and the defendant- accused cannot be expected to discharge an unduly high standard of proof. In paragraph Nos. 27 and 28, following was laid down:-

"27. Section 139 of the Act is an example of a reverse onus clause that has been included in furtherance of the legislative objective of improving the

credibility of negotiable instruments. While Section 138 of the Act specifies a strong criminal remedy in relation to the dishonour of cheques, the rebuttable presumption under Section 139 is a device to prevent undue delay in the course of litigation. However, it must be remembered that the offence made punishable by Section 138 can be better described as a regulatory offence since the bouncing of a cheque is largely in the nature of a civil wrong whose impact is usually confined to the private parties involved in commercial transactions. In such a scenario, the test of proportionality should guide the construction and interpretation of reverse onus clauses and the defendant-accused cannot be expected to discharge an unduly high standard of proof.

28. In the absence of compelling justifications, reverse onus clauses usually impose an evidentiary burden and not a persuasive burden. Keeping this in view, it is a settled position that when an accused has to rebut the presumption under Section 139, the standard of proof for doing so is that of "preponderance of probabilities". Therefore, if the accused is able to raise a probable defence which creates doubts about the existence of a legally enforceable debt or liability, the prosecution can fail. As clarified in the citations, the accused can rely on the materials submitted by the complainant in order to raise such a defence and it is conceivable that in some cases the accused may not need to adduce evidence of his/her own."

25. Now this Court comes on the merits of the cases set up by the learned counsel for the applicant, learned A.G.A. for the State as well as learned counsel for opposite party no.2.

26. It is not the case of the applicant that four cheques bearing nos. 041564 dated 7th September, 2018, 041565 dated 14th September, 2018, 041566 dated 21st September, 2018 and 041567 dated 28th September, 2018 amounting to Rs. 80,00,000/- drawn on Dena Bank, Bhosari Branch-Pune have not been given by the accused-applicant to opposite party no.2 and the signatures appended on the aforesaid cheques were not of the accused-applicant. It is also not the case of the applicant that the aforesaid cheques were misplaced or stolen.

27. It is no doubt true that opposite party no.2 invested Rs. 80,00,000/- in the firm/company of the accused-applicant and when a dispute arose between them, for returning the said amount of Rs. 80,00,000/-, accused-applicant had given four cheques bearing nos. 041564 dated 7th September, 2018, 041565 dated 14th September, 2018, 041566 dated 21st September, 2018 and 041567 dated 28th September, 2018 amounting to Rs. 80,00,000/- drawn on Dena Bank, Bhosari Branch-Pune, which had been duly signed by the accused-applicant, were issued in favour of the complainant and he also requested the complainant to deposit the same in her bank accounts for withdrawal. It is also not disputed that the aforesaid cheques were deposited by opposite party no.2 on **21st October, 2018 i.e. within six months** from the date issuance of the aforesaid four cheques, in her bank account maintained at for withdrawal of the money, but same have been dishonoured and returned from her bank with a remark "FUNDS INSUFFICIENT" as on **31st October, 2018** and intimation in that regard has been received by opposite party no.2 on 16th November, 2018. On receiving the said intimation about

dishonour of the aforesaid cheques, opposite party no.2 sent legal notice to the accused-applicant through her Advocate on **22nd November, 2018** and the same has been received by the accused-applicant on **26th November, 2018**, i.e. **within fifteen days** from the date of receiving of intimation from the bank about dishonour of cheques as provided under the provisions of N.I. Act. When the accused-applicant after receiving legal notice dated 22nd/26th November, 2018, has failed to pay the amount of dishonoured cheques **within fifteen days**, opposite party no.2 filed a complaint against the accused-applicant on **3rd January, 2019**. From the aforesaid it is clear that all the ingredients provided under Section 138 N.I. Act are fully satisfied in filing of the complaint by opposite party no.2 against the accused-applicant. Therefore, a case for the offence punishable under Section 138 N.I. Act is made out against the accused-applicant.

28. The contention of opposite party no.2 that Additional Chief Judicial Magistrate, Bhadohi, Gyanpur has every right to try the complaint case filed by opposite party no.2 under Section 138 N.I. Act, has force, as her bank account has been maintained at Kashi Gomti Sanyukt Gramin Bank, Branch-Ugapur, District Bhadohi in which she had submitted the aforesaid four cheques issued and signed by the applicant in her favour and the same has been dishonoured and returned to her with remark "FUNDS INSUFFICIENT". Therefore, the territorial jurisdiction is limited to Judgeship Bhadohi at Gyanpur. It may also be noticed that the permanent addresses of opposite party no. 2 is Village-Jakkhini, Jakkhini Anish Tehsil, Rajatalab, District-Varanasi and Village-Jaddupur, Police Station-Aurai, District-Bhadohi-221201. It is, thus, clear that the Additional Chief Judicial Magistrate, Bhadohi, Gyanpur has every right to try the aforesaid complaint case as he has jurisdiction to do so. The Apex Court in the case of **Dashrath Rupsingh Rathod Vs. State of Maharashtra** reported in *MANU/SC/0655/2014* has held that place, situs or venue of judicial enquiry and trial of offence must logically be restricted to where the drawee bank is located. The relevant portion whereof is being quoted herein below:

"To sum up:

(i) An offence under Section 138 of the Negotiable Instruments Act, 1881 is committed no sooner a cheque drawn by the accused on an account being maintained by him in a bank for discharge of debt/liability is returned unpaid for insufficiency of funds or for the reason that the amount exceeds the arrangement made with the bank.

(ii) ***Cognizance of any such offence is however forbidden under Section 142 of the Act except upon a complaint in writing made by the payee or holder of the cheque in due course within a period of one month from the date the cause of action accrues to such payee or holder under clause (c) of proviso to Section 138.***

(iii) The cause of action to file a complaint accrues to a complainant/payee/holder of a cheque in due course if

(a) the dishonoured cheque is presented to the drawee bank within a period of six months from the date of its issue.

(b) If the complainant has demanded payment of cheque amount within thirty days of receipt of information by him from the bank regarding the dishonour of the cheque and

(c) If the drawer has failed to pay the cheque amount within fifteen days of receipt of such notice.

(iv) The facts constituting cause of action do not constitute the ingredients of the offence under Section 138 of the Act.

(v) The proviso to Section 138 simply postpones/defers institution of criminal proceedings and taking of cognizance by the Court till such time cause of action in terms of clause (c) of proviso accrues to the complainant.

(vi) Once the cause of action accrues to the complainant, the jurisdiction of the Court to try the case will be determined by reference to the place where the cheque is dishonoured.

(vii) The general rule stipulated under Section 177 of Cr.P.C applies to cases under Section 138 of the Negotiable Instruments Act. Prosecution in such cases can, therefore, be launched against the drawer of the cheque only before the Court within whose jurisdiction the dishonour takes place except in situations where the offence of dishonour of the cheque punishable under Section 138 is committed along with other offences in a single transaction within the meaning of Section 220(1) read with Section 184 of the Code of Criminal Procedure or is covered by the provisions of Section 182(1) read with Sections 184 and 220 thereof."

29. The contention of the learned counsel for the applicant that the present proceedings initiated by opposite party no.2 against the applicant under Section 138 N.I. Act in the court of Additional Chief Judicial Magistrate, Bhadohi, Gyanpur, are res judicata proceedings, as opposite party no.2 has already filed complaint case before the court of Judicial Magistrate, First Class-Pinpri at Pinpri (Pune) on 6th December, 2018, which is still pending consideration, has only been stated to be rejected on the ground that 'Res Judicata' means a case or suit involving a particular issue between two or more parties already decided by a court. Perusal of the both the complaint cases filed by opposite party no.2 against the applicant under Section 138 N.I. Act before the Court of Additional Chief Judicial Magistrate, Bhadohi, Gyanpur as well as before the Court of Judicial Magistrate, First Class-Pinpri at Pinpri (Pune), clearly indicates that both are for different dishnouring of cheques and for different amounts i.e. for different cause of action.

30. The next contention of the learned counsel for the applicant that opposite party no.2 has initiated parallel proceedings against the applicant by filing the present complaint case before the Court of Additional Chief Judicial Magistrate, Bhadohi, Gyanpur, as he has already initiated proceedings under Section 138 N.I. Act before the Court of Judicial Magistrate, First Class-Pinpri at Pinpri (Pune) has also no leg to stand, as opposite party no.2 has filed the present complaint case under Section 138 N.I. for dishnouring of four cheques bearing nos. 041564 dated 7th September, 2018, 041565 dated 14th September, 2018, 041566 dated 21st September, 2018 and 041567 dated 28th September, 2018 amounting to Rs. 80,00,000/-, whereas the complaint case filed by opposite party no.2 against applicant in the court Judicial Magistrate, First Class-Pinpri at Pinpri (Pune) for dishonouring of cheque no. 000015 dated 31st August, 2018 amounting to Rs. 7,00,000/-. It is therefore, apparently clear that both proceedings initiated by opposite party no.2 against the applicant under Section 138 N.I. are not parallel proceedings, both are for dishnouring of

different cheques and different amount i.e. for different cause of action.

31. So far as the contention of the learned counsel for the applicant that the entire amount of Rs. 80 lacs had already been paid to opposite party no.2 by the applicant through four cheques i.e. (i) cheque no. 111185 amounting to Rs. 14,00,000/-, (ii) cheque no. 36963 amounting to Rs. 25,00,000/-, cheque no. 36974 amounting to Rs. 16,00,000/- and cheque no. 123523 amounting to Rs. 25,00,000/-, which were issued from Dena Bank, has no relevance in the facts of the present case, as any Court of law under the provisions of Section 138 N.I. Act can only see whether all ingredients mentioned in the said section are satisfied and prima facie a case for the offence punishable under the said Section is made out or not. As already noticed by this Court herein above, four cheques bearing nos. 041564 dated 7th September, 2018, 041565 dated 14th September, 2018, 041566 dated 21st September, 2018 and 041567 dated 28th September, 2018 amounting to Rs. 80,00,000/- drawn on Dena Bank, Bhosari Branch-Pune have been issued by the accused-applicant in favour of opposite party no.2, which have duly been signed by him and the same have been dishnoured and returned to her. Therefore, a prima facie case for the offence under Section 138 N.I. is made out against the applicant. However, it is open for the applicant to initiate such proceedings as he may be permissible under law for recovery of entire amount paid by him, if any, like he has already filed a suit in the Court Civil Judge (Senior Division), Pune against opposite party no.2 for payment of Rs. 38 lacs along with interest @ 8% per annum, a copy of plaint has been enclosed as Annexure-6 to the affidavit accompanying the present application.

32. So far as the last contention of the learned counsel for the applicant that the present proceedings initiated by opposite party no. 2 against the applicant are mala fide based on false and frivolous allegation, this Court finds that the contention made by the applicant's learned counsel call for adjudication on pure questions of fact which may adequately be adjudicated upon only by the trial court and while doing so even the submissions made on points of law can also be more appropriately gone into by the trial court in this case. The issue whether it is appropriate for this Court being the Highest Court to exercise its jurisdiction under Section 482 Cr.P.C. to quash the summoning order and the entire proceedings of the aforesaid complaint case at the stage when the Magistrate has merely issued process against the applicant and trial is to yet to come only on the submission made by the learned counsel for the applicant that present criminal case initiated by opposite party no.2 are not only malicious but also abuse of process of law, has elaborately been discussed by the Apex Court in the following judgments:

(i) **R.P. Kapur Versus State of Punjab**; *AIR 1960 SC 866,*

(ii) **State of Haryana & Ors. Versus Ch. Bhajan Lal & Ors.**;*1992 Supp.(1) SCC 335,*

(iii) **State of Bihar & Anr. Versus P.P. Sharma & Anr.**; *1992 Supp (1) SCC 222,*

(iv) **Zandu Pharmaceuticals Works Ltd. & Ors. Versus Mohammad Shariful Haque & Anr.**; *2005 (1) SCC 122,*

(v) **M. N. Ojha Vs. Alok Kumar Srivastava**; *2009 (9) SCC 682*,

(vi) **Mohd. Allauddin Khan Vs. The State of Bihar & Others**; *2019 0 Supreme (SC) 454*,

(vii) **Nallapareddy Sridhar Reddy Vs. The State of Andhra Pradesh & Ors.**; *2020 0 Supreme (SC) 45*, and laslty

(ix) **Rajeev Kaurav Vs. Balasahab & Others**; *2020 0 Supreme (SC) 143*.

33. In view of the aforesaid, this Court does not deem it proper, and therefore cannot be persuaded to have a pre-trial before the actual trial begins. A threadbare discussion of various facts and circumstances, as they emerge from the allegations made against the accused-applicant, is being purposely avoided by the Court for the reason, lest the same might cause any prejudice to either side during trial. But it shall suffice to observe that the perusal of the complaint case filed by opposite party no.2 and the statements of the complainant and her witnesses under Sections 200 and 202 Cr.P.C. makes out a prima facie case against the accused at this stage and there appear to be sufficient ground for proceeding against the accused. I do not find any justification to quash the summoning order and the entire proceedings of the aforesaid complaint case initiated against the applicant, as the case does not fall in any of the categories recognized by the Apex Court which may justify their quashing.

34. The prayer for quashing the impugned summoning order dated 13th March, 2019 as well as the entire proceedings of the Complaint Case No. 14 of 2019 (Smt. Gyan Devi Vs. Ashok Ram Dular Vishwakarma) under Section 138 of Negotiable Instrument Act, Police Station-Aurai, District-Bhadohi, pending in the Court of Additional Chief Judicial Magistrate, Bhadohi, Gyanpur, are refused, as I do not see any abuse of the court's process at this pre-trial stage.

35. Accordingly, the present applicants is rejected. Interim order, if any, stands discharged.

(2021)02ILR A627
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 22.01.2021

BEFORE

THE HON'BLE SUNEET KUMAR, J.

Application U/S 482 Cr.P.C. No. 36633 of 2013
connected with
Application U/S 482 Cr.P.C. No. 39879 of 2013
connected with
Application U/S 482 Cr.P.C. No. 33505 of 2013

Ratan Kumar Sarsawat ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri R.S. Singh, Sri Hari Bans Singh

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

(A) Criminal Law - Indian Penal Code, 1860 - Sections 467 - Forgery of valuable security , will , Sections 468 - Forgery for purpose of cheating , Sections 471 - Using as genuine a forged (document or electronic record) , Sections 420 - Cheating and dishonestly indducing delivery of property, Sections 409 - Criminal breach of ttrust by public servant, or by banker, merchant or aagent , Sections 120B - Punishment of Criminal conspiracy , Prevention of Corruption Act, 1988 - Sections 13(2) - Criminal misconduct by a public servant.

(B) Criminal Law - exoneration in departmental proceedings would not lead

to exoneration or acquittal in criminal case - standard of proof in department proceeding is lower than that of criminal prosecution - departmental proceeding or for that matter criminal cases have to be decided only on the basis of evidence adduced therein - Truthfulness of the evidence in the criminal case can be judged only after the evidence is adduced therein - Criminal case cannot be rejected on the basis of the evidence in the departmental proceeding or the report of the Enquiry Officer based on those evidence. (Para -20)

Applicants were employees in the office of Soil Conservation Firozabad - NABARD launched a time bound scheme for improvement of the denuded and banjar (infertile) soil - entire work done on the directions passed by the higher authorities - work of the Scheme executed as per the norms of the Government - appointed an Investigating Officer ("IO') to enquire the matter - preliminary enquiry - F.I.R. lodged - Investigating Officer recorded statement of the complainant - no irregularity was committed in execution of the project - statement of the applicant - work is of supervisory nature - performed his duty as per orders of the higher authorities - applicant has not committed any irregularity in performing the work under the Scheme - charge sheet submitted to the State Government seeking sanction to prosecute the applicants - Upon sanction Court below took cognizance of the offence - cognizance order and consequential proceedings are under challenge.(Para - 5,6)

HELD:- The delay, if any, has been caused by the applicants themselves, and the fault cannot be attributed to the prosecution of having unnecessarily/ deliberately caused delay in pursing the prosecution. The trial has not proceeded after the stage of cognizance as restrain orders were operating and the accused/applicants have not submitted to the trial. The delay perse, in the circumstances, has not violated the rights of the applicants to speedy trial.(Para - 35)

Application u/s 482 Cr.P.C. rejected. (E-6)

List of Cases cited:-

1. Pankaj Kumar Vs St. of Mah., AIR 2008 SC 3077

2. P.S. Rajya Vs St. of Bihar , 1996 STPL (LE) 21754 SC

3. St. of N.C.T. of Delhi Vs Ajay Kumar Tyagi , 2012 (9) SCC 685

4. P.S. Rajya Vs St. of Bihar , (1996) 9 SCC 1

5. State Vs M. Krishna Mohan , (2007) 14 SCC 667

6. C.B.I. Vs V.K. Bhutiani's , (2009) 10 SCC 674

7. Ashoo Surendranath Tewari Vs The Deputy Superintendent of Police, EOW, CBI10, Criminal appeal No. 575 of 2020 (arising out of SLP (Crl.) decided on 8 September 2020

8. Radheyshyam Kejriwal Vs St.of W.B. & anr. , (2011) 3 SCC 581

9. Abdul Rehman Antulay Vs R.S. Nayak1 , (1992) 1 SCC 225

10. Ranjan Dwivedi Vs CBI through the Director General , (2012) 8 SCC 495

11. Asian Resurfacing of Raod Agency Pvt. Ltd. v. CBI , (2018) SCC Online SC 210

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

1. Heard Shri Hari Bans Singh, learned counsel for the applicants and Shri Vikas Goswami, learned Additional Government Advocate ("A.G.A.') appearing for the State.

2. By the instant petitions filed under Section 482 of the Code of Criminal Procedure, 19731 ("Cr.P.C.') applicants seek quashing of the entire proceedings of S.S.T. No. 34 of 2010 (State vs. Shiv Kumar Chandal and others) under Sections 467, 468, 471, 420, 409, 120B IPC, and 13(2) of Prevention of Corruption Act, 1988, pending in the court of Special Judge/Sessions Judge, Firozabad.

3. All the applications, herein, are being heard together on consent. The applicants are chargesheeted in the same case crime number. For the sake of convenience the facts arising in Ratan Kumar Saraswat2 (36633/2013) is being referred to.

4. This Court had granted protection to the applicants from coercive measures. It is informed by the learned counsel for the applicants that the trial since then has not proceeded.

5. The facts, briefly stated, is that applicants were employees in the office of Soil Conservation Firozabad. The first applicant retired from the post of Accountant, on 31 December 2005. NABARD launched a time bound scheme in 1997-98 for improvement of the denuded and banjar (infertile) soil. A meeting of the District Soil and Water Conservation Committee was held on 25 September 1997, under the Chairmanship of the District Magistrate, Firozabad, wherein, it was decided that tractor and machinery shall be utilized for completing the work of the Scheme in a time bound programme. Accordingly, in compliance of the order issued by the State Government earth work and other related work was carried out on behalf of the Soil Conversation Officer.

6. It is urged that entire work was done on the directions passed by the higher authorities and the work of the Scheme was executed as per the norms of the Government. It appears that some complaint came to be filed with regard to lapses in the execution of the work and loss caused to the Government. On the complaint, it is urged that Technical Audit Cell conducted an enquiry headed by Additional Director of Agriculture (Soil Conservation). Upon considering the report, Director, Agriculture U.P. informed the State Government that the work was done as per norms and no loss of any kind was caused to the Government. It, however, appears that on the complaint, Secretary of the Department, vide communication dated 14 July 1998, directed the Deputy Inspector General of Police, Economic Offences Wing3 to inspect the project work and enquire whether there was any loss caused to the Government in execution of the project. Pursuant thereto, EOW, CID, Kanpur, appointed an Investigating Officer ("IO') to enquire the matter. After preliminary enquiry, an F.I.R. was lodged on 6 July 2005. The Investigating Officer recorded statement of the complainant Smt. Meena Rajpur, Deputy Director of Agriculture (Soil Conservation), Chhedi Lal Gupta, Soil Conservation Officer, Unit IV Firozabad, who stated that no irregularity was committed in execution of the project, and statement of the applicant. Applicant stated that work of the applicant is of supervisory nature and he performed his duty as per orders of the higher authorities; applicant has not committed any irregularity in performing the work under the Scheme. After investigation, a charge sheet was submitted to the State Government seeking sanction to prosecute the applicants. Upon sanction, the learned Court below took cognizance of the offence vide order dated 5 April 2010. The cognizance order and consequential proceedings are under challenge.

7. It is submitted by learned counsel for the applicant that the prosecution is malicious as the complaint was lodged by a local leader; applicant is a petty employee (Accountant); Scheme was duly enquired by the Technical Audit Cell, which did not find any irregularity or financial loss;

Scheme was executed as per norms prescribed by the Government; there is no evidence against the applicants linking them with the commission of the offence; there is no complaint by any labour or supplier of tractors employed in execution of the Scheme; work assigned to the applicant was of inspection, measurement and verification of the work executed.

8. It is, further, urged that in departmental enquiry conducted by the Technical Audit Cell, nothing adverse has been found, consequently, prosecution of the applicant based on the same material is abuse of the process of the court. It is further urged that the matter pertains to the year 1997-99, F.I.R. came to be lodged in 2005, thereafter, charge sheet was submitted, but cognizance was taken in 2010. It is, therefore, submitted that entire prosecution stands vitiated denying the applicants speedy trial. Reliance has been placed on the decision of the Supreme Court in ***Pankaj Kumar vs. State of Maharastra***4.

9. In rebuttal, learned A.G.A. submits that allegation against the applicants is of criminal conspiracy (Section 120 IPC), read with other sections for which the applicants have been charge sheeted. It is contended that payments were made in cash over and above the prescribed limit based on manufactured documents; applicant in conspiracy with other accused persons caused revenue loss to the exchequer. It is further contended that amount twice the prescribed rate was paid; the money was used for purposes other than for the purpose prescribed under the Scheme. The delay in trial is not attributable to the prosecution. There is no such departmental enquiry as is being submitted by the learned counsel for the applicants. The petition is liable to be rejected being devoid of merit.

10. Rival submissions fall for consideration.

11. As per the F.I.R., it is alleged that the tractors were engaged from outside, including, State of Rajasthan. Payments were made in cash, whereas, payments over and above Rs.2,000/- was to be paid through cheque. It is further alleged that the cost incurred per hectare, as shown from the record, is at Rs.6983/-, whereas, the Technical Asset Protection Report, 1997-98, the rate prescribed is at Rs.3100/-, per hectare, thus, causing revenue loss at Rs.57,14,644/-. Similar allegations have been made for loss caused under different heads. It is further alleged that the officials conspired and caused loss to the revenue @ Rs.3883/- per hectare by preparing forged and manufactured documents. First applicant along with 10 other accused persons are named in the F.I.R.. After investigation, charge sheet came to be filed against 7 accused persons including the applicants.

12. Learned counsel has placed reliance on the decision rendered in **P.S. Rajya vs. State of Bihar**5, to submit that pursuing the prosecution against the applicants is not justified for the reason that the enquiry conducted by the department against the alleged irregularity / loss, nothing was found. The project was executed as per norms prescribed by the Government. It is further urged that in the given facts there has been inordinate delay caused by the prosecution in trial. The applicants have been denied speedy trail, thereby, infringing their right under Act 21.

13. The following questions arise for consideration from the rival contentions of the parties:

i) whether in view of the departmental enquiry, pursing prosecution against the applicants would tantamount to abuse of the process of the court;

ii) whether delay in trial in the given facts has violated the principle of speedy trial read into Act, 21 of the Constitution of India.

14. It would be apposite to examine the law on the proposition of law being pressed by the learned counsel for the applicant.

15. In **State of N.C.T. of Delhi Vs Ajay Kumar Tyagi**6 (for short "NCT Delhi case"), a three Judge Bench was called upon to answer a reference whether a person exonerated in departmental proceeding, no criminal proceedings can be lauched or continued. The issue for consideration by the Bench reads thus:

"The facts of the case are that the respondent has been accused of taking bribe and was caught in a trap case. We are not going into the merits of the dispute. However, it seems that there are two conflicting judgments of two Judge Benches of this Court; (I) P.S. Rajya vs. State of Bihar reported in (1996) 9 SCC 1, in which a two Judge Bench held that if a person is exonerated in a departmental proceeding, no criminal proceedings can be launched or may continue against him on the same subject matter, (ii) Kishan Singh Through Lrs. Vs. Gurpal Singh & Others 2010 (8) SCALE 205, where another two Judge Bench has taken a contrary view."

16. On having considered the authority on the proposition of law, Supreme Court, answered the reference in the following terms:

*"**We are, therefore, of the opinion that the exoneration in the departmental proceeding ipso facto would not result into the quashing of the criminal prosecution.** We hasten to add, however, that if the prosecution against an accused is solely based on a finding in a proceeding and that finding is set aside by the superior authority in the hierarchy, the very foundation goes and the prosecution may be quashed. But **that principle will not apply in the case of the departmental proceeding as the criminal trial and the departmental proceeding are held by two different entities. Further they are not in the same hierarchy."***

17. In **P.S. Rajya v. State of Bihar**7, (for short "PS Rajya' case) the question before the Court was as to whether:-

"3. .....the respondent is justified in pursuing the prosecution against the appellant under Prevention of Corruption Act, 1947 notwithstanding the fact that on an identical charge the appellant was exonerated in the departmental proceedings in the light of a report submitted by the Central Vigilance Commission and concurred by the Union Public Service Commission."

18. The Court clarified in para 23 of the report that *"...We have already held that for the reasons given, on the peculiar facts of this case, the criminal proceedings initiated against the appellant cannot be pursued..."* In other words the Court did not lay down that an exoneration of an employee in departmental proceedings, the criminal prosecution has to be quashed.

19. In **NCT Delhi**, the Court, therefore, was of the opinion that the prosecution was not terminated in P.S.

Rajya case on the ground of exoneration in the departmental proceedings but on the peculiar facts. The observation is as follows:

*"The decision in the case of **P.S. Rajya** (supra), therefore does not lay down any proposition that on exoneration of an employee in the departmental proceeding, the criminal prosecution on the identical charge or the evidence has to be quashed. It is well settled that the decision is an authority for what it actually decides and not what flows from it. Mere fact that in **P.S. Rajya** (Supra), the Supreme Court quashed the prosecution when the accused was exonerated in the departmental proceeding would not mean that it was quashed on that ground."*

20. **P.S. Rajya** case came up for consideration before the Supreme Court in **State v. M. Krishna Mohan**8, thereafter, in the case of **Central Bureau of Investigation v. V.K. Bhutiani's**9, the Supreme Court held that quashing of the prosecution was illegal holding that exoneration in departmental proceedings would not lead to exoneration or acquittal in criminal case. It is well settled that the standard of proof in department proceeding is lower than that of criminal prosecution. It is equally well settled that the departmental proceeding or for that matter criminal cases have to be decided only on the basis of evidence adduced therein. Truthfulness of the evidence in the criminal case can be judged only after the evidence is adduced therein. The criminal case cannot be rejected on the basis of the evidence in the departmental proceeding or the report of the Enquiry Officer based on those evidence.

21. Recently in **Ashoo Surendranath Tewari vs. The Deputy Superintendent of Police, EOW, CBI**10, (for short "Ashoo Tewari case), Supreme Court relying on **Radheyshyam Kejriwal Vs. State of West Bengal and another**11 (for short "Radheyshyam Kejriwal case), set aside the judgment of the High Court and Special Judge and discharged the appellant from the offence under the Penal Code. The facts, therein, is that the employer SIDBI did not consider it a fit case, consequently, declined permission to prosecute the appellant. The Chief Vigilance Commission (CVC) after having gone through the arguments put forth by the CBI and SIDBI during the course of joint meeting was of the opinion that the appellant may have been negligent without any criminal culpability.

22. In **Radhey Shyam Kejriwal**, the adjudicating authority under the provisions of the Foreign Exchange Regulation Act, 197312, was not convinced with the Enforcement Directorate to impose penalty upon the appellant. In other words, if the departmental authorities themselves, in statutory adjudication proceedings recorded a categorical and an unambiguous finding that there is no such contravention of the provisions of the Act, it would be unjust for such departmental authorities to continue with the criminal prosecution and say that there is sufficient material. It would be unjust and an abuse of the process of the court to permit Enforcement Directorate & Foreign Exchange Regulatory Authority to continue with criminal proceedings on the very same material.

23. After referring to various decisions the Supreme Court in **Radhey Shyam Kejriwal** culled out the ratio of the decisions as follows:-

"38. The ratio which can be culled out from these decisions can broadly be stated as follows:

(i) Adjudication proceedings and criminal prosecution can be launched simultaneously;

(ii) Decision in adjudication proceedings is not necessary before initiating criminal prosecution;

(iii) Adjudication proceedings and criminal proceedings are independent in nature to each other;

(iv) The finding against the person facing prosecution in the adjudication proceedings is not binding on the proceeding for criminal prosecution;

(v) Adjudication proceedings by the Enforcement Directorate is not prosecution by a competent court of law to attract the provisions of Article 20(2) of the Constitution or Section 300 of the Code of Criminal Procedure;

(vi) The finding in the adjudication proceedings in favour of the person facing trial for identical violation will depend upon the nature of finding. If the exoneration in adjudication proceedings is on technical ground and not on merit, prosecution may continue; and

(vii) ***In case of exoneration, however, on merits where the allegation is found to be not sustainable at all and the person held innocent, criminal prosecution on the same set of facts and circumstances cannot be allowed to continue, the underlying principle being the higher standard of proof in criminal cases."***

24. The Court finally concluded:

"39. In our opinion, therefore, the yardstick would be to judge as to whether the allegation in the adjudication proceedings as well as the proceeding for prosecution is identical and the exoneration of the person concerned in the adjudication proceedings is on merits. In case it is found on merit that there is no contravention of the provisions of the Act in the adjudication proceedings, the trial of the person concerned shall be an abuse of the process of the court."

25. In nutshell, to recapitulate, the principle culled out in **Radhey Shaym Kejriwal** case, is that where the statutory adjudicating authority did not find prima facie case to impose penalty for violation of FERA, the prosecution based on the same material was held unjustified and abuse of the process of the Court. In **Ashoo Tewari**, CVC agreed with the competent authority of SIDBI (employer), after hearing the CBI, that complicity and culpability of the appellant was not found. The Court relying on para 38(vii) of **Radhey Shaym Kejriwal** and having regard to the detail order of CVC was of the considered opinion that the *"chances of conviction in a criminal trial involving the same facts appear to be bleak"*.

26. Reverting to the facts of the instant case, learned counsel for the applicant is unable to show from the so called report of the Technical Audit Cell that complicity and culpability of the applicants was not found. The specific allegation against the applicants is that twice the amount over and above the sanctioned rate was spent. Further, the accused persons had made payment to the labourers and the tractors engaged for the Scheme in-cash by preparing false and manufactured documents. Reliance has been placed on the communication dated 30 May 2005, of Additional Director Agriculture (Soil Conservation), U.P., Agra Division, Agra, addressed to Director Agriculture, U.P. Krishi Bhawan, Lucknow, wherein, request was made that the investigation initiated after lodging of the F.I.R. be halted. It is noted therein that the Scheme for the year 1997-98 and 1998-99, the EOW was of the opinion that twice

the sanctioned rate was released, whereas, the entire scheme was evaluated in 2001-2002. The EOW wrongly computed the work at a flat rate at Rs. 3100/-, whereas, as per norms the payment cannot exceed Rs.7200/- per hectare. In other words, it was stated in the communication that average of the different payments made per hectare would have to be taken and that sum should not exceed the upper limit, that is, Rs. 7200/- per hectare. Pursuant thereof, Director of Agriculture, vide communication dated 2 June 2005, placing reliance upon the letter of the Additional Director of Agriculture, requested the Government not to prosecute the officers of the department as there was no loss caused to the Government. It appears that the State Government did not act upon the communication and on 6 July 2005, F.I.R. came to be lodged. Thereafter, sanction was granted by the State Government for prosecution.

27. It is evident from the facts emerging from the material placed on record that no departmental proceeding, and/or disciplinary enquiry was ever conducted against the accused persons, including, the applicants. Further, the material relied upon by the I.O. is not part of any such proceedings. The prosecution is based upon an independent enquiry got conducted by the State Government by the E.O.W.. It is not the case of the applicant/accused that the prosecution is based upon the very same material relied upon by the department against the accused that was part of departmental statutory adjudication proceeding. The departmental enquiry being relied upon by the applicants was never accepted by the Government. The Government, on the contrary got an independent enquiry conducted to find out whether loss was caused to the Government. The final report came to be accepted by the Government. The authorities relied upon by the learned counsel for the applicant to submit that the applicants have been exonerated in the departmental enquiry lacks merit. The petition is bereft of the essential pleadings and foundation to that effect. The submission, accordingly, is rejected.

28. The next point pressed by learned counsel for the applicant is that the prosecution against the applicants should be quashed due to inordinate delay in concluding the prosecution and trial, thus, being violative of the concept of speedy trial enshrined in Article 21 of the Constitution of India.

29. In **Abdul Rehman Antulay v. R.S. Nayak**13 (Abdul Rehman Antulay case) the Court observed as follows:

"While determining whether undue delay has occurred (resulting in violation of Right to Speedy Trial) one must have regard to all the attendant circumstances, including nature of offence, number of accused and witnesses, the workload of the court concerned, prevailing local conditions and so on -- what is called, the systemic delays. It is true that it is the obligation of the State to ensure a speedy trial and State includes judiciary as well, but a realistic and practical approach should be adopted in such matters instead of a pedantic one."

30. The aforesaid decision came up for consideration before a Seven-Judge Constitution Bench in the case of **P. Ramachandra Rao Vs. State of Karnataka**. The Court over ruled four

earlier decisions* on the point, and while approving the ratio, the Court in Paragraph 29 (1) & (2) observed as follows:

"(1) The dictum in **Abdul Rehman Antulay v. R.S. Nayak**14 is correct and still holds the field.

(2) The propositions emerging from Article 21 of the Constitution and expounding the right to speedy trial laid down as guidelines in **Abdul Rehman Antulay v. R.S. Nayak**15 adequately take care of right to speedy trial. We uphold and reaffirm the said propositions."

31. The Constitution Bench, in **Abdul Rehman Antulay**16, has formulated certain propositions, 11 in number, meant to serve as guidelines. The paragraphs relevant for the instant case are extracted:

(1).....…

(2) Right to speedy trial flowing from Article 21 encompasses all the stages, namely the stage of investigation, inquiry, trial, appeal, revision and re-trial. That is how, this Court has understood this right and there is no reason to take a restricted view.

... ... …

... ... …

(5) While determining whether undue delay has occurred (resulting in violation of Right to Speedy Trial) one must have regard to all the attendant circumstances, including nature of offence, number of accused and witnesses, the workload of the court concerned, prevailing local conditions and so on -- what is called, the systemic delays. It is true that it is the obligation of the State to ensure a speedy trial and State includes judiciary as well, but a realistic and practical approach should be adopted in such matters instead of a pedantic one.

... ... …

... ... …

(8) Ultimately, the court has to balance and weigh the several relevant factors - "balancing test' or "balancing process' - and determine in each case whether the right to speedy trial has been denied in a given case.

(9) Ordinarily speaking, where the court comes to the conclusion that right to speedy trial of an accused has been infringed the charges or the conviction, as the case may be, shall be quashed. But this is not the only course open. The nature of the offence and other circumstances in a given case may be such that quashing of proceedings may not be in the interest of justice. In such a case, it is open to the court to make such other appropriate order - including an order to conclude the trial within a fixed time where the trial is not concluded or reducing the sentence where the trial has concluded - as may be deemed just and equitable in the circumstances of the case.

(10) It is neither advisable nor practicable to fix any time-limit for trial of offences. Any such rule is bound to be qualified one. Such rule cannot also be evolved merely to shift the burden of proving justification on to the shoulders of the prosecution. In every case of complaint of denial of right to speedy trial, it is primarily for the prosecution to justify and explain the delay. At the same time, it is the duty of the court to weigh all the circumstances of a given case before pronouncing upon the complaint. The Supreme Court of USA too has repeatedly refused to fix any such outer time-limit in spite of the Sixth Amendment. Nor do we think that not fixing any such outer limit ineffectuates the guarantee of right to speedy trial.

(11) An objection based on denial of right to speedy trial and for relief on that

account, should first be addressed to the High Court. Even if the High Court entertains such a plea, ordinarily it should not stay the proceedings, except in a case of grave and exceptional nature. Such proceedings in High Court must, however, be disposed of on a priority basis."

32. The matter pertaining to reasonably expeditious trial again came up for consideration by Supreme Court in **Ranjan Dwivedi vs. CBI through the Director General**17. The Court relying upon the Constitution Bench and Larger Bench decisions declined to quash the proceeding which was pending for 37 years. Appellant/accused had approached the Court at the stage of argument, contending that the right enshrined in Article 21 was infringed. The Supreme Court held that length of the delay is not sufficient in itself to warrant a finding that the accused was deprived of the right to a speedy trial. The relevant paras reads thus:

"23. The length of the delay is not sufficient in itself to warrant a finding that the accused was deprived of the right to a speedy trial. Rather, it is only one of the factors to be considered, and must be weighed against other factors. Moreover, among factors to be considered in determining whether the right to speedy trial of the accused is violated, the length of delay is least conclusive. While there is authority that even very lengthy delays do not give rise to a per se conclusion of violation of constitutional rights, there is also authority that long enough delay could constitute per se violation of right to speedy trial. In our considered view, the delay tolerated varies with the complexity of the case, the manner of proof as well as gravity of the alleged crime. This, again, depends on case to case basis. There cannot be universal rule in this regard. It is a balancing process while determining as to whether the accused's right to speedy trial has been violated or not. The length of delay in and itself, is not a weighty factor."

25. Prescribing a time limit for the trial court to terminate the proceedings or, at the end thereof, to acquit or discharge the accused in all cases will amount to legislation, which cannot be done by judicial directives within the arena of judicial law making power available to constitutional courts; .....…"

33. In the given facts of the case in hand, it is not in dispute that the Scheme pertains to the year 1997-98 and 1998-99. The State Government in July 1998 had directed the EOW to conduct an enquiry with regard to any loss caused to the government. F.I.R. came to be lodged on 6 July 2005 and charge sheet was filed on 13 March 2010. The applicants were summoned to face trial on 5 April 2010. Thereafter, applicant/accused had approached this Court by filing criminal writ petition, wherein, arrest of the applicants came to be stayed. Thereafter, applicant/accused filed petitions under Section 482 Cr.P.C., wherein, the Court, vide order dated 10 October 2013, had stayed the proceedings by directing no coercive action be taken against the applicant (36633/2013). The order reads thus:

"Heard learned counsel for the applicant and learned A.G.A. for the State.

The present application under Section 482 Cr.P.C., has been filed for quashing the entire proceedings of S.S.T. No. 34 of 2010 (State Vs. Shiv Kumar Chandel and others, under Sections 467, 468, 471, 420, 409, 120B IPC and 13(2) P.C. Act,pending before the Special Judge/ Sessions Judge, Firozabad.

It is contended by learned counsel for the applicant that in the present case,

F.I.R., was lodged on 06.07.2005 and charge sheet has been filed after a lapse of 5 years i.e. on 05.04.2010. It is thus, argued that as per settled principles of law of Hon'ble Apex Court, reported in AIR 2008 SC 3077 in the matter of Pankaj Kumar Vs. State of Maharastra in which, it has been held that such prolonged investigation which is not attributable to the applicant and taking note of the fact, the proceedings were quashed in the aforesaid case. It is thus contended that in the present matter charge sheet has been filed after 5 years, which is liable to be quashed by this Court.

Issue notice to the opposite party no.2 returnable within a period of four weeks. Steps be taken within a week.

Learned A.G.A. prays for and is granted four weeks' time for filing counter affidavit. Opposite party no.2 may also file counter affidavit within the same period. As prayed by learned counsel for the applicant, two weeks, thereafter, is granted for filing rejoinder affidavit.

List immediately after expiry of the aforesaid period.

Till the next date of listing, no coercive action shall be taken against the applicant in the aforesaid case."

34. Similar orders came to be passed in respect of other co-accused persons. It appears that the trial did not proceed thereafter. The trial court vide order dated 3 March 2020, however, summoned the applicant/accused to face trial pursuant to the direction of the Supreme Court in **Asian Resurfacing of Raod Agency Pvt. Ltd. v. CBI**18. Thereafter, the applicants are pressing the instant petition.

35. From the facts narrated herein above, it is evident that the delay, if any, has been caused by the applicants themselves, and the fault cannot be attributed to the prosecution of having unnecessarily/ deliberately caused delay in pursing the prosecution. The trial has not proceeded after the stage of cognizance as restrain orders were operating and the accused/applicants have not submitted to the trial. The delay perse, in the circumstances, has not violated the rights of the applicants to speedy trial.

36. The applications being devoid of merit is, accordingly, rejected.

37. The applicants to surrender before the trial court within three weeks from date. The trial court shall make an endevour to expedite the proceedings and conclude the trial, at the earliest possible, without granting unnecessary adjournment to either of the parties, provided there is no other legal impediment.

(2021)02ILR A637
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 29.01.2021

BEFORE

THE HON'BLE RAVI NATH TILHARI, J.

Application U/S 482 Cr.P.C. No. 36722 of 2016

Jai Prakash Gupta ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Rajesh Yadav

Counsel for the Opposite Parties:
A.G.A., Sri Kshitij Shailendra

Criminal Law-Suit for permanent injunction, cancellation of will deed and mutation proceeding pending-High court's direction to frame charges expeditiously

and conclude Trial -merely pendency of civil suit -not a case for quashing of criminal proceedings.

Application dismissed. (E-7)

List of Cases cited: -

1. 'Prof R.K. Vijayasarathy & anr. Vs Sudha Seetharam & anr., reported in (2019) 16 SCC 739.

2."P. Swaroopa Rani Vs M. Hari Narayanan @ Hari Babu", 2008(72) ALR 171 (SC).

3. "Syed Askari Hadi Ali Angustine Imam & anr. Vs St. (Delhi Administration and another)", (2009) 5 SCC 528.

4. "M.S. Sheriff & P.C. Damodar Nair Vs. St. of Mad.", AIR 1954 SC 397.

5. "Kamala Devi Agarwal Vs St. of W.B.", AIR 2001 SC 3846.

6. "M. Krishnaan Vs Vijay Singh & anr.", AIR 2001 SC 3014.

7. "Vishnu Dutt Sharma Vs Daya Sapra", 2009(4) AWC 3405 (SC).

8. "Trisuns Chemical Industry Vs Rajesh Agarwal & ors.", AIR 1999 SC 3499.

9. "Tapas Adhikri & ors. Vs St. of U.P. & ors.", 2009(5) ADJ 649.

10. "Sharad Agrawal Vs St. of U.P. & ors.", in Criminal Misc. Application No.35595 of 2019

11. "M.S. Sheriff & P.C. Damodar Nair Vs St. of Mad.", AIR 1954 SC 397

12. "Lal Muni Devi (Smt.) Vs St. of Bih., (2001) 2 SCC 17

13."G. Sagar Suri Vs St. of U.P.", AIR 2000 SC 754;

14. "M/s. Indian Oil Corporation Vs M/s NEPC India Ltd.", AIR 2006 SC 2780

15."Mohammed Ibrahim & ors. Vs St. of Bih. & anr.", (2009) 8 SCC 751

16. 'Sardool Singh Vs Nasib Kaur', 1987 Supp SCC 146.

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

1. Heard Sri Rajesh Yadav, learned counsel for the applicant and Sri Kshitiz Shailendra, learned counsel for the opposite party no.2 and learned AGA appearing for the State and perused the material brought on record.

2. This application under Section 482 of the Code of Criminal Procedure (Cr.P.C.) has been filed with prayer to quash the entire proceeding of Criminal Case No.16323 of 2016(State Vs. Jai Prakash Gupta and others), pending in the court of Additional Chief Judicial Magistrate, Court No.3, Moradabad, under Sections 420, 467, 468, 471, IPC, arising out of Case Crime No. 743(wrongly typed as 747) of 2015, Police Station Majhola, District Moradabad. Further prayer is to quash the charge-sheet dated 15.07.2016 and cognizance order dated 01.10.2016 passed in the said case.

3. Briefly stated the facts of the case as per the pleadings exchanged in the case, are that one Ashwani Kumar Bansal, father of opposite party no.2 is said to have executed an unregistered will in favour of Jai Prakash Gupta, the applicant on 25.07.2007, which was later on registered on 15.10.2013, under Section 40 of the Indian Registration Act, before the Sub-Registrar, Tehsil Tanda, District Rampur. On the basis of the said will mutation proceedings were initiated by the applicant in which the Tehsildar (Judicial), Moradabad, passed order dated 30.09.2015 in his favour and the Khatauni of the concerned Khata was corrected by mutating the name of the applicant. The opposite

party no.2 challenged the order dated 30.09.2015, in Revision No.C-20151300001638, under Section 219 of U.P. Land Revenue Act and in the said revision the order dated 30.09.2015 was set-aside by the Additional Commissioner, Moradabad Division, Moradabad by order dated 08.09.2016. The Revision No.2098 of 2016 field by the applicant, before the Board of Revenue, challenging the order dated 08.09.2016 was dismissed by order dated 10.08.2017. The applicant filed Writ B No.4068 of 2018, and it is the case of the opposite party no.2 that although he had field the caveat, but ignoring the caveat, the petition was filed, in which misleading arguments were advanced. The interim order dated 25.05.2018 was passed, but a perusal thereof shows that the applicant represented before this Court in the writ petition, that Ashwani Kumar Bansal was the father of the applicant, whereas, it is submitted that the applicant was his servant and it was so mentioned in the alleged will itself. The will deprived all the legal heirs of the property and was in favour of the servant. The opposite party no.2 is said to have filed counter affidavit in the writ petition which matter is said to be pending.

4. Ankush Bansal son of late Ashwani Kumar Bansal alongwith his mother (widow of Ashwani Kumar Bansal) filed Original Suit No.377 of 2015(Smt. Prabha Bansal and others Vs. Jai Prakash Gupta and others) against the applicant, for a decree of permanent injunction with respect to the land of Gata No.720, area 1.497 hectares, subject matter of the will, to restrain the defendants 1 and 2 therein from transferring the said land and from interfering in the possession of the plaintiffs of that suit. The opposite party no.2 was also impleaded as Performa defendant no.3, since he was not available, but the suit was filed also for his interest. The learned Civil Judge (Junior Division), Moradabad granted an ad-interim temporary injunction by order dated 14.10.2015.

5. A suit being Original Suit No.311 of 2016 has also been filed by the opposite party no.2 and others, challenging the will in question which suit has been connected with Original Suit No.377 of 2015 and is pending before the civil court concerned.

6. The opposite party no.2 lodged first information report in Case Crime No.0743 dated 02.11.2015, under Sections 420, 467, 468, 471, IPC against the applicant and two others, inter-alia on the averments that after the death of Ashwani Kumar Bansal on 10.02.2008, the names of his legal heirs, the opposite party no.2, his brother and mother was recorded in the Khatauni in the year 2009. The applicant-accused no.1 with two other accused persons to grab the valuable land of the informant prepared the forged will dated 25.07.2007, in which the other co-accused persons were made the witnesses, giving wrong address of the father of the informant at Tanda, Rampur, whereas he never resided at Tanda, Rampur. The said will was got registered on 15.11.2013, whereas the father died in the year 2008 and on the basis of the said forged will the order of mutation was obtained ex-parte without any notice to the legal heirs. The informant came to know about the said will and the forgery when the applicant made efforts to sell the land to one Surajpal.

7. The FIR was challenged in Criminal Misc. Writ Petition No.27751 of 2015, in which by order dated 24.11.2015 passed by this Court, the arrest of the applicant was stayed till submission of the

police report under Section 173(2) Cr.P.C. After investigation, the investigating officer submitted charge-sheet against the applicant and the other co-accused persons under Sections 420, 467, 468, 471, IPC, on 15.07.2016, upon which the Magistrate took cognizance by order dated 01.10.2016. The present petition under Section 482 Cr.P.C. has been filed with the prayer to quash the said charge-sheet, the order of cognizance and the proceedings of the Criminal Case No.16323 of 2016.

8. Learned counsel for the opposite party no.2 has pointed out that the opposite party no.2 filed application under Section 482 Cr.P.C. No.44523 of 2018(Ambuj Bansal Vs. State of U.P. and 3 others), which application was disposed of by order dated 10.12.2018 with a direction to the court below to secure the presence of the accused persons and frame charges, expeditiously, preferably within a period of three months from the date of production of a certified copy of that order, before the Magistrate concerned.

9. It has been stated in the counter affidavit that the applicant was released on bail by order dated 09.03.2018 passed by this Court, in Criminal Misc. Bail Application No.19625 of 2017. The opposite party no.2 filed Criminal Misc. Bail Cancellation Application No.2224 of 2018, which was disposed of by order dated 15.10.2009 and thereby the trial court was also directed to conclude the trial of the case according to Section 309 Cr.P.C. on day to day basis, if there was no legal impediment.

10. During arguments, learned counsel for the opposite party no.2 pointed out that the trial of the criminal case is going on with a rapid pace pursuant to the orders of this Court; the witnesses have already been examined and trial is at the stage of Section 313 Cr.P.C.

11. Learned counsel for the applicant submitted that the opposite party no.2 filed application under Section 482 Cr.P.C. No.44523 of 2018, without disclosing the correct facts and consequently the ex-parte order dated 10.12.2018, to expedite the trial was passed. He has further submitted that the opposite party no.2 again lodged a first information report in Case Crime No.314 of 2018, under Sections 420, 467, 468 and 471 IPC, at Police Station Majhola, in which also the charge-sheet was filed, against which the applicant field Application under Section 482 Cr.P.C. No.38662 of 2018, in which this Court by order dated 20.12.2018, stayed further proceeding of Case No.7669 of 2018, arising out of Case Crime No.314 of 2018.

12. Be that as it may, from the facts as narrated by the applicant and the opposite party no.2 it is evident that in Application under Section 482 Cr.P.C. No.44523 of 2018, this Court by order dated 10.12.2018 has issued direction to the court below to secure the presence of the accused and frame charges expeditiously, within the time stipulated in that order. It is also evident that in Criminal Misc. Bail Cancellation Application No.2224 of 2018, there is direction to the trial court to conclude the trial of the case according to Section 309 Cr.P.C. on day to day basis, if there was no legal impediment, vide order dated 15.10.2009. Nothing has been brought on record, nor even argued, that any application or any proceeding against the aforesaid orders dated 10.12.2018 and 15.10.2009 was taken by either of the parties for recall or setting aside of the said orders. Those orders, stand even today, as per the submissions advanced.

13. Learned counsel for the applicant submitted that in view of the pendency of civil suits, one for permanent injunction and the other for cancellation of the will deed, as well as the proceedings for mutation on the basis of will at the stage of writ petition, the initiation of the criminal proceedings in pursuance of the first information report, is an abuse of the process of the Court and both the proceedings Civil and Criminal cannot go simultaneously. He has submitted that the dispute is predominantly a civil dispute and so long as the document i.e. the will, is not decided to be forged by the civil court, the criminal persecution could not be lodged. The civil dispute is being given the color of the criminal dispute. On this ground, challenge has been made to the charge-sheet as well as the proceedings of the criminal case. Learned counsel for the applicant has placed reliance on the judgment of Hon'ble the Supreme Court, in the case of **''Prof R.K. Vijayasarathy and Another Vs. Sudha Seetharam and another',** reported in (2019) 16 SCC 739.

14. Per contra, learned counsel for the opposite party no.2 submitted that the civil proceedings and the criminal proceedings can go on simultaneously. The criminal proceedings are to be given primacy or preference, over civil proceedings. Merely because, the civil proceedings are pending, the criminal proceedings cannot be set-aside or quashed. He has placed reliance on the following judgments in support of his submissions:-

*1. **"P. Swaroopa Rani Vs. M. Hari Narayanan @ Hari Babu"**, 2008(72) ALR 171 (SC).*

*2. **"Syed Askari Hadi Ali Angustine Imam and another Vs. State (Delhi Administration and another)",** (2009) 5 SCC 528.*

*3. **"M.S. Sheriff and P.C. Damodar Nair Vs. State of Madras",** AIR 1954 SC 397.*

*4. **"Kamala Devi Agarwal Vs. State of West Bengal",** AIR 2001 SC 3846.*

*5. **"M. Krishnaan Vs. Vijay Singh and another",** AIR 2001 SC 3014.*

*6. **"Vishnu Dutt Sharma Vs. Daya Sapra"**, 2009(4) AWC 3405 (SC).*

*7. **"Trisuns Chemical Industry Vs. Rajesh Agarwal and others"**, AIR 1999 SC 3499.*

*8. **"Tapas Adhikri and others Vs. State of U.P. and others"**, 2009(5) ADJ 649.*

*9. **"Sharad Agrawal Vs. State of U.P. and others"**, in Criminal Misc. Application No.35595 of 2019, decided on 25.09.2019, passed by this Court.*

15. Learned AGA submitted that the civil and criminal proceedings can go on simultaneously and the pendeny of the civil suit cannot be a bar to the institution of the criminal proceeding, if, prima-facie, a case for commission of offence is made out on the averments made in the FIR or complaint and consequently on the ground of the dispute being pending in the Civil Court or before Revenue Court, the criminal proceedings are not required to be quashed.

16. I have considered the submissions advanced by the learned counsel for the applicant, learned counsel for the opposite party no.2 and the learned AGA and have also perused the material brought on record.

17. In view of the submissions advanced by the learned counsel for the

parties, the following points arise for consideration:-

(i) Whether the civil and criminal proceedings can simultaneously go on or in view of pendency of civil proeedings, the criminal proceedings are to be quashed ?

(ii) Whether in the present case, in view of the pendency of the civil suits for permanent injunction; and also for cancellation of the will; the criminal proceedings, in question, are liable to be quashed.?

18. Taking the first point, first, to answer the same this Court proceeds to consider some of the judgments on the point in issue as hereinafter.

19. In the case of **"M.S. Sheriff and P.C. Damodar Nair Vs. State of Madras"**, AIR 1954 SC 397, the Constitution Bench of the Hon'ble Supreme Court held that as between the civil and the criminal proceedings, the criminal matters should be given precedence, however, observing that no hard and fast rule can be laid down. It was further held that the possibility of conflicting decisions in the civil and criminal courts was not a relevant consideration but, the only relevant consideration was the likelihood of embarrassment. Another factor, which weighed was that a civil suit often drags for years and it was undesirable that a criminal prosecution should wait till everybody had forgotten about the crime. The public interest demanded that the criminal justice should be swift and sure. The guilty should be punished while the events are still fresh in the public mind and the innocent should be absolved as early as is consistent with a fair and impartial trial. It would be undesirable to let things slide till memories have grown too dim to trust. It was also held that special considerations obtaining in a particular case may make some other course, more expedient, and just. An example was given that the civil case or the other criminal proceeding may be so near to its end, as to make it inexpedient to stay it, in order to give precedence to the other proceeding.

20. In **M.S. Sheriff (Supra)** the proceedings of the civil suits were stayed till the finalization of criminal proceedings. It is relevant to reproduce paragraph nos.14 to 16 of **M.S. Sheriff (Supra)** as under:-

"14.We were informed at the hearing that two further sets of proceedings arising out of the same facts are now pending against the appellants. One is two civil suits for damages for wrongful confinement. The other is two criminal prosecutions under S. 344. I.P.C. for wrongful confinement, one against each Sub-Inspector. It was said that the simultaneous prosecution of these matters will embarrass the accused. But after the hearing of the appeal we received information that the two criminal prosecutions have been closed with liberty to file fresh complaints when the papers are ready, as the High Court records were not available on the application of the accused. As these prosecutions are not pending at the moment, the objection regarding them does not arise but we can see that the simultaneous prosecution of the present criminal proceedings out of which this appeal arises and the civil suits will embarrass the accused. We have therefore to determine which should be stayed.

15.As between the civil and the criminal proceedings we are of the opinion that the criminal matters should be given precedence. There is some difference of opinion in the High Courts of India on this

point. No hard and fast rule can be laid down but we do not consider that the possibility of conflicting decision in the civil and criminal Courts is a relevant consideration. The law envisages such an eventuality when it expressly refrains from making the decision of the Court binding on the other, or even relevant, except for certain limited purposes, such as sentence or damages. The only relevant consideration here is the likelihood of embarrassment.

16.Another factor which weighs with us is that a civil suit often drags on for years and it is undesirable that a criminal prosecution should wait till everybody concerned has forgotten all about the crime. The public interest demand that criminal justice should be swift and sure; that the guilty should be punished while the events are still fresh in the public mind and that the innocent should be absolved as early as is consistent with a fair and impartial trial. Another reason is that it is undesirable to let things slide till memories have grown too dim to trust. This, however, is not a hard and fast rule. Special considerations obtaining in any particular case might make some other course more expedient and just. For example, the civil case or the other criminal proceeding may be so near its end as to make it inexpedient to stay it in order to give precedence to a prosecution ordered under S. 476. But in this case we are of the view that the civil suits should be stayed till the criminal proceedings have finished."

21. In **"Lal Muni Devi (Smt.) Vs. State of Bihar,** (2001) 2 SCC 17, the Hon'ble Supreme Court held that there could be no dispute to the proposition that if the complaint does not make out an offence it can be quashed. However, it was also held that it is also settled law that facts may give rise to a civil claim and also amount to an offence and merely because a civil claim is maintainable that does not mean that the criminal complaint cannot be maintained. The Hon'ble Supreme Court held that, as in that case, the High Court did not state that on facts no offence was made out, the criminal prosecution could not have been quashed merely on the ground that the dispute was a civil wrong.

22. In **M. Krishnan (Supra)** the Hon'ble Supreme Court held that in almost all cases of cheating and fraud in the whole transaction, there is generally some element of civil nature. In that case, the allegations were regarding the forging of the documents and acquiring gains on the basis of such forged documents. It was held that the proceedings could not be quashed only because the respondents there in, had filed a civil suit with respect to those documents. In a criminal Court the allegations made in the complaint have to be established independently, notwithstanding, the adjudication by a civil court. If the complainant had failed to prove the allegations made by him in the complaint the accused would be entitled to discharge but not otherwise. If mere pendency of a suit is made a ground for quashing the criminal proceedings, the unscrupulous litigants, apprehending criminal action against them, would be encouraged to frustrate the course of justice and law by filing suits with respect to the documents intended to be used against them after the initiation of criminal proceedings or in anticipation of such proceedings. Such a course cannot be the mandate of law. The civil proceedings as distinguished from the criminal action have to be adjudicated and concluded by adopting separate yard sticks. In criminal cases, the onus is, of proving the allegations beyond reasonable doubt,

which is not applicable to civil proceedings which are decided merely on the basis of probabilities with respect to the acts complained of.

23. It is appropriate to reproduce para 5 of **M. Krishnan (Supra)** as under:-

"Accepting such a general proposition would be against the provisions of law inasmuch as in all cases of cheating and fraud, in the whole transaction, there is generally some element of civil nature. However, in this case, the allegations were regarding the forging of the documents and acquiring gains on the basis of such forged documents. The proceedings could not be quashed only because the respondents had filed a civil suit with respect to the aforesaid documents. In a criminal court the allegations made in the complaint have to be established independently, notwithstanding the adjudication by a civil court. Had the complainant failed to prove the allegations made by him in the complaint, the respondents were entitled to discharge or acquittal but not otherwise. If mere pendency of a suit is made a ground for quashing the criminal proceedings, the unscrupulous litigants, apprehending criminal action against them, would be encouraged to frustrate the course of justice and law by filing suits with respect to the documents intended to be used against them after the initiation of criminal proceedings or in anticipation of such proceedings. Such a course cannot be the mandate of law. Civil proceedings, as distinguished from the criminal action, have to be adjudicated and concluded by adopting separate yardsticks. The onus of proving the allegations beyond reasonable doubt, in criminal case, is not applicable in the civil proceedings which can be decided merely on the basis of the probabilities with respect to the acts complained of. The High Court was not, in any way, justified to observe:

"In my view, unless and until the civil court decides the question whether the document are genuine or forged, no criminal action can be initiated against the petitioners and in view of the same, the present criminal proceedings and taking cognizance and issue of process are clearly erroneous."

24. In **"Kamala Devi Agarwal (Supra)** the Hon'ble Supreme Court on consideration of the earlier authorities on the point, held, that criminal cases have to be proceeded with in accordance with the procedure as prescribed under the Code of Criminal Procedure and the pendency of a civil action in a different court even though higher in status and authority, cannot be made a basis for quashing of the proceedings.It is considered appropriate to refer paragraph nos.9, 10 and 17 of **Kamala Devi Agarwal (Supra)** as under:-

"9. Criminal prosecution cannot be thwarted at the initial stage merely because civil proceedings are also pending. After referring to judgments in State of Haryana v. Bhajan Lal , Rajesh Bajaj v. State NCT of Delhi *this Court in* Trisuns Chemical Industry v. Rajesh Agarwal & Ors. *[1999 (8) SC 687] held:*

"Time and again this Court has been pointing out that quashing of FIR or a complaint in exercise of the inherent, powers of the High Court should be limited to very extreme exceptions (vide State of Haryana v. Bhajan Lal and Rajesh Bajaj v. State NCT of Delhi].

In the last referred case this court also pointed out that merely because an act has a civil profile is not sufficient to denude it of its criminal outfit. We quote the following observations:

"10. It may be that the facts narrated in the present complaint would as well reveal a commercial transaction or money transaction. But that is hardly a reason for holding that the offence of cheating were committed in the course of commercial and also money transaction."

17. In view of the of authorities to the contrary, we are satisfied that the High Court was not justified in quashing the proceedings initiated by the appellant against the respondents. We are also not impressed by the argument that as the civil suit was pending in the High Court, the Magistrate was not justified to proceed with the criminal case either in law or on the basis of propriety. Criminal cases have to be proceeded with in accordance with the procedure as prescribed under the Code of Criminal Procedure and the pendency of a civil action in a different court even though higher in status and authority, cannot be made a basis for quashing of the proceedings."

25. In **Vishnu Dutt Sharma (Supra)**, also, it has been held that any finding in a criminal proceeding by no stretch of imagination would be binding in a civil proceeding. If a primacy is given to a criminal proceeding, the civil suit must be determined on its own keeping in view the evidence brought on record in such suit and not in terms of the evidence brought in the criminal proceedings.

26. In **P. Swaroopa Rani (Supra)** the Hon'ble Supreme Court held that it is well-settled that in a given case, civil proceedings and criminal proceedings can proceed simultaneously. Whether civil proceedings or criminal proceedings shall be stayed depends upon the fact and circumstances of each case.

27. In **Syed Askari Hadi Ali (Supra)** the question involved was the effect of pendency of a probate proceeding vis-a-vis a criminal case involving allegations of forgery of a will. The Hon'ble Supreme Court, reiterated, that indisputably, in a given case, a civil proceeding as also a criminal proceeding may proceed simultaneously. Cognizance in a criminal proceeding can be taken by the criminal court upon arriving at the satisfaction that there exists a prima facie case. The question as to whether in the facts and circumstances of the case one or the other proceedings would be stayed would depend upon several factors including the nature and the stage of the case. Ordinarily, a criminal proceeding will have primacy over the civil proceeding. Precedence to a criminal proceeding is given having regard to the fact that the disposal of a civil proceeding ordinarily takes a long time and in the interest of justice the former should be disposed of as expeditiously as possible. It has been so held in paragraph nos.21, 22 and 23, which are reproduced as under:-

"21. Indisputably, in a given case, a civil proceeding as also a criminal proceeding may proceed simultaneously. Cognizance in a criminal proceeding can be taken by the criminal court upon arriving at the satisfaction that there exists a prima facie case. The question as to whether in the facts and circumstances of the case one or the other proceedings would be stayed would depend upon

several factors including the nature and the stage of the case.

22. It is, however, now well settled that ordinarily a criminal proceeding will have primacy over the civil proceeding. Precedence to a criminal proceeding is given having regard to the fact that disposal of a civil proceeding ordinarily takes a long time and in the interest of justice the former should be disposed of as expeditiously as possible. The law in this behalf has been laid down in a large number of decisions. We may notice a few of them.

23. In M.S. Sheriff & anr. vs. State of Madras & Ors. [AIR 1954 SC 397], a Constitution Bench of this Court was seized of a question as to whether a civil suit or a criminal case should be stayed in the event both are pending; it was opined that the criminal matter should be given precedence. In regard to the possibility of conflict in decisions, it was held that the law envisages such an eventuality when it expressly refrains from making the decision of one Court binding on the other or even relevant, except for certain limited purposes, such as sentence or damages. It was held that the only relevant consideration was the likelihood of embarrassment."

28. In this connection, reference also deserves to be made to the judgments of the Hon'ble Supreme Court in the cases of **"G. Sagar Suri Vs. State of U.P."**, AIR 2000 SC 754; **"M/s. Indian Oil Corporation Vs. M/s NEPC India Ltd."**, AIR 2006 SC 2780 and **"Mohammed Ibrahim & others Vs. State of Bihar & Another"**, (2009) 8 SCC 751.

29. In **G. Sagar Suri (Supra)**, the Hon'ble Supreme Court held that in the exercise of jurisdiction under Section 482 Cr.P.C. the High Court has to see if the matter, which is essentially of a civil nature, has been given a cloak of criminal offence. Criminal proceedings are not a short cut of other remedies available in law. It has been further held that if, the High Court comes to the conclusion that allowing the proceeding to continue would be an abuse of the process of the Court or that ends of justice required that the proceeding be quashed, the High Court is entitled to quash the criminal proceeding. Paragraph Nos.8 and 9 of **G. Sagar Suri (Supra)** read as under:-

"8. Jurisdiction under Section 482 of the Code has to be exercised with a great care. In exercise of its jurisdiction High Court is not to examine the matter superficially. It is to be seen if a matter, which is essentially of civil nature, has been given a cloak of criminal offence. Criminal proceedings are not a short cut of other remedies available in law. Before issuing process a criminal court has to exercise a great deal of caution. For the accused it is a serious matter. This Court has laid certain principles on the basis of which High Court is to exercise its jurisdiction under Section 482 of the Code, Jurisdiction- under this Section has to be exercised to prevent abuse of the process of any court or otherwise to secure the ends of justice.

9. In State of Karnataka v. L. Muniswamy and Others, AIR (1977) SC 1489 = [1977] 3 SCR 113, this Court said that in the exercise of the wholesome power under Section 482 of the Code High Court is entitled to quash a proceeding if it comes to the conclusion that allowing the proceeding to continue would be an abuse of the process of the Court or that the ends of justice require that the proceedings are to be quashed."

30. In **"M/s. Indian Oil Corporation (Supra)**, one of the points which came up for consideration before Hon'ble the Supreme Court was:

"Whether existence or availment of civil remedy in respect of disputes arising from breach of contract, bars remedy under the criminal law ?".

It was held that any effort to settle civil disputes and claims, which do not involve any criminal offence, by applying pressure, through criminal prosecution should be deprecated and discouraged. The principles laid down in the earlier judgments, were quoted, one of which was that the given set of facts may make out; (a) purely a civil wrong or (b) purely a criminal offence or (c) a civil wrong as also a criminal offence. A commercial transaction or a contractual dispute, apart from furnishing a cause of action for seeking remedy in civil law may also involve a criminal offence. As the nature and scope of civil proceedings are different from criminal proceedings, the mere fact that the complaint raised a commercial transaction, or breach of contract, for which a civil remedy is available or has been availed, is not by itself a ground to quash the criminal proceedings. The test is whether the allegations in the complaint disclose a criminal offence or not. Paragraph nos. 9 and 10 of the report are being reproduced as under:-

"9. The principles relating to exercise of jurisdiction under Section 482 of the Code of Criminal Procedure to quash complaints and criminal proceedings have been stated and reiterated by this Court in several decisions. To mention a few - Madhavrao Jiwaji Rao Scindia v. Sambhajirao Chandrojirao Angre [1988 (1) SCC 692], State of Haryana vs. Bhajanlal [1992 Supp (1) SCC 335], Rupan Deol Bajaj vs. Kanwar Pal Singh Gill [1995 (6) SCC 194], Central Bureau of Investigation v. Duncans Agro Industries Ltd., [1996 (5) SCC 591], State of Bihar vs. Rajendra Agrawalla [1996 (8) SCC 164], Rajesh Bajaj v. State NCT of Delhi, [1999 (3) SCC 259], Medchl Chemicals & Pharma (P) Ltd. v. Biological E. Ltd. [2000 (3) SCC 269], Hridaya Ranjan Prasad Verma v. State of Bihar [2000 (4) SCC 168], M. Krishnan vs Vijay Kumar [2001 (8) SCC 645], and Zandu Phamaceutical Works Ltd. v. Mohd. Sharaful Haque [2005 (1) SCC 122]. The principles, relevant to our purpose are :

(i) A complaint can be quashed where the allegations made in the complaint, even if they are taken at their face value and accepted in their entirety, do not prima facie constitute any offence or make out the case alleged against the accused.

For this purpose, the complaint has to be examined as a whole, but without examining the merits of the allegations. Neither a detailed inquiry nor a meticulous analysis of the material nor an assessment of the reliability or genuineness of the allegations in the complaint, is warranted while examining prayer for quashing of a complaint.

(ii) A complaint may also be quashed where it is a clear abuse of the process of the court, as when the criminal proceeding is found to have been initiated with malafides/malice for wreaking vengeance or to cause harm, or where the allegations are absurd and inherently improbable.

(iii) The power to quash shall not, however, be used to stifle or scuttle a legitimate prosecution. The power should be used sparingly and with abundant caution.

(iv) The complaint is not required to verbatim reproduce the legal ingredients of the offence alleged. If the necessary factual foundation is laid in the complaint,

merely on the ground that a few ingredients have not been stated in detail, the proceedings should not be quashed. Quashing of the complaint is warranted only where the complaint is so bereft of even the basic facts which are absolutely necessary for making out the offence.

(v) A given set of facts may make out : (a) purely a civil wrong; or (b) purely a criminal offence; or (c) a civil wrong as also a criminal offence. A commercial transaction or a contractual dispute, apart from furnishing a cause of action for seeking remedy in civil law, may also involve a criminal offence. As the nature and scope of a civil proceedings are different from a criminal proceeding, the mere fact that the complaint relates to a commercial transaction or breach of contract, for which a civil remedy is available or has been availed, is not by itself a ground to quash the criminal proceedings. The test is whether the allegations in the complaint disclose a criminal offence or not.

10. While on this issue, it is necessary to take notice of a growing tendency in business circles to convert purely civil disputes into criminal cases. This is obviously on account of a prevalent impression that civil law remedies are time consuming and do not adequately protect the interests of lenders/creditors. Such a tendency is seen in several family disputes also, leading to irretrievable break down of marriages/families. There is also an impression that if a person could somehow be entangled in a criminal prosecution, there is a likelihood of imminent settlement. Any effort to settle civil disputes and claims, which do not involve any criminal offence, by applying pressure though criminal prosecution should be deprecated and discouraged. In G. Sagar Suri vs. State of UP [2000 (2) SCC 636], this Court observed :

"It is to be seen if a matter, which is essentially of civil nature, has been given a cloak of criminal offence. Criminal proceedings are not a short cut of other remedies available in law. Before issuing process a criminal court has to exercise a great deal of caution. For the accused it is a serious matter. This Court has laid certain principles on the basis of which High Court is to exercise its jurisdiction under Section 482 of the Code. Jurisdiction under this Section has to be exercised to prevent abuse of the process of any court or otherwise to secure the ends of justice."

While no one with a legitimate cause or grievance should be prevented from seeking remedies available in criminal law, a complainant who initiates or persists with a prosecution, being fully aware that the criminal proceedings are unwarranted and his remedy lies only in civil law, should himself be made accountable, at the end of such misconceived criminal proceedings, in accordance with law. One positive step that can be taken by the courts, to curb unnecessary prosecutions and harassment of innocent parties, is to exercise their power under section 250 Cr.P.C. more frequently, where they discern malice or frivolousness or ulterior motives on the part of the complainant. Be that as it may."

31. In **"Mohammed Ibrahim (Supra)**, the Hon'ble Supreme Court held that there is growing tendency of the complainants attempting to give the cloak of a criminal offence to matters which are essentially and purely civil in nature, either to apply pressure on the accused, or out of enmity towards the accused, or to subject

the accused to harassment. Criminal Court should ensure that the proceedings before it are not sued for settling scores or to pressurize parties to settle civil dispute. But, at the same time, it should be noted that several dispute of a civil nature may also contain the ingredient of criminal offences and if so, will have to be tried as criminal offences, even if, they also amount to a civil dispute.

32. In **Trisuns Chemical Industry (Supra)** relied on by learned counsel for the opposite party no.2, it was held that the provision incorporated in the agreement for referring the disputes to arbitration is a remedy for affording relief to the party affected by breach of the arrangement but the arbitrator cannot conduct a trial of any act which amounted to an offence albeit the same act may be connected with the discharge of any function under the agreement. Hence, those are not good reasons for the High Court to axe down the complaint at the threshold itself. The investigation agency should have had the freedom to go into the whole gamut of the allegations and to reach a conclusion of its own. Preemption of such investigation would be justified only in very extreme case.

33. This case **Trisuns Chemical Industry (Supra)** is not on the point, as the case at hand is not of pendency of any arbitration proceedings, but is a case of pendency of civil suits in civil court. There is vast difference between the powers and jurisdiction of the civil court and the arbitrator, as is evident from **Trisuns Chemical Industry (Supra)** that the arbitrator can not conduct a trial of any act which amounted to an offence.

34. In **Tapas Adhikari (Supra)** this Court has also held that so far as the pendency of civil suit is concerned, the proceedings in civil or revenue courts are filed for the purpose of obtaining different reliefs. If remedy is available in civil or revenue courts, but on the basis of allegations, prima facie, any criminal offence is made out, the same may not be quashed, only on the ground that civil proceedings are pending. The civil and criminal proceedings may run parallel, therefore, on account of pendency of the civil suit, the proceedings of the criminal case cannot be quashed.

35. In **Sharad Agrawal (Supra)** also this Court has held that in a case where an act is both criminal offence and a civil wrong, the law appears to be consistent that both the civil court and criminal court would have jurisdiction independent of the other. In certain cases, depending upon the facts, proceedings before the civil court or the criminal court may be stayed, pending out come of the case before the other, but on those consideration proceedings before the criminal court or before the civil court, cannot be quashed or scuttled. It was further held that it is not the law that the proceedings before the criminal court are to be quashed because the same facts in issue i.e. subject matter of criminal proceedings between the parties is also the subject matter of a pending civil suit.

36. In the case of **''Professer R.K.Vijaysarathy (Supra)**, on which learned counsel for the applicant has placed reliance, the Hon'ble Supreme Court, in paragraph nos. 27, 28 and 29 has held as under:-

27. Learned Senior Counsel for the appellant contended that the actions of the first respondent constitute an abuse of process of the court. It is contended that the present dispute is of a civil nature and the

first respondent has attempted to cloak it with a criminal flavor to harass the aged appellants. It is also contended that there is an undue delay in filing the complaint from which the present appeal arises, and this demonstrates the mala fide intention of the first respondent in filing the complaint against the appellants. Learned Senior Counsel for the appellants relied on the decision of this Court in **"State of Karnataka v L Muniswamy"**, (1977) 2 SCC 699. In that case, the prosecution alleged that eight of the accused had conspired to kill the complainant. The Karnataka High Court quashed the proceedings on the ground that no sufficient ground was made out against the accused. A three judge Bench of this Court dismissed the appeal by the State with the following observations:

"7...In the exercise of this wholesome power, the High Court is entitled to quash a proceeding if it comes to the conclusion that allowing the proceeding to continue would be an abuse of the process of the Court or that the ends of justice require that the proceeding ought to be quashed. The saving of the High Court's inherent powers, both in civil and criminal matters, is designed to achieve a salutary public purpose which is that a court proceeding ought not to be permitted to degenerate into a weapon of harassment or persecution. 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 proceeding in the interest of justice."

28. The jurisdiction under Section 482 of the Code of Criminal Procedure has to be exercised with care. In the exercise of its jurisdiction, a High Court can examine whether a matter which is essentially of a civil nature has been given a cloak of a criminal offence. Where the ingredients required to constitute a criminal offence are not made out from a bare reading of the complaint, the continuation of the criminal proceeding will constitute an abuse of the process of the court.

29. In the present case, the son of the appellants has instituted a civil suit for the recovery of money against the first respondent. The suit is pending. The first respondent has filed the complaint against the appellants six years after the date of the alleged transaction and nearly three years from the filing of the suit. The averments in the complaint, read on its face, do not disclose the ingredients necessary to constitute offences under the Penal Code. An attempt has been made by the first respondent to cloak a civil dispute with a criminal nature despite the absence of the ingredients necessary to constitute a criminal offence. The complaint filed by the first respondent against the appellants constitutes an abuse of process of court and is liable to be quashed."

37. From the above, it is evident that in **Prof. R.K. Vijayasarathy (Supra)**, the Hon'ble Supreme Court has clearly held that the jurisdiction under Section 482 of the Code of Criminal Procedure (Cr.P.C.) has to be exercised with care and in the exercise of its jurisdiction the High Court shall examine whether a matter which was essentially of a civil nature has been given a cloak of a criminal offence. Where the ingredient required to constitute a criminal offence are not made out from a bare recording of the complaint, the continuation of the criminal proceedings will constitute abuse of the process of the Court. However, it has not been laid down that merely because a civil suit is pending the criminal proceeding cannot

simultaneously proceed or in view of mere pendency of civil proceedings, the criminal proceedings are to be stayed or quashed. In **Prof. R.K. Vijayasarathy (Supra)**, the Hon'ble Supreme Court found that the complaint did not disclose the ingredient necessary to constitute offences under the Penal Code and also that an attempt was made to cloak a civil dispute with criminal nature, despite the absence of the necessary ingredients to constitute the criminal offence and consequently that was an abuse of the process of the Court.

38. The principles of law with reasons as laid down in the aforesaid judgments are that:

(1) As between the civil and the criminal proceedings, ordinarily, the criminal matters should be given precedence. The reason being, that a civil suit for often drags on for years and it would be undesirable that a criminal prosecution should wait till the civil proceedings are decided. The public interest demands that the criminal justice should be swift and sure. Another reason being that if mere pendency of a suit is made a ground for quashing the criminal proceedings, the unscrupulous litigants apprehending criminal action against them, may frustrate the course of justice and law by filing suits with respect to the documents intended to be used against them after the initiation of criminal proceedings or in anticipation of such proceedings which cannot be the mandate of law. The criminal prosecution cannot be thwarted at the initial stage merely because civil proceedings are also pending.

(2) While no one with a legitimate cause or grievance should be prevented from seeking remedy available in criminal law, but at the same time it is also to be considered that there is growing tendency in many disputes i.e. business/family/matrimonial, etc. to convert purely civil disputes into criminal case, for so many reasons, e.g. civil law remedies are time consuming; or if a person would somehow be entangled in a criminal prosecution, there is possibility of an imminent settlement. The criminal proceedings cannot be a short cut of other remedies available in law. If complainant is attempting to give the cloak of a criminal offence to matters which are essentially and purely civil in nature, the same cannot be allowed to settle the scores or to pressurize parties to settle civil dispute.

(3) Several disputes of a civil nature which may also contain the ingredient of criminal offences will also have to be tried as criminal offences, even if, they also amount to civil disputes.

(4) Whether civil proceedings or criminal proceedings shall be stayed depends upon the facts and circumstances of each case. No hard and fast rule can be laid down. The test is whether the allegations in the complaint disclose a criminal offence or not. The stage of proceeding is a relevant consideration as well.

(5) Mere pendency of civil suit cannot be a ground to quash the criminal proceedings.

39. Point No.1 as framed in para 17 is answered in terms of paragraph no.38, above.

40. Now I proceed to consider point no.2, "Whether in the present case in view of pendency of civil suits for permanent injunction and also for cancellation of the will, the criminal proceedings in question are liable to be quashed.?"

41. Submission of the learned counsel for the applicant is that so long as the civil suit is pending in which the genuineness of the will is under question and so long as

that issue is not decided the criminal prosecution should not proceed and be quashed. This submission deserves rejection, as mere pendency of civil suits cannot be a ground to quash the criminal proceedings.

42. In respect to the above submission, reference may be made to the judgment of Hon'ble the Supreme Court in the case of **Syed Askari Hadi Ali (Supra)**, in which the Hon'ble Supreme Court considered earlier judgment in the case of **''Sardool Singh Vs. Nasib Kaur'**, 1987 Supp SCC 146. In the case of Sardool Singh (Supra), a civil suit between the parties was pending wherein the contention of the respondent therein was that no will was executed, whereas, the contention of the appellants therein was that a will was executed by the testator. A case for grant of probate on the basis of same will was also pending. The civil court was therefore seized of the question as regards the validity of the will. The matter was subjudice in those two cases in the civil courts. The Hon'ble Supreme Court took the view that at that juncture, the respondent therein could not, be permitted to institute a criminal prosecution on the allegation that the will was a forged one and that question was to be decided by the civil court after recording the evidence and hearing the parties in accordance with law; and it would not be proper to permit the criminal prosecution, when the validity of the very will was being tested in a civil court. Hon'ble Supreme Court, in Syed Askari Hadi Ali(Supra), observed with respect to the case of **Sardool Singh (Supra)**, as regard the aforesaid, that "no ratio, however, can be culled out, therefrom. Why such a direction was issued or such observations were made, do not appear from the said decision." Paragraph no.35 of **Syed Askari Hadi Ali (Supra)**, reads as under:-

"35. The question came up for consideration again before this Court in Sardool Singh & Anr. vs. Smt. Nasib Kaur [1987 (Supp.) SCC 146], wherein it was opined:

*"A civil suit between the parties is pending wherein the contention of the respondent is that no Will was executed whereas the contention of the appellants is that a Will has been executed by the testator. A case for grant of probate is also pending in the court of learned District Judge, Rampur. The civil court is therefore seized of the question as regards the validity of the Will. The matter is sub judice in the aforesaid two cases in civil courts. At this juncture the respondent cannot therefore be permitted to institute a criminal prosecution on the allegation that the Will is a forged one. That question will have to be decided by the civil court after recording the evidence and hearing the parties in accordance with law. It would not be proper to permit the respondent to prosecute the appellants on this allegation when the validity of the Will is being tested before a civil court. We, therefore, allow the appeal, set aside the order of the High Court, and quash the criminal proceedings pending in the Court of the Judicial Magistrate, First Class, Chandigarh in **Smt. Nasib Kaur v. Sardool Singh**. This will not come in the way of instituting appropriate proceedings in future in case the civil court comes to the conclusion that the Will is a forged one."*

No ratio, however, can be culled out therefrom. Why such a direction was issued or such observations were made do not appear from the said decision."

43. In the case of **M. Krishnan(Supra)**, wherein the judgment of the High Court was under challenge in

which the High Court had observed that *"in my view, unless and until the civil court decides the question whether the document are genuine or forged, no criminal action can be initiated against the petitioners and in view of the same, the present criminal proceedings and taking cognizance and issue of process are clearly erroneous."* the Hon'ble Supreme Court held that the High Court was not in any way justified to observe the same. It was held that the criminal proceeding could not be quashed only because the respondents had filed a civil suit with respect to the aforesaid document.

44. Learned counsel for the applicant could not demonstrate before this Court as to how any cognizable offence was not made out against the applicant and as to how the offences under which the trial is proceeding, after submission of the charge-sheet, those offences were not made out. It has not been submitted by the learned counsel for the applicant that even on the basis of the material collected during investigation, the offence was not made out for submission of the charge-sheet. Any such material has also not been brought on record before this Court. Consequently, there is no occasion for this Court to enter into this aspect of the matter, if on the averments in the FIR and the materiel collected during investigation, any case for quashing of the charge-sheet and the proceedings of the criminal case is or is not made out, on the ground that such proceedings do or do not amount to abuse of the process of Court under Section 482 Cr.P.C.

45. The trial is proceeding against the applicant on day-to-day basis. It is pending at the stage of Section 313 Cr.P.C. There is direction of this Court, vide order dated 10.12.2018 passed in Application under Section 482 Cr.P.C. No.44523 of 2018, and vide order dated 15.10.2009 passed in Criminal Misc. Bail Cancelation Application No.2224 of 2018, to conclude the trial according to Section 309 Cr.P.C. and on day-to-day basis. Considering the stage of the proceedings of the criminal case, as well, which is near to its end, the case for quashing of the criminal proceedings is not made out.

46. Thus considered this Section 482 Cr.P.C. petition deserves to be dismissed and is dismissed being devoid of merits.

47. No orders as to costs.

(2021)02ILR A653
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 29.01.2021

BEFORE

THE HON'BLE PRAKASH PADIA, J.

Matter Under Article 227 No. 339 of 2021

Indian Oil Corp. Ltd. ...Petitioner
Versus
M/s J. Lal Filling Station & Anr. ...Respondents

Counsel for the Petitioner:
Sri Rakesh Kumar, Sri H.P. Dube, Sri Vipul Dube

Counsel for the Respondents:
C.S.C.

A. Constitution of India, 1950-Article 227-Challenge to-suspension of retail outlet dealership and show cause notice-Instead of filing reply of show cause notice the plaintiff/respondent filed an application for grant of interim injunction -injunction granted arbitrarily-satisfaction that there is a prima facie case by itself is not sufficient to grant injunction-the court

further has to satisfy non-interference would result in "irreparable loss" to the party seeking relief and there is no other remedy available except to grant injunction-conduct of the party and "balance of convenience" is also relevant-suit filed by the plaintiffs is barred u/s 14(1) of the Specific Relief Act, 1963-Once an application is filed u/s 8 of the Arbitration & Conciliation Act, the court has no jurisdiction to continue with the suit-injunction order is wholly illegal and contrary to the settled principles of law.(Para 1 to 23)

The writ petition is allowed. (E-5)

List of Cases cited:-

1. Dalpat Kumar Vs Prahlad Singh (1992) 1 SCC 719.

2. M.P. Mathur Vs DTC, (2006) 13 SCC 706

3. Wander Ltd. & anr. Vs Antox India P. Ltd.(1990) Supl. SCC 727

4. Gujarat Bottling Co. Ltd. Vs Coca Cola Co. (1995) 5 SCC 545,

5. Hindustan Petroleum Corp. Ltd. Vs Pinkcity Midway Petroleums (2003) 6 SCC 503

6. Ram Roop & ors. Vs Bishwa Nath & ors. (1958) AIR Ald 456

7. Shalini Shyam Sethi & ors. Vs Rajendra Shanker Patel (2010) 8 SCC 329

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

1. Heard Sri Rakesh Kumar, learned counsel for the petitioner and Sri H.P. Dube, Advocate and Sri Vipul Dube, Advocate have put their appearance on behalf of respondents.

2. The petitioner has filed the present petition under Article 227 of the Constitution of India with the following prayers:-

"(a) To direct the Civil Judge (Senior Division) Agra to decide the application NO.37Ga filed by the petitioner-Corporation under Section 8 of the Arbitration & Conciliation Act, 1996, forthwith;

(b) to set a side the order dated 10.7.2018 passed by the Civil Judge, (Senior Division) Agra;

(c) issue any other suitable, order or direction which this Hon'ble Court may deem fit and proper in the circumstances of the case;

(d) award costs in favour of the applicant throughout."

3. Facts in brief as contained in the writ petition are that the petitioner-Indian Oil Corporation had appointed various retail outlet dealers for sale of petroleum products. After selection of respondent No.1 as a dealer, an agreement was executed between the petitioner-corporation and Sri Satish Kumar Arora, the proprietor of the retail outlet/respondent No.2 on 25.02.2005 for retail sale of petroleum products. An inspection of the retail outlet of the plaintiffs/respondents was carried out on 17.5.2017 in the presence of Sri Satish Kumar Arora, the proprietor of the retail outlet/respondent No.2, by a team nominated by the District Magistrate, Agra consisting of members namely B.K. Shukla, DSO Agra, Sri Mayank Kumar SO (Retail Sales) IOCL, Agra-I, Sri A.K.Mishra, ARO Agra, Sri Rohit Yadav, ACM-IV, Agra, Sri Rajvir Singh, Police Inspector Agra and Sri Sanjay Singh, Police Inspector, Agra, Sri Rajesh Singh, Inspector,W&M, Agra, Sri Shailendra Singh, Inspector W.&M, Agra, Sri Avdesh Singh, Service Engineer M/s Midco Ltd. and Sri A.K. Mahawar Senior Foreman, IOCL Agra. During the inspection of the retail outlet of the plaintiffs/respondents, it was found that the

pulsar of 1 nozzle of Motor Spirit (petrol), bearing Sl. No.03GC0228GVR was suspected to be tampered as there was some extra soldering in the pulsar and based on the aforesaid inspection report, a fact finding letter dated 30.5.2017 was issued to the respondent No.1 asking him to submit his reply. At the time of inspection, the pulsar card was seized and sent by the petitioner-corporation to the Original Equipment Manufacturer (OEM), i.e., M/s MIDCO for testing at their lab as per the Marketing Disciplinary Guidelines. Thereafter a report was submitted by the Midco on 28.2.20218 mentioning therein that

(1) One of the pulser signal cable is found connected to IS PIN through additional cable.

(2) PPFL cable is found disconnected from the pulsar PCB.

4. After perusal of the same, the competent authority namely Deputy General Manager (Retail Sales), Agra Division Agra. issued a show cause notice to the respondents on 25.05.2018.

5. It is argued by Sri Rakesh Kumar, learned counsel for the petitioner that on issuance of show cause notice, an original suit was preferred by the petitioner being Original Suit No.716 of 2018 with the following reliefs:-

"The plaintiffs, therefore, prays for judgement and decree for declaration as under:-

A. That a decree of declaration be passed against the defendant to declare the show cause notice dated 30.05.2017 and 25.05.2018 9sent on 04.07.2018) is null and void and not binding upon the plaintiffs consequential relief of permanent prohibitory injunction be passed to restrain the defendant, its officers and employees from interfering in supplying of the petrol/diesel and other lubricants products of all kinds to the plaintiffs retail outlet by suspending or terminating the retail outlet and dealership stopping their supplies on the basis of the report dated 17.5.2017 and show cause notices dated 30.05.2017 and 25.5.2018 (sent on 4.7.2018) in any manner whatsoever.

B. That the defendant to pay cost of the suit.

C. That such other or further relief as the nature of the case admits of be also granted to the plaintiffs."

6. Along with suit, an application for grant of interim injunction was also filed on 10.07.2018 seeking following relief:

"For the reasons given in the accompanying affidavit, it is respectfully prayed that the Hon'ble Court may be pleased to restrain the defendant, its officers and employees from interfering in supplying of the petrol/diesel and other lubricant products of all kinds to the plaintiffs retail outlet by suspending or terminating the retail outlet and dealership stopping their supplies on the basis of the report dated 17.05.2017 and show causes notices dated 30.05.2017 and 25.05.2018 (sent on 04.07.2018) in any manner whatsoever till the disposal of this suit"

7. The trial Court on 10.07.2018 following order was passed on the injunction application:-

"10-7-2010

वादी द्वारा प्रार्थना पत्र 8ग मय शपथपत्र 9ग प्रस्तुत कर कथन किया गया है कि प्रतिवादीगण व उसके अधिकारियों व कर्मचारियों को अस्थायी निषेधाज्ञा व्यादेश के माध्यम से निषेधित किया जाये कि वे वाद के

अन्तिम निस्तारण तक वादी को पेट्रोल/डीजल एवं अन्य उससे संबंधित उत्पादों की आपूर्ति में कोई बाधा उत्पन्न न करें।

सुना तथा पत्रावली का अवलोकन किया।

वादीगण ने अपने कथन के समर्थन में शपथपत्र 9ग के संलग्नक लीजडीड दिनॉक 1.10.2003 की प्रति निरीक्षण टिप्पणी दिनॉक 17.5.2017 की प्रति, नोटिस दिनॉक 30.5.2017 की प्रति व वादी को पत्र दिनॉक 7.6.2017, सत्यापन प्रमाण पत्र, पंजीकरण प्रमाण पत्र आदि की प्रति एवं सूची 11ग से मूल नोटिस दिनॉक 25.5.2018 कागज सं0 12ग/1 ता 12ग/4 लिफाफा नोटिस दिनॉक 25.5.2018 की प्रति कागज सं0 13ग नोटिस दिनॉक 30.5.2018 की प्रति कागज सं0 14ग जवाब दिनॉक 17.6.2017 की प्रति कागज सं0 15ग/1 व पत्र दिनॉक 9.7.2018 की प्रति कागज सं0 16ग प्रस्तुत किये गये हैं।

सुना तथा पत्रावली का अवलोकन किया।

वाद के तथ्यों एवं परिस्थितियों के प्रकाश में यदि इस स्तर पर वादीगण के पक्ष में एक पक्षीय अस्थायी निषेधाज्ञा व्यादेश पारित नही किया गया तो वादी वाद का उद्देश्य विफल होने तक अपूर्णनीय क्षति होने की सम्भावना है। अतः प्रतिवादी को एकपक्षीय निषेधाज्ञा व्यादेश के माध्यम से निषेधित किया जाता है कि वह स्वयं अथवा अपने सहयोगियों के माध्यम से वादी के आउटलेट को निलम्बित या समाप्त कर वादी को आपूर्ति होने वाले पेट्रोल/डीजल एवं उससे संबंधित अन्य उत्पादों की आपूर्ति को अग्रिम नियत तिथि तक बाधित न करें। पत्रावली प्रार्थना पत्र 8ग के निस्तारण हेतु दिनॉक 27.7.2018 को पेश हो। वादीगण आदेश 39 नियम 3 का अनुपालन अविलम्ब करें।

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सिविल जज (सि0डि0)
आगरा।"

8. It is argued that on the same day, i.e., 10.07.2018, when the suit was preferred, an ex parte injunction was granted in favour of the plaintiffs-respondents by the Civil Judge (Junior Division), Agra, restraining the petitioner-defendant from suspending or terminateing the retail outlet and further directions were given to not to stop sales and supplies of the petroleum products till the next date fixed. It is argued that an application under Sction 8 of the Arbitration & Conciliation Act, 1996 was filed by the petitioner-Corporation on 19.9.2019. It is argued that large numbers of dates were fixed in the matter but no orders were passed on the same by the court below. It is argued that the reliefs soubht by the plaintiffs-respondents are clearly barred by sub-section (1) of Section 14 of the Specfic Relief Act. The counsel for the petitioner relied upon a judgement in support of his submission, reported in (1991) 1 SCC 533 (Indian Oil Corporation Ltd. Vs. Amritsar Gas Service & others).It is argued that in view of the aforesaid, the suit filed by the plaintiffs-respondents itself was not maintainable.

9. It is further argued that once an application under Section 8 of the Arbitration & Conciliation has been filed, the Civil Court has no jurisdiction to continue with the suit in support of his submission. He relied upon thejudgment of Hon'ble Supreme Curt, reported in 2003 (6) SCC 503 (Hindustan Petroleum Corporation Ltd. Vs. Pinkcity Midway Petroleum).

10. On the other hand, it is argued by Sri H.P. Dube, learned counsel for the respondents that no action whatsoever has been taken by the petitioner-defendant for more than one year by moving any application for vacation of such interim injunction or for dismissal of the suit as provided under Order VII Rule 11 CPC. It is further argued that the order passed by the Civil Court dated 10.7.2018 us an appealable Order XXXXIII Rule 1(r). Thus the petition under Argicle 227 of the Constitution of India is not maintainable.

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

12. It appears from perusal of the record that in spite of the aforesaid ex-parte

injunction order, no action was taken by the petitioner-corporation to move any application in the court below for vacation of the aforesaid order and for the first time after more than one year, an application was filed as provided under Section 8 of the Arbitration and Conciliation Act, 1996 read with Section 151 CPC with the prayer to refer the matter to the Director Marketing of Indian Oil Corporation for arbitration.

13. It is clear from perusal of the record that only a show cause notice was issued to the respondents by the Petitioner-Defendant asking them to submit their reply to the aforesaid notice which was issued on the basis of the inspection carried out and report submitted by OEM on 28.02.2018. It further appears that certain irregularity was found during the inspection and only thereafter, the show cause notice was issued to the respondent-plaintiff. The only remedy which was available to the plaintiff respondent to file a reply to the show cause notice but in place of submitting reply, suit in question has been filed by the plaintiff-respondent and on the same day, i.e, on 10.07.2018, ex-parte interim injunction was granted by the trial Court. It further reveals from perusal of the order dated 10.07.2018 by which interim injunction was granted that none of the ingredients as required by law namely prima facie case, balance of convenience and irreparable loss have been seen by the trial court while granting interim injunction. It further reveals from perusal of the record that an application for appointment of arbitration was filed on 11.9.2019 but till date no decision has been taken on the same. Section 36 of the Specific Reliefs Act, 1963 provides for preventive relief. Section 37 of the Specific Reliefs Act, 1963 provides that temporary injunction in a suit shall be regulated by the Code of Civil Procedure. The grant of relief in a suit for specific performance is itself a discretionary remedy. It is settled law that for the grant of interim injunction, plaintiff has to establish a strong prima facie case on the basis of undisputed facts. The conduct of the plaintiffs-respondents will also be very relevant consideration for the purpose of injunction. At this stage for the grant of interim injunction, the discretion has to be exercised judiciously and not arbitrarily.

14. The cardinal principles for grant of temporary injunction were settled by the Apex Court in the case of ***Dalpat Kumar vs. Prahlad Singh, (1992) 1 SCC 719***. The relevant paragraph is quoted below:-

"5...Satisfaction that there is a prima facie case by itself is not sufficient to grant injunction. The Court further has to satisfy that noninterference by the Court would result in "irreparable injury" to the party seeking relief and that there is no other remedy available to the party except one to grant injunction and he needs protection from the consequences of apprehended injury or dispossession. Irreparable injury, however, does not mean that there must be no physical possibility of repairing the injury, but means only that the injury must be a material one, namely one that cannot be adequately compensated by way of damages. The third condition also is that "the balance of convenience" must be in favour of granting injunction. The Court while granting or refusing to grant injunction should exercise sound judicial discretion to find the amount of substantial mischief or injury which is likely to be caused to the parties, if the injunction is refused and compare it with that which is likely to be caused to the other side if the injunction is granted. If on weighing

competing possibilities or probabilities of likelihood of injury and if the Court considers that pending the suit, the subject matter should be maintained in status quo, an injunction would be issued. Thus the Court has to exercise its sound judicial discretion in granting or refusing the relief of ad interim injunction pending the suit."

15. In the case of ***M.P. Mathur vs. DTC, (2006) 13 SCC 706***, following observations were made by the Apex Court which is quoted below:-

"14. The present suit is based on equity...In the present case, the plaintiffs have sought a remedy which is discretionary. They have instituted the suit under Section 34 of the 1963 Act. The discretion which the court has to exercise is a judicial discretion. That discretion has to be exercised on well settled principles. Therefore, the court has to consider--the nature of obligation in respect of which performance is sought, circumstances under which the decision came to be made, the conduct of the parties and the effect of the court granting the decree. In such cases, the court has to look at the contract. The court has to ascertain whether there exists an element of mutuality in the contract. If there is absence of mutuality the court will not exercise discretion in favour of the plaintiffs. Even if, want of mutuality is regarded as discretionary and not as an absolute bar to specific performance, the court has to consider the entire conduct of the parties in relation to the subject matter and in case of any disqualifying circumstances the court will not grant the relief prayed for (Snell's Equity, 31st Edn., p. 366)...."

16. In the case of ***Wander Ltd. and another vs. Antox India P. Ltd., 1990 Suppl. SCC 727*** prescribes a rule of prudence only. Much will depend on the facts of a case. In the case of ***Gujarat Bottling Co. Ltd. vs. Coca Cola Co., reported in (1995) 5 SCC 545***, following observations were made :

"47....Under Order 39 of the Code of Civil Procedure, jurisdiction of the Court to interfere with an order of interlocutory or temporary injunction is purely equitable and, therefore, the Court, on being approached, will, apart from other considerations, also look to the conduct of the party invoking the jurisdiction of the Court, and may refuse to interfere unless his conduct was free from blame. Since the relief is wholly equitable in nature, the party invoking the jurisdiction of the Court has to show that he himself was not at fault and that he himself was not responsible for bringing about the state of things complained of and that he was not unfair or inequitable in his dealings with the party against whom he was seeking relief. His conduct should be fair and honest...."

17. It is settled law that where arbitration clause exists, the court is a mandatory duty to report the dispute arising between the contracting parties to the arbitrator in the case of ***Hindustan Petroleum Corporation Ltd. Vs. Pinkcity Midway Petroleums (2003) 6 SCC 503***. Following observations have been made by the Apex Court in paragraph 14 of the aforesaid judgement which is reproduced below:-

"Therefore, in cases where there is an arbitration clause in the agreement, it is obligatory for the Court to refer the parties to arbitration in terms of their arbitration agreement and nothing remains to be decided in the original action after such an

application is made except to refer the dispute to an arbitrator. Therefore, it is clear that if, as contended by a party in an agreement between the parties before the Civil Court, there is a clause for arbitration, it is mandatory for the Civil Court to refer the dispute to an arbitrator."

18. In this view of the matter, the interim injunction granted by the court below in favour of the plaintiffs-respondents is per se illegal and in complete violation of the law laid down by the Apex Court from time to time.

19. Insofar as the arguments advanced by Sri H.P. Dube, learned counsel for the respondents that against interim injunction granted in favour of the plaintiffs-respondents, an alternative remedy is available to the petitioner to file an appeal as provided under Order 41 Rule 1(r) of CPC is concerned, the principles relating to the scope and applicability of Article 227 of the Constitution of India in great detail by a Division Bench of this Court in the case of ***Ram Roop and others Vs. Bishwa Nath and others reported in AIR 1958 Allahabad 456*** which are reproduced below:-

1. The superintendence referred to in Article 227 of the Constitution includes judcial superintendence.

2. The power conferred by the Article is wide but not unlimited. The exercise of the power is discretionary and relief under the Article cannot be claimed as a matter of right. The principles regulating the exercise of the power are generally speaking the same as the principles on which writs can be issued under Article 226 but in a sense the power under Article 227 is wider as the High Court can sometimes issue directions in the exercise of that power which it could not do under Article 226.

3. The power under the Article can be exercised even in those cases in which no appeal or revision lies in the High Court.

4. The power should not ordinarily be exercised if any other remedy is available to the aggrieved party even though the pursuing of that remedy may involve some inconvenience or delay.

5.The power should not be used to correct mere errors of fact or law. Error of law may include a wrong decision on a question of jurisdiction.

6. The power is to be used sparingly only in appropriate cases in which the conscience of the Court is pricked and it feels that immediate interference is called for as it is necessary to keep the Subordinate Courts or Tribunals within their bound or to prevent some outrageous miscarriage of justice and grave results would follow if the power is not exercised. Whether a particular case is of this kind or not will depend on its own facts and circumstances. Such cases cannot obviously be exhaustively catalogued."

20. The Apex Court in the case of ***Shalini Shyam Sethi and others Vs. Rajendra Shanker Patel (2010) 8 SCC 329*** has considered the entire history and scope of Article 227 in detail and after considering the various decisions of various High Courts as well as Supreme Court has formulated principles for exercise of jurisdiction under Article 227 of the Constitution of India in para 49 of the which is under:-

"49. On an analysis of the aforesaid decisions of this Court, the following principles on the exercise of High Court's jurisdiction under Article 227 of the Constitution may be formulated:

(a) A petition under Article 226 of the Constitution is different from a petition under Article 227. The mode of exercise of power by High Court under these two Articles is also different.

(b) In any event, a petition under Article 227 cannot be called a writ petition. The history of the conferment of writ jurisdiction on High Courts is substantially different from the history of conferment of the power of Superintendence on the High Courts under Article 227 and have been discussed above.

(c) High Courts cannot, on the drop of a hat, in exercise of its power of superintendence under Article 227 of the Constitution, interfere with the orders of tribunals or Courts inferior to it. Nor can it, in exercise of this power, act as a Court of appeal over the orders of Court or tribunal subordinate to it. In cases where an alternative statutory mode of redressal has been provided, that would also operate as a restrain on the exercise of this power by the High Court.

(d) The parameters of interference by High Courts in exercise of its power of superintendence have been repeatedly laid down by this Court. In this regard the High Court must be guided by the principles laid down by the Constitution Bench of this Court in Waryam Singh Vs. Amarnath (AIR 1954 SC 215) and the principles in Waryam Singh (supra) have been repeatedly followed by subsequent Constitution Benches and various other decisions of this Court.

(e) According to the ratio in Waryam Singh (supra), followed in subsequent cases, the High Court in exercise of its jurisdiction of superintendence can interfere in order only to keep the tribunals and Courts subordinate to it, "within the bounds of their authority'.

(f) In order to ensure that law is followed by such tribunals and Courts by exercising jurisdiction which is vested in them and by not declining to exercise the jurisdiction which is vested in them.

(g) Apart from the situations pointed in (e) and (f), High Court can interfere in exercise of its power of superintendence when there has been a patent perversity in the orders of tribunals and Courts subordinate to it or where there has been a gross and manifest failure of justice or the basic principles of natural justice have been flouted.

(h) In exercise of its power of superintendence High Court cannot interfere to correct mere errors of law or fact or just because another view than the one taken by the tribunals or Courts subordinate to it, is a possible view. In other words the jurisdiction has to be very sparingly exercised.

(i) High Court's power of superintendence under Article 227 cannot be curtailed by any statute. It has been declared a part of thebasic structure of the Constitution by the Constitution Bench of this Court in the case of L. Chandra Kumar vs. Union of India & others, reported in (1997) 3 SCC 261 and therefore abridgement by a Constitutional amendment is also very doubtful.

(j) It may be true that a statutory amendment of a rather cognate provision, like Section 115 of the Civil Procedure Code by the Civil Procedure Code (Amendment) Act, 1999 does not and cannot cut down the ambit of High Court's power under Article 227. At the same time, it must be remembered that such statutory amendment does not correspondingly expand the High Court's jurisdiction of superintendence under Article 227.

(k) The power is discretionary and has to be exercised on equitable principle. In an appropriate case, the power can be exercised suo motu.

(l) On a proper appreciation of the wide and unfettered power of the High

Court under Article 227, it transpires that the main object of this Article is to keep strict administrative and judicial control by the High Court on the administration of justice within its territory.

(m) The object of superintendence, both administrative and judicial, is to maintain efficiency, smooth and orderly functioning of the entire machinery of justice in such a way as it does not bring it into any disrepute. The power of interference under this Article is to be kept to the minimum to ensure that the wheel of justice does not come to a halt and the fountain of justice remains pure and unpolluted in order to maintain public confidence in the functioning of the tribunals and Courts subordinate to High Court.

(n) This reserve and exceptional power of judicial intervention is not to be exercised just for grant of relief in individual cases but should be directed for promotion of public confidence in the administration of justice in the larger public interest whereas Article 226 is meant for protection of individual grievance. Therefore, the power under Article 227 may be unfettered but its exercise is subject to high degree of judicial discipline pointed out above.

(o) An improper and a frequent exercise of this power will be counter-productive and will divest this extraordinary power of its strength and vitality."

21. Applying the principles, as laid down by the Apex Court in the case of ***Shalini Shyam (supra)***, the Court is of the opinion that it is a fit case, where the court shold exercise its jurisdiction under Article 227 of the Constitution of India, despite there being alternative remedy is available for the reasons (1) the order dated 10.7.2018 granting interim injunction is illegal, against the settled principles of law and perverse (2) the suit filed by the plaintiffs-respondents is barred under Section 14(1) of the Specfic Relief Act, (3) Once an application is filed under Section 8 of the Arbitration and Conciliation Act, the court has no jurisdiction to continue with the suit, as held in case of Hindustan Petroleum Corporation (supra) and (4) to ensure that wheel of justice does not come to a halt and foundation of justice remains pure and unpolluted in orderto maintain public confidence in functioning of the court.

22. In view of the aforesaid, the injunction order dated 07.2.2018 as extended from time to time is set aside being wholly illegal and contrary to the settled principles for grant of temporary injunction.

23. At this point, Sri H.P. Dube, learned counsel for the respondents submits that his client will withdraw the suit filed by them by moving an appropriate application before the Court below within a period of one week from today. He further prayed that a direction be issued to the petitioner to allow time to file reply to the show cause notice dated 25.5.2018.

24. In view of the undertaking and submission of Sri H.P. Dube, learned counsel for the respondents, the Civil Judge (Senior Division) Agra is directed to pass appropriate order on the withdrawal application of the plaintiffs-respondents within one week from the date of filing of withdrawal application of the plaintiffs-respondents, who undertakes to file it within one week. The plaintiffs-respondents are further directed to file reply to the show cause notice dated 25.5.2018, within one month from today. If the reply to

show-cause notice is file within stipulated period, the petitioner-Corporation will pass appropriate orders on the same in accordance with law within further period of one month, after providing opportunity of hearing to the plaintiffs-respondents.

25. With the aforesaid direction, the petition is allowed.

(2021)02ILR A662
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.02.2021

BEFORE

THE HON'BLE SAUMITRA DAYAL SINGH, J.

Arbitration and Conciliation Appl. U/S 11(4) No. 68 OF 2019

Tata Projects Ltd. ...Applicant
Versus
Central Organisation for Railway Electrification ...Opp. Party

Counsel for the Applicant:
Sri Rahul Agarwal

Counsel for the Opp. Party:
Sri Navneet Chandra Tripathi

A. Civil Law - Arbitration and Conciliation Act, 1996-Section 11(4)-challenge to-appointment of arbitrator-seeking appointment of arbitrator in respect of payment dispute-applicant successfully executed the work but aggrieved by the full payment have not been made-applicant issued a notice to appoint the arbitrator but the respondent refused to appoint-applicant was within it's right to approach the Court for appointment of independent arbitrator-claim made is not time barred-proposed arbitrator is eligible as he was appointed Presiding Officer of the SAT before enforcement of the 2020 Rules dated 12.02.2020-those rules do not apply to proposed arbitrator-no legal impediment in his continuance as an arbitrator-neither on ground of legality nor of propriety, the proposed arbitrator is inconvenienced.(Para 1 to 38)

The application is allowed. (E-5)

List of Cases cited:-

1. Central Organization for Railway Electrification Vs M/S ECISPIC –SMO-MCML (JV) A joint Venture Comp.; (2019) SCC Online 1635,

2. Beghar Foundation Vs K.S. Puttaswamy (Retd.); (2021) 123 taxman. Com 344 SC

3. U.O.I . Vs M/S Tantia Construction Ltd.(S.L.P.(C) Nos. 12670/2020)

4. Build India Construction System Vs U.O.I (2002) 5 SCC 433

5. Bharat Broadband Network Ltd. Vs United Telecoms Ltd. (2019) 5 SCC 755

6. Madras Bar Association Vs U.O.I. & anr.(2020) SCC Online SC 962

(Delivered by Hon'ble Saumitra Dayal Singh, J.)

1. Heard Sri Rahul Agarwal, learned counsel for the applicant and Sri Navneet Chandra Tripathi, learned counsel for the opposite party.

2. Present is an application filed under Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act'). The application was filed on 12.07.2019 with a prayer to appoint an independent arbitrator, to adjudicate the disputes that have arisen between the parties under a written contract dated 01.03.2010 entered into between the applicant and the Chief Project Manager, Railway Electrification for the work "Design, Supply, Erection, Testing & Commissioning of 25 KV, AC, 50 Hz, Single Phase, Traction Overhead Equipments, Switching Stations,

Booster Transformer Stations, LT Supply Transformer Stations and All Ancillary Equipments Madurai (Excl.)-Tuticorin-Vanchimaniyanchi-Nagercoil (Excl.) of Southern Railway", valued at Rs. 24,97,54,357/- (Rupees Twenty Four Crores Ninety Seven Lakhs Fifty Four Thousand Three Hundred Fifty Seven only).

3. Before approaching this Court, the applicant had issued the statutory notice dated 31.12.2018, invoking arbitration. Referring to Section 12(5) of the Act (as enforced w.e.f. 23.10.2015), the applicant expressed its desire for appointment of an independent arbitral tribunal and for that purpose nominated a retired Judge of this Court. It required the opposite party to nominate an arbitrator of its choice so that the two arbitrators (thus appointed), may nominate a third arbitrator. The three arbitrators together were to constitute the arbitral tribunal.

4. In response to the above notice, on 21.01.2019, the opposite party denied the request for arbitration. It stated, under Clause 1.2.54(b)(i), the arbitration could be sought only after 120 days and before completion of 180 days from the date of presentation of the final bill. Since, the final bill payment was made on 13.06.2016, the request for arbitration first made on 31.12.2018, was outside the said period. Therefore, it was stated to be lacking in 'locus standi'. Second, it was stated that the 'No Claim Certificate' issued by the applicant while obtaining the final payment contained an undertaking to the following effect:

"1. The undersigned is in receipt of the above referred letter in connection with the subject matter. Your attention is invited to Tender Clause No. 1.2.54(b)(i) wherein it is clearly stated that after 120 days but within 180 days of his presenting final claim on disputed matters shall demand in writing that the dispute or difference be referred to arbitration. But it is to inform that you had advised vide your letter No. TPL/RLY/VPT/019/3006-2 dated 30.06.2016 that you had received the final Bill payment on 13 June, 2016. As you have failed to seek any redressal of grievance within the aforesaid period, your demand for arbitration does not have any locus-standi at this distant date.

2. It shall be also noted that you have submitted a "No Claim Certificate" under Signature and seal of firm, in which it states "should any claim be raised by us in future under this agreement, the same shall be nullified by virtue of this indenture".

3. Similarly, your attention is invited to Clause No. 17 of the "Preamble" (Page No.8 of the tender paper) which states that General Conditions of Contract of concerned Railway as amended for advance correction slips issued up to date shall be part of the contract. The clause no. 63 of latest GCC provies that no such notice of dispute shall be served later than 30 days after the date of issue of completion certificate by the Engineer. The Completion Certificate was issued on 15.03.2015. Hence, it is regretted to inform you that Railway is not in a position to entertain your demand for arbitration at this farthest date as the same is not admissible at this juncture."

Third, referring to Clause 17 of the Preamble to the agreement and thereby invoking Clause 63 of the General Conditions of Contract (hereinafter referred to as the 'GCC'), it was further objected that no dispute could be raised for adjudication through arbitration, later than 30 days after the date of issuance of the Completion Certificate which in this case was

15.3.2015. Further, communications dated 22.1.2019 and 10.1.2019 appear to have been issued by other authorities of the opposite party, again taking an objection as to limitation, and no other.

5. It is at that stage that the present application was filed wherein, upon exchange of pleadings, the matter was heard on 24.10.2019 and an order proposing to appoint an independent arbitrator was passed on that date. It reads:

"1. Present application has been filed under Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to Arbitration Act) seeking appointment of independent arbitrator with respect to payment dispute that are claimed to be existing between the parties under a written agreement dated 01.3.2010 between the Chief Project Manager, Railway Electrification, Chennai of the Ministry of Railways, Railway Board and the applicants for design, supply, erection, testing and commissioning of 25 KV, A.C. Single phase 50 Hz, Traction Overhead Equipments, Switching Stations, Booster Transformer Stations and LT supply Transformer Stations in Madurai (Excl)-Tuticorin-Vanchimaniyachi-Nagercoil (Excl) Gr. 154 of Southern Railway under RE-project Chennai.

2. The applicant claims to have successfully executed that work but is aggrieved by the fact that full payments have not been made to it. Relying on the arbitration clause 1.2.54 of the general terms of the contract, it has been submitted that in the first place, the applicant had issued a notice dated 8.8.2018 (Annexure-4 to the application) in terms of Clause 1.2.54 (a). The railways did not offer any resolution of that dispute within the prescribed period of 120 days. Therefore, again in accordance with Clause 1.2.54 (d) (i), the applicant issued a further notice to the respondent addressed to the Chief Project Manager, Railway Electrification, Chennai for appointment of an arbitrator. By means of paragraph-11, the applicant also proposed the name of an arbitrator proposed to be appointed.

3. As a fact, the respondent did not appoint any arbitrator and did not offer any panel of arbitrators to the applicants. In fact, by a communication dated 22.1.2019 issued by the Deputy CEE (PSI), the applicant was informed that no claim certificate had been issued by it on 26.5.2016, copy of the same was also annexed. In addition, it was mentioned that the notice dated 31.12.2018 should have been addressed to the General Manager/CORE, Allahabad as the dispute may have been referred only by the General Manager.

4. In such facts, the present application has been filed by the applicant claiming, in the first place, existence of arbitration clause whereunder the payment dispute is required to the resolution. Further, it has been claimed that despite all efforts made by the applicant and despite procedure having been followed, the respondents have failed to constitute the arbitral Tribunal and therefore, this Court may appoint an independent arbitrator in terms of Section 11 of the Act.

5. Heard Sri Varad Nath, Advocate holding brief for Sri Rahul Agarwal, learned counsel for the applicant and Sri N.C. Tripathi, learned counsel for the respondent.

6. Pleadings have been exchanged and the matter has been heard. At the outset, objections have been raised as to the maintainability of the present case. In that regard, it has been submitted that the work was executed at Chennai, though the

headquarter of the respondent is at Allahabad, however, no part of the cause of action had arisen at Allahabad. In short, it is submitted that this Court does not have territorial jurisdiction to interfere the present application under Section 11 of the Act. The aforesaid preliminary objections has been met by the learned counsel for the applicant by placing reliance on a recent decision of Supreme Court in Brahmani River Pellets Ltd. Vs. Kamachi Industries Ltd., AIR 2019 SC 3658 wherein it has been observed as below:

"16. Where the contract specified the jurisdiction of the court at a particular place, only such court will have the jurisdiction to deal with the matter and parties intended to exclude all other courts. In the present case, the parties have agreed that the 'venue' of arbitration shall be at Bhubaneswar. Considering the agreement of the parties having Bhubaneswar as the venue of arbitration, the intention of the parties is to exclude all other courts. As held in Swastik, non-use of words like 'exclusive jurisdiction', 'only', 'exclusive', 'alone' is not decisive and does not make any material difference.

17. When the parties have agreed to have the 'venue' of arbitration at Bhubaneswar, the Madras High Court erred in assuming the jurisdiction under Section 11(6) of the Act, Since only Orrisa High Court will have the jurisdiction to entertain the petition filed under Section 11 (6) of the Act, the impugned order is liable to set aside."

7. In that case, the relevant clause with regard to venue was clause 18 between those parties which read as below:

"18. Arbitration shall be under Indian Arbitration and Conciliation Law 1996 and the Venue of Arbitration shall be Bhubaneswar".

8. Thus, in view of the fact that the parties had agreed to provide for venue of arbitration at Bhubaneswar, the Supreme Court has laid down the law that the jurisdiction to entertain an application under Section 11 (6) of the Act would have been with the High Court having jurisdiction over Bhubaneswar and not the High Court of Madras which has not jurisdiction over Bhubaneswar.

9. In the present case, the venue clause is contained in Clause 1.2.54(k) which is quoted below: .

" The venue for an arbitration shall be the place from which the Letter of Acceptance of Tender is issued or such other place as the purchaser at his discretion may determine."

10. Undisputedly, the letter of acceptance of tender which would, in the first place, constitute venue of arbitration is at Allahabad. That letter of acceptance is dated 2.2.2010 (Annexure-1 to the application).

11. Therefore, in view of the law laid down by the Supreme Court, the preliminary objection raised by Sri Tripathi, learned counsel for the respondents cannot be accepted. Sri Tripathi has placed reliance on the orders of two learned Single Judges of this Court, passed in Arbitration and Conciliation Application U/s 11 (4) Nos.39 of 2012 and 148 of 2018 decided on 19.7.2017 and 29.4.2019 respectively which are no longer good law in view of the decision of the Supreme Court in Brahmani River Pellets Ltd. (supra).

12. In the present case, the venue clause clearly provides that venue of arbitration would be at Allahabad in view of the letter acceptance having been issued from Allahabad. The further stipulation in venue clause providing for any other venue at the discretion of the respondent may not bar the jurisdiction of this Court, inasmuch as, no other place of arbitration has yet been provided or specified.

13. Then, second objection has been raised by Sri N.C. Tripathi of procedure for

appointment of arbitrator being not complied with. In that regard, it has been submitted, under Clause 1.2.54 d (ii), the notice, seeking appointment of arbitration should have been issued to the General Manager. Inasmuch as, the notice was not issued to that authority, the procedure was not complied with to any extent. Second, it has been stated that in any case if at all, any arbitrator was to be appointed, it had to be in accordance with law, from the panel prepared by the respondent. The applicant had itself appointed an arbitrator suo moto, outside such panel, therefore, the procedure stood violated. In that regard, reliance has been placed on the decision of the Supreme Court in the case of Union of India Vs. Parmar Construction Company (2019) 5 SCALE 453.

14. The aforesaid objection has been met by learned counsel for the applicant who would submit that as the applicant had fully complied with the procedure by first issuing the notice dated 8.8.2018 seeking resolution of the dispute by the Railway Authority themselves. Admittedly, that resolution was never offered by the Railway Authority. Accordingly, the applicant issued the notice dated 31.12.2018 after expiry of 120 days time period prescribed under Clause 1.2.54 (b) (i) of the general terms. Since the contract had been signed by the Chief Project Manager, Railway Electrification, Chennai, the notice was issued, addressed to him. Referring to Clause 1.2.54 (d) (ii), it has been submitted that the said clause does not stipulate issuance of notice to the General Manager. In so far as the applicant had issued the notice to the authority who had executed the contract on behalf of the Railway and who was the Chief Project Manager, Railway Electrification, there was no defect in issuance of the notice.

15. Referring to various clauses of the notice, it has then been submitted that clearly, the applicant had brought out the existence of unresolved dispute between the parties and sought appointment of arbitrator. Merely because the applicant had proposed the name of arbitrator, did not introduce an invalidity in the notice as may lead to the inference that the prescribed procedure for appointment of arbitrator had been violated. In face of that notice, it was clear that the applicant was seeking arbitration under the agreement for resolution of the dispute. It cannot be denied that there exists a dispute at least on a prima facie, basis. It would have remained for the respondent to omit the name of the arbitrator proposed by the applicant and in his place to propose the names of arbitrator as contained in the general terms and conditions.

16. In so far as the respondents did not give any such reply and did not propose any panel of arbitration, they cannot be heard to say that the procedure had been violated. In fact, referring to the reply dated 22.1.2019, it has been submitted that the arbitration was refused mainly not on account of the fact that the procedure prescribed had not been followed but on an understanding of the respondent that no dispute survived in face of no claim certificate dated 26.5.2016 having been issued.

17. Having heard learned counsel for the parties, in so far as the procedure prescribed is concerned, clearly the Railways did not respond to the first notice dated 8.8.2018 issued under Clause 1.2.54 (b) (i). To that extent, undisputedly, the procedure stood complied. Coming to the notice seeking appointment for arbitration, again perusal of the notice dated 31.12.2018 brings out the grievance of the

applicant with respect to non-payment (claimed) and further non resolution of that dispute within a period of 120 days from the notice dated 8.8.2018.

18. Thereafter, though the applicant proposed the name of an arbitrator which it sought to appoint yet, in paragraph-12 of the same, notice had addressed the respondent to appoint its arbitrator in terms of the Act.

19. Accordingly, it has to be accepted that the arbitration had been sought by the applicant in terms of the Act and also it had exercised its objection permissible to be raised under Section 12 (5) of the Act. The fact that it had proposed the name of independent arbitrator may, therefore, remain a proposal made by the applicant but not a conduct as may be read to have violated the procedure itself. The railway-respondent may have been within its rights to oppose the name proposed by the applicant, however, they cannot claim that by proposing such name, the applicant had violated the procedure. Therefore, the second objection as to violation of procedure also does not merit acceptance.

20. Third, in view of the observation made above, the objection raised by Sri Tripathi to proposal to appoint an independent arbitrator outside the panel of arbitrators available with the respondent, also cannot be accepted. In the first place, the applicant had exercised its right to object to the appointment as arbitrator, any person who may have been a railway employee. Second, the railway never proposed any names to the applicant for appointment of arbitrator. Therefore, it has to be accepted that it remained from the parties to appoint the consented arbitrator.

21. Present application has been filed after expiry of statutory period from the issuance of notice dated 31.12.2018, therefore, in that regard, the application does not suffer from any infirmity. Last, it has been submitted that the applicant had submitted his no claim certificate in unequivocal terms. Though, prima facie, it appears that such no claim certificate had been issued, however, that issue pertains to merits of the claim proposed to be filed and not to the maintainability or merits of the present application which has to remain confined to provide for a forum where a claim may arise. Therefore, leaving all rights open to the respondent to object to the claim that is proposed to be filed before the learned arbitrator proposed to be appointed, that objection cannot be entertained at this stage.

22. In this context, it has been stated by learned counsel for the applicant that three other similar applications involving similar nature of disputes arising inter-parties, matters have been referred to arbitration to Mr. Justice Tarun Agarwala, Chief Justice (Retired) Meghalaya High Court, residing at Delhi/NCR: A-5, Sector 14, NOIDA, Tel. (0120) 2510066, 1515596 (Mob. No. 9415307976, 7705007976). In view of such facts, it is desirable that the parties may be at convenience, if they, are offered the same learned arbitrator.

23. In view of the above, this Court proposes to appoint Mr Justice Tarun Agarwala, Chief Justice (Retired) Meghalaya High Court, as the sole Arbitrator, subject to his consent under Section 11(8) of the Arbitration and Conciliation Act, 1996.

24. The Registry is directed to obtain consent of the proposed Arbitrator, in terms of Section 11(8) of the aforesaid Act within three weeks.

25. List after four weeks."

6. Thus, the objections raised by the opposite party (at that stage) were rejected and a named arbitrator was proposed to be

appointed. His consent was sought. It is a matter of record that the consent of the named arbitrator has been received.

7. In the meanwhile, the opposite party has filed Application No. 6 of 2020, in these proceedings (Arbitration And Conciliation Application u/s-11(4) No. - 68 of 2019) and has prayed for modification and/or recall of the order dated 24.10.2019. The said application has been pressed on two grounds only. First, relying on a later decision of the Supreme Court in **Central Organization for Railway Electrification Vs. M/S ECI-SPIC-SMO-MCML (JV) A Joint Venture Company; 2019 SCC OnLine 1635**, it has been submitted that the Court may appoint an arbitrator/arbitral tribunal only in accordance with the terms of the contract and not otherwise i.e. the arbitrator, if any, may be appointed from the panel of arbitrators of the said opposite party only. Second, relying on Appellate Tribunal and Other Authorities (Qualifications, Experience and other Conditions of Service of Member) Rules, 2020, it has been submitted, the named arbitrator, proposed by the order dated 24.10.2019, has incurred a legal ineligibility, to arbitrate the dispute between the parties.

8. Opposing the said objections /recall /review sought, Sri Rahul Agarwal has first invoked the principle that a later decision may never offer a ground to review any order. He relied a decision of the Supreme Court (majority view) in **Beghar Foundation Vs. K.S. Puttaswamy (Retd.); (2021) 123 taxman.com 344 (SC)**. He has also relied on a later order of the Supreme Court passed in **Special Leave to Appeal (C) Nos. 12670/2020 (Union of India Vs. M/S Tantia Constructions Limited),** dated 11.01.2021, whereby the correctness of the decision of the Supreme Court in **Central Organization for Railway Electrification (supra)** has been doubted and referred to a larger Bench of the Supreme Court.

9. Having heard learned counsel for the parties, first, the objection being raised by Sri Rahul Agarwal is found to be too technical to merit acceptance. By the order dated 24.10.2019, no final decision had been made by the Court. Only a named arbitrator had been proposed to be appointed after hearing the parties on the submissions as had been made, at that stage. However, the proceeding for appointment of the arbitrator has remained pending, as before.

10. Neither under the Act nor under the Rules of the Court, there is any stipulation as may require the Court to decide all objections to an application (moved under Section 11 of the Act), by one order and to appoint the arbitrator by another order. It is a rule of convenience adopted by the Court while dealing with such applications that first, upon any such application being filed, disclosing existence of arbitration agreement between the parties, prima facie existence of an arbitrable dispute and failure to constitute an arbitral tribunal in accordance with the procedure agreed to between the parties, a notice is issued to the opposite party/parties. At the second stage, any objection that is raised to the application is dealt with and thereafter consent of the proposed arbitrator is sought. At the third stage, after receipt of that consent, and normally, in the absence of any further objection, the appointment is made and the application disposed of. If, however, any other or further objection arises, then, there is nothing, either under Section 11 of the

Act or otherwise, to prevent the Court from dealing with that objection at the third stage. Before any order could be passed to confirm the order dated 24.10.2019 and thus appoint the proposed arbitrator and decide finally the proceeding, the opposite party filed Application No. 6 of 2020. Though titled - application for review/recall the order dated 24.10.2019, in effect, and for all legal consequences, it is an application praying to the Court to not confirm its order dated 24.10.2019. Looked at in the context of the scope and the current status of the proceeding, the order dated 24.10.2019 is no better than a pure interlocutory/procedural order in a proceeding that is still pending. It is an order that neither decides the point in dispute finally nor it otherwise hinders the Court from passing a final order contrary to any observation made in it, on the basis of any further objection now raised. Accordingly, the matter has been heard again at length, at the stage of confirmation of the order dated 24.10.2019.

11. Then, learned counsel for the applicant submits that the applicant had been awarded a contract for the work - "Design, Supply, Erection, Testing & Commissioning of 25 KV, AC, 50 Hz, Single Phase, Traction Overhead Equipments, Switching Stations, Booster Transformer Stations, LT Supply Transformer Stations and All Ancillary Equipments Madurai (Excl.)-Tuticorin-Vanchimaniyanchi-Nagercoil (Excl.) of Southern Railway", on 1.3.2010. The said agreement contained General Conditions of Contract 1.2.2, which reads as below:

"Conditions of Contract : 1.2.2

If the Tender submitted by a Tenderer is accepted and the contract awarded to the Tenderer, the various works coming under the purview of the contract shall be governed by the terms and conditions included in the Tender papers covering the following :

(i) Preamble to the Tender Papers.

(ii) Instructions to Tenderers and conditions of Tendering, as included in Part-I, Chapter-I.

(iii) Conditions of contract, as included in this chapter.

(iv) Prices and Payments, as included in Part-I Chapter-III.

(v) Explanatory notes of Schedule 1, Schedule of prices, Part-I, Chapter-IV. .

(vi) General specifications, as included or referred to in Part-II and

(vii) Particular specifications, as included or referred to in Part-III, and

(viii) Annexures under Part-IV and Forms under Part-V and as modified or amended by the letter of acceptance of the tender.

12. The arbitration clause is found contained in Clause 1.2.54 of that agreement. It reads as under:

"ARBITRATION: 1.2.54

(a) MATTERS FINALLY DETERMINED BY THE RAILWAY*:*

All disputes and differences of any kind whatsoever arising out of or in connection with the contract, whether during the progress of the work or after its completion and whether before or after the determination of the contract shall be referred by the contractor to the Railway Electrification and the Railway Electrification shall within 120 days after receipt of the Contractor's representation make and notify decisions on all matters referred to by the contractor in writing provided that matters for which specific provision has been made in clauses 1.1.10(b), 1.2.9, 1.2.14(a)(v), 1.2.14(d)(i),

1.2.14(d)(ii), 1.2.23, 1.2.29, 1.2.57, 1.2.59, 1.2.60, 1.2.61, 1.2.62, 1.3.2(j) and 1.3.17(c) of this tender paper shall be deemed as 'excepted matters' and decisions of the Railway Electrification authority, thereon shall be final and binding on the contractor provided further that 'excepted matters' shall stand specifically excluded from the purview of the arbitration clause and not be referred to arbitration.

(b)(i) DEMAND FOR ARBITRATION

In the event of any dispute or difference between the parties hereto as to the construction or operation of this contract, or the respective rights and liabilities of the parties or any matter in question, dispute or difference on any account or as to the withholding by the Railway Electrification of any certificate to which the contractor may claim to be entitled to, or if the Railway Electrification fails to make a decision within 120 days, then and in any such case, but except in any of the 'excepted matters' referred to in clause 1.2.54(a) above of these conditions, the contractor, after 120 days but within 180 days of his presenting his final claim on disputed matters, shall demand in writing that the dispute or difference be referred to arbitration.

(b) (ii) The demand for arbitration shall specify the matters which are in question or subject of the dispute or difference as also the amount of claim itemwise. Only such dispute(s) or difference(s) in respect of which the demand has been made together with counter claims or set off shall be referred to arbitration and other matters shall not be included in the reference.

(A) The Arbitration proceedings shall be assumed to have commenced from the day a written and valid demand for arbitration is received by the Railway.

(B) The claimant shall submit his claim stating the facts supporting the claims along with all relevant documents and the relief or remedy sought against each claim within a period of 30 days from the date of appointment of the arbitral tribunal.

(C) The Railway Electrification shall submit its defence statement and counter claim(s), if any, within a period of 60 days of receipt of copy of claims from Tribunal thereafter, unless otherwise extension has been granted by Tribunal.

(b) (iii) No new claim shall be added during proceedings by either party. However, a party may amend or supplement the original claim or defence thereof during the course of arbitration proceedings subject to acceptance by Tribunal having due regard to the delay in making it.

(b) (iv) If the contractor(s) does/do not prefer his/their specific and final claims in writing, within a period of 90 days of receiving the intimation from the Railway Electrification that the final bill is ready for payment, he/they will be deemed to have waived his/their claim(s) and the Railway Electrification shall be discharged and released of all liabilities under the contract in respect of these claims.

(c) Obligation during pendency of arbitration Work under the contract shall unless otherwise directed by the engineer, continue during the arbitration proceedings, and no payment due or payable by the Railway Electrification shall be withheld on account of such proceedings, provided, however, it shall be open for arbitral tribunal to consider and decide whether or not such work should continue during arbitration proceedings.

(d)(i) In cases where the total value of all claims in question added together does not exceed Rs.10,00,000/- (Rupees ten

lakhs only), the arbitral tribunal consist of a sole arbitrator who shall be either the General Manager or a gazetted officer of Railway not below the grade of JA grade nominated by the General Manager in that behalf. The sole arbitrator shall be appointed within 60 days from the day when a written and valid demand for arbitration is received by Railway.

(d)(ii) In cases not covered by clause 1.2.54 (d)(i), the arbitral tribunal shall consist of a panel of three Gazetted Railway Electrification Officers not below JA grade, as the arbitrators. For this purpose, the Railway Electrification will send a panel of more than 3 names of Gazetted Railway Officers of one or more departments, of the Railway Electrification to the contractor who will be asked to suggest to General Manager upto 2 names out of the panel for appointment as contractor's nominee. The General Manager shall appoint at least one out of them as the contractor's nominee and will, also simultaneously appoint the balance number of arbitrators either from the panel or from outside the panel, duly indicating the presiding arbitrator from amongst the 3 arbitrators so appointed, within 60 days. While nominating the arbitrators it will be necessary to ensure that one of them is from the Accounts department. As officer of Selection Grade of the Accounts department shall be considered of equal status to the officers in SA grade of other departments of the Railways for the purpose of appointment of arbitrators.

(d)(iii) If one or more of the arbitrators appointed as above refuses to act as arbitrator, withdraws from his office as arbitrator, or vacates his/their office/offices or is/are unable or unwilling to perform his functions as arbitrator for any reason whatsoever or dies or in the opinion of the General Manager fails to act without undue delay, the General Manager shall appoint new arbitrator/arbitrators to act in his/their place in the same manner in which the earliest arbitrator/arbitrators had been appointed. Such re-constituted Tribunal may at its discretion, proceed with the reference from the stage at which it was left by the previous arbitrator(s).

(d)(iv) The arbitral tribunal shall have power to call for such evidence by way of affidavits or otherwise as the arbitral tribunal shall think proper, and it shall be the duty of the parties thereto to do or cause to be done all such things as be necessary to enable the arbitral tribunal to make the award without any delay.

(d)(v) While appointing arbitrator(s) under sub-clause 1.2.54 d(i), d(ii) and d(iii) above, due care shall be taken that he/they is/are not the one/those who had an opportunity to deal with the matters to which the contract relates or who in the course of his/their duties as Railway servant(s) expressed views on all or any of the matters under dispute or differences. The proceedings of the arbitral tribunal or the award made by such Tribunal will, however, not be invalid merely for the reason that one or more arbitrator had, in the course of his service, opportunity to deal with the matters to which the contract relates or who in the course of his/their duties expressed views on all or any of the matters under dispute.

(e)(i) The arbitral award shall state item wise, the sum and reasons upon which it is based.

(e)(ii) A party may apply for corrections of any computational errors, any typographical or clerical errors or any other error of similar nature occurring in the award and interpretation of a specific

point of award to tribunal within 30 days of receipt of the award.

(e)(iii) A party may apply to tribunal within 30 days of receipt of award to make an additional award as to claims presented in the arbitral proceedings but omitted from the arbitral award.

(f) In case of the Tribunal, comprising of three Members, any ruling or award shall be made by a majority of Members of Tribunal. In the absence of such a majority, the views of the Presiding arbitrator shall prevail.

(g) Where the arbitral award is for the payment of money, no interest shall be payable on whole or any part of the money for any period till the date on which the award is made.

(h) The cost of arbitration shall be borne by the respective parties. The cost shall inter-alia include fee of the arbitrator(s) as per the rates fixed by the Railway Administration from time to time.

(i) Subject to the provisions of the aforesaid Arbitration and Conciliation Act 1996 and the rules there under and any statutory modification thereof shall apply to the arbitration proceedings under this clause.

(j) ***ASSESSMENT OF COST***

Upon every and any such reference the assessment of the cost incidental to the reference and award respectively shall be at the decision of the sole arbitrator or of the presiding arbitrator as the case may be.

(k) ***VENUE***

The venue for an arbitration shall be the place from which the Letter of Acceptance of Tender is issued or such other place as the Purchaser at this discretion may determine."

13. Referring to the aforesaid clause, specifically Clause 1.2.54(d)(ii), it has been submitted that the value of the dispute being in excess of Rs. 1 crore, that clause would govern the arbitration sought by the applicant. Next, referring to the stipulation in the aforesaid sub-Clause (d)(ii), providing for a panel of three arbitrators - all Gazetted Railway Electrification Officers, not below JA grade, it has been submitted that the said clause falls foul with Section 12(5) of the Act that came into force w.e.f. 23.10.2015. Since, no arbitrator could be appointed under that clause, it has been submitted that the applicant had not erred in seeking appointment of an independent arbitral tribunal, as proposed by the notice dated 31.12.2018. Further, the present application is also wholly maintainable and there is no error in the order dated 24.10.2019. It may be confirmed.

14. Also, it has been submitted, by virtue of Clause 1.2.2 read with the Clause 17 of the Preamble to the Tender Papers to the contract, as was executed on 01.03.2010, the terms and conditions contained in the GCC as they existed on the date of the execution of the contract alone would bind the parties. In that regard, Clause 17 of the Preamble to the contract entered into between the parties, is quoted below:

*"**17. General Conditions of the Contract** - 'General Conditions of Contract' of concerned Railway as amended for advance correction slips issued upto date, shall be part of the contract. This may be obtained by the tenderer/contractor on payment from any Divisional Railway Manager's office of concerned Railway in which the present section lies."*

15. Then, referring to Clause 64(3)(a)(ii) of the GCC as was existing in

the year 2010, he would submit, the invalidity in the arbitral tribunal proposed by the railway by virtue of Section 12(5) of the Act would attract to that clause as well. Clause 64(3) of the GCC (2010), reads as below:

*"**64(3)(a)(i)** - In cases where the total value of all claims in question added together does not exceed Rs. 10,00,000/- (Rupees ten lakhs only), the arbitral tribunal shall consist of a sole arbitrator who shall be a gazetted officer of Railway not below JA grade, nominated by the General Manager. The sole arbitrator shall be appointed within 60 days from the day when a written and valid demand for arbitration is received by GM.*

***64(3)(a)(ii)** - In cases not covered by the clause 64(3)(a)(i), the arbitral tribunal shall consist of a Panel of three Gazetted Rly. Officers not below JA grade or 2 Railway Gazetted Officers not below JA Grade and a retired Railway Officer, retired not below the rank of SAG Officer, as the arbitrators. For this purpose, the Railway will send a panel of more than 3 names of Gazetted Rly. Officers, of one or more departments of the Rly. which may also include the name(s) of retired Railway Officer(s) empanelled to work as Railway arbitrator to the contractor within 60 days from the day when a written and valid demand for arbitration is received by the GM. Contractor will be asked to suggest to General Manager at least 2 names out of the panel for appointment as contractor's nominee within 30 days from the date of dispatch of the request by Railway. The General Manager shall appoint at least one out of them as the contractor's nominee and will, also simultaneously appoint the balance number of arbitrators either from the panel or from outside the panel, duly indicating the 'presiding arbitrator' from amongst the 3 arbitrators so appointed. GM shall complete this exercise of appointing the arbitral tribunal within 30 days from the receipt of the names of contractor's nominees. While nominating the arbitrators it will be necessary to ensure that one of them is from the Accounts department. An officer of Selection Grade of the Accounts Department shall be considered of equal status to the officers in SA grade of other departments of the Railway for the purpose of appointment of arbitrator.*

***64(3)(a)(iii)** - If one or more of the arbitrators appointed as above refuses to act as arbitrator, withdraws from his office as arbitrator, or vacates his/their office/offices or is/are unable or unwilling to perform his functions as arbitrator for any reason whatsoever or dies or in the opinion of the General Manager fails to act without undue delay, the General Manager shall appoint new arbitrator/arbitrators to act in his/their place in the same manner in which the earlier arbitrator/arbitrators had been appointed. Such re-constituted Tribunal may, at its discretion, proceed with the reference from the stage at which it was left by the previous arbitrator(s).*

***64(3)(a)(iv)** - The arbitral tribunal shall have power to call for such evidence by way of affidavits or otherwise as the arbitral tribunal shall think proper, and it shall be the duty of the parties hereto do or cause ot be done all such things as may be necessary to enable the arbitral tribunal to make the award without any delay. The arbitral tribunal should record day-to-day proceedings. The proceedings shall normally be conducted on the basis of documents and written statements.*

***64(3)(a)(v)** - While appointing arbitrator(s) under sub-clause (i), (ii) & (iii) above, due care shall be taken that he/they is/are not the one/those who had an*

opportunity to deal with the matters to which the contract relates or who in the course of his/their duties as Railway servant(s) expressed views on all or any of the matters under dispute or differences. The proceedings of the arbitral tribunal or the award made by such Tribunal will, however, not be invalid merely for the reason that one or more arbitrator had, in the course of his service, opportunity to deal with the matters to which the contract relates or who in the course of his/their duties expressed views on all or any of the matters under dispute.

***64(3)(b)(i)** - The arbitral award shall state item wise, the sum and reasons upon which it is based. The analysis and reasons shall be detailed enough so that the award could be inferred there from.*

***64(3)(b)(ii)** - A party may apply for corrections of any computational errors, any typographical or clerical errors or any other error of similar nature occurring in the award of a tribunal and interpretation of a specific point of award to tribunal within 60 days of receipt of the award.*

***64(3)(b)(iii)** - A party may apply to tribunal within 60 days of receipt of award to make an additional award as to claims presented in the arbitral proceedings but omitted from the arbitral award."*

16. Here, it has been submitted that at no stage of the proceedings, the applicant waived his rights arising from Section 12(5) of the Act. To further his submissions, Sri Agarwal states, in the present case, the work awarded on 01.03.2010 was completed on 15.03.2015, when the completion certificate came to be issued. Therefore, by no stretch of imagination, the amended GCC (2016) or GCC (2019) would ever attract to these proceedings as the amendments made to the GCC after 01.03.2010 came into existence after the work stood completed.

17. It has also been pointed out that earlier the applicant had instituted before the Court at Hyderabad, a proceeding under Section 8 of the Act. In that proceeding, an objection had been raised by the railway, relying on Clause 1.2.54 of the terms of the contract. Clause 1.2.54 constitutes the special terms of contract entered into between the parties. Hence, the general arbitration clause contained in Clause 64 of the GCC (2010) would not be applicable.

18. Responding to the above, Sri Navneet Chandra Tripathi, learned counsel appearing for the opposite party would submit that the learned named arbitrator (as proposed) cannot be appointed as the arbitrator, in light of the decision of the Supreme Court in **Central Organization for Railway Electrification (supra)**. In that case also, this Court had appointed an independent arbitrator overlooking the stipulations contained in Clause 64(3)(a)(ii) and Clause 64(3)(b) of the GCC (2016). The Supreme Court held - even while making an appointment under Section 11 of the Act, the Court could not have overlooked the conditions of contract between the parties governing the constitution of the arbitral tribunal. In fact, the Court was bound to apply those conditions and appoint the arbitrator/arbitral tribunal, accordingly.

19. Further, it has been submitted, even in that case, the amended GCC (2016) was taken into consideration by the Supreme Court and the arbitral tribunal was constituted from the panel of retired railway officers with respect to a contract executed prior to coming into existence of the GCC (2016). Last, it has been submitted that, in the present case, the claim made for appointment of an arbitrator is wholly time barred, as has been clearly stated by the opposite party in their

communications dated 21.1.2019, 22.1.2019 and 10.1.2019, all in response to the statutory notice for appointment of an independent arbitrator dated 31.12.2018. No other or further objection has been raised.

20. Having heard learned counsel for the parties and having perused the record, in the first place, it is undisputed between the parties that the contract had been awarded to the applicant on 01.03.2010 and the completion certificate was issued on 15.03.2015. According to the opposite party the final bill payment was made to the applicant on 13.06.2016. Therefore, in the first place, the arbitration clause contained in the agreement dated 01.03.2010, being Clause 1.2.54 (as extracted above) would be relevant. That clause clearly stipulated an arbitral panel of three Gazetted Railway Officers, not below JA grade. Upon the railway proposing a panel containing names of three such officers, the applicant would be required to nominate two names from that proposal. Of that, one would have to be necessarily appointed as a member of the arbitral tribunal. Then, it also cannot be denied, under the conditions of that contract, Clause 1.2.2 (as quoted above), the Preamble to the Tender Papers are also part of the contract entered into between the parties. In turn, by virtue of Clause 17 thereto, Clause 64 of the General Conditions of the Contract also became part of the contract. Therefore, the submission of Sri Agarwal, seeking overriding effect in favour of the specific conditions of contract (Clause 1.2.54) over clause 64 (of the GCC), loses significance as both clauses are part of the arbitration agreement between the parties. Also, no overriding effect has been created in favour of clause 1.2.54 and there is nothing in the language of the contract to draw that inference.

21. Therefore, a question does arise - how much or which version (amended or unamended) of the GCC would be part of the contract entered into between the parties? Here, in the first place, it may be noted that the General Conditions of Contract were created and issued by the railways purely by way of a unilateral action. The GCC have been revised by the railways from time to time, which act is also a unilateral act of the railway authorities alone. Then, the terms of the General Conditions of Contract got incorporated into the particular contract - by reference and not as part of the set of documents signed by the parties. It became part of the contract, by virtue of the enabling Clause 17 of the Preamble to the Tender Papers that again became part of the contract by virtue of Clause 1.2.2 of the contract entered into between the parties herein. Hence, it needs examination whether the GCC has been made part of the contract 'by reference' or 'by incorporation'.

22. To examine that question, it is the language of Clause 17 of the Preamble to the Tender Papers alone that may be relevant. It clearly reads that the GCC of the concerned railway, as amended for advance correction slips would become part of the contract. Therefore, Clause 17 provides that the exact updated version of the GCC, would govern the rights of the parties. However, by virtue of the phrase "issued up to date", suffixed to the words "as amended for advance correction slips", provides and limits only that amendment to the GCC to be applied to the contract in question as may have been in existence on the date the contract being signed. It is so, because as only such correction slips may

be open to inspection and issued as may be in existence on the date of the contract being signed. Clearly Clause 17 of the Preamble to the Tender Papers is in the nature of a private law made by incorporation and not law made by reference. Therefore, the future/amended GCC (2016) and (2019) would have no enforceability viz a viz the present contract.

23. Even otherwise, to accept the submission of Sri Tripathi, that the phrase "upto date" would include the date when the dispute has arisen cannot be accepted as there is no other clause or stipulation of contract shown to exist as may allow for a new contract condition to arise unilaterally at the instance of the railway. Also, there is no intention to apply to the contract in question (i.e. the arbitration Clause), the GCC, as may be amended from time to time, in future. In **Build India Construction System v. Union of India, (2002) 5 SCC 433**, the successful bidder signed the letter of acceptance on 22.02.1985, specifically undertaking to abide by the terms and conditions of GCC "as modified", if any, elsewhere. Later, on 4.9.1986, the Government of India, sanctioned an amendment in the GCC. Upon disputes arising thereafter, the award made was set aside by the High Court relying on the amended GCC. Reversing that decision, the Supreme Court observed as below:

"A plain reading of the acceptance letter dated 22-2-1985 signed by the appellant clearly suggests a copy of general conditions of contract with (i) Errata Nos. 1 to 27, and (ii) Amendment Nos. 1 to 27 having been supplied by the respondents to the appellant and having been read and understood by the appellant followed by the appellant's agreement to abide by the terms and conditions thereof. The expression "as modified", qualifies the terms and conditions contained in the general conditions of contract as on and till that day. There is nothing contained in the acceptance letter, either expressly or by necessary implication, to spell out the appellant having authorized the respondents to carry out modifications in the terms and conditions of the contract otherwise than by mutual agreement and to hold the appellant bound by such modifications though not consented to by him and though not even brought to his knowledge."

24. In the instant case, undisputedly, the contract was executed by the parties on 01.03.2010. On that date, the applicant could have been aware of only such terms and conditions forming part of the contract as were in existence on that date. Undisputedly, on that date, GCC (2010) alone was in existence and the amendments that have been cited by Sri Tripathi, as were made, in the years 2016 and 2019, were not in existence. It may be safely assumed that on that they were not in contemplation. In fact, the amendment made to the GCC, in the year 2016 (with reference to arbitration clause) arose solely on account of the statutory amendment made whereby Section 12(5) of the Act was introduced w.e.f. 23.10.2015. Thus, though this issue is common to the facts of the present case as also to the facts obtaining in **Central Organization for Railway Electrification (supra)**, apparently, it was not raised before this Court and therefore, not decided by it. On the other hand, the decision of the Supreme Court has proceeded on the assumption that the amended GCC (2016) was applicable to the contract that had been executed in that case on 20.09.2010. Careful perusal of the decision of the

Supreme Court does not bring out any objection was by the claimant, raised in that regard. Also, it does not consider the ratio in **Build India Construction System (supra).**

25. Undisputedly, if the GCC (2016) or (2019) was to be read into the present contract, retired railway officers would be empanelled on the alternative panel of arbitrators and the ineligibility accruing to the serving employees by virtue of Section 12(5) of the Act would stand cured upon that panel of arbitrators being offered for appointment. However, since, in my opinion, the amended GCC (2016) or amended GCC (2019) are not part of the private law between the parties, they do not apply to the facts of the present case.

26. The fact that paragraph no. 19 of that decision tends to support appointment of serving railway officers to the arbitral tribunal (by applying Clause 64 of the GCC), clearly, that observation has to be read in the context of the amended GCC (2016) that was considered by the Supreme Court. It did not contemplate appointment of serving railway officers as a mandatory condition. In effect, Clause 64(3)(b) [as amendment of GCC (2016)] introduced a proviso to Section 12(5) of the Act in it's application to such agreements. In the event of the contractor nor waiving his right to object to the panel of arbitrators, the railway gave to itself a right to cure the defect in it's panel and offer an alternative panel of retired officers in place of the panel of serving officers. Obviously, the alternative panel would not be hit by Section 12(5).

27. Then, the ratio of that decision of the Supreme Court contained in paragraph no. 26 as concluded in paragraph no. 27 thereof is also of no help to the opposite party as the same pertains to retired railway officers only. Since, Clause 1.2.54 of the contract dated 01.03.2010 and the GCC (2010) did not allow for a panel of retired railway officers only (as noted above) and since the GCC (2010) did not contain any clause equivalent to clause 64(3)(b) introduced by GCC (2016), for that reason alone, the decision of the Supreme Court is wholly distinguishable. The ineligibility in the appointment of serving railway officers arose on account of legislative intervention, upon introduction of Section 12(5) of the Act w.e.f. 23.10.2015. Thereby the private law created by the parties (Clause 1.2.54 read with Clause 64 of the GCC (2010), stood overridden and unenforceable.

28. Since, the applicant herein did not waive its right to object to serving railway officers to be appointed as arbitrators (after the dispute had arisen), and since, in fact, it outrightly proposed to appoint an independent arbitrator after voicing its objection to the contractual stipulation, there was no defect in the applicant approaching this Court for appointment of an independent arbitrator under Section 11 of the Act. The procedure prescribed under the contract was invoked by the applicant upon issuance of notice dated 31.12.2018. Since the opposite party failed to appoint a consented arbitrator, the applicant was left with no option but to approach this Court in that regard. The application is found to be wholly maintainable. That is the ratio of another decision of the Supreme Court in **Bharat Broadband Network Ltd. Vs. United Telecoms Ltd.; (2019) 5 SCC 755** which is wholly attracted to the present facts as well. While, dealing with the de jure inability of an arbitrator to act as such - arising from the legal effect of Section 12(5) of the Act read with the Seventh

Schedule thereto, the Supreme Court held as under:

"Section 12(5), on the other hand, is a new provision which relates to the de jure inability of an arbitrator to act as such. Under this provision, any prior agreement to the contrary is wiped out by the non obstante clause in Section 12(5) the moment any person whose relationship with the parties or the counsel or the subject-matter of the dispute falls under the Seventh Schedule. The sub-section then declares that such person shall be "ineligible" to be appointed as arbitrator. The only way in which this ineligibility can be removed is by the proviso, which again is a special provision which states that parties may, subsequent to disputes having arisen between them, waive the applicability of Section 12(5) by an express agreement in writing. What is clear, therefore, is that where, under any agreement between the parties, a person falls within any of the categories set out in the Seventh Schedule, he is, as a matter of law, ineligible to be appointed as an arbitrator. The only way in which this ineligibility can be removed, again, in law, is that parties may after disputes have arisen between them, waive the applicability of this sub-section by an "express agreement in writing". Obviously, the "express agreement in writing" has reference to a person who is interdicted by the Seventh Schedule, but who is stated by parties (after the disputes have arisen between them) to be a person in whom they have faith notwithstanding the fact that such person is interdicted by the Seventh Schedule."

29. Further, as to the observation made by the Supreme Court (in paragraph no. 37 of the report) in **Central Organization for Railway Electrification (supra)**, in the first place, the observation of the Supreme Court has been made while deciding the issue whether the General Manager himself being ineligible by operation of law to appoint an arbitrator was eligible to nominate the arbitrator. That issue does not arise in the facts of the present case as in response to the notice dated 31.12.2018, the opposite party did not appoint of any arbitrator and did not offer for appointment any panel of arbitrators to the applicant. In fact, the opposite party refused arbitration. The question of the eligibility of the General Manager to appoint an arbitrator would have arisen if, as in the facts of **Central Organization for Railway Electrification (supra),** any offer had been made by the opposite party to appoint the arbitral tribunal in terms of the contract entered into between the parties. In this regard, provisions of Section 11(4)(a) of the Act are specific. Inasmuch as the opposite party failed to appoint an arbitrator, the applicant was within it's rights to approach this Court for appointment of an independent arbitrator. Here, it may be noted, the correctness of this view expressed by the Supreme Court in **Central Organization for Railway Electrification (supra)** on the above noted point has been doubted in **Union of India Vs. M/S Tantia Constructions Limited (supra).** That matter is engaging the attention of the Supreme Court.

30. As to the other objection raised by the Sri Tripathi that the claim for appointment is wholly time barred, it is true that a specific stand had been taken by the opposite party in its reply dated 21.01.2019 on three counts. First, it has been objected that the claim for appointment of an arbitrator was not made after 120 days and

before completion of 180 days from the presentation of the final claim. Second, it has been submitted that the applicant had clearly nullified any future claim by issuing the no-claim certificate while receiving the final payment. Third, it has been submitted that claim is time barred, it having been made more than 30 days after issue of the completion certificate.

31. Though, the nature of objections raised are specific and, if correct, they go to the root of the matter as limitation may disentitle the claimant to the remedy, yet, it cannot be disputed that such objection is always a mixed question of fact and law. At the present stage, in a summary proceeding confined to the appointment of an arbitrator, it is not for this Court to allow the parties to lead evidence and thereafter to reach a conclusion that the claim made is time barred. That process would itself involve adjudication as to facts. Thus, what fate may arise upon that objection being raised by the opposite party may remain to be examined in the proceedings before the arbitrator where, amongst others, it would be specifically open to the opposite party to raise the plea of limitation. That appears to be consistent with the legislative intent contained in Section 11(6A) of the Act.

32. No other objection has been pressed as to the appointment of the sole independent arbitrator. For the purposes of clarity, though the original contract contemplates an arbitral tribunal of three arbitrators, at present, it is not the case of the opposite party that an arbitral tribunal comprising of three arbitrators be provided.

33. Then, the consent of the proposed arbitrator had been sought by the order dated 24.10.2019. It has been received on record. In that regard, Sri Tripathi has further brought on record the Appellate Tribunal and Other Authorities (Qualifications, Experience and other Conditions of Service of Member) Rules, 2020, notified on 12.02.2020. The same have been enforced w.e.f. 12.02.2020. Relying on Rule 2(f) read with Rule 18(3) of the Rules, it has been submitted that the proposed arbitrator being Presiding Officer of the Security Appellate Tribunal, he cannot undertake any arbitration work while functioning in that capacity w.e.f. 12.02.2020. He therefore submits that the proposed arbitrator has incurred a legal ineligibility, to conduct the arbitration from 12.02.2020.

34. On the other hand, Sri Rahul Agarwal, learned counsel for the appellant has placed on record copies of letter dated 14.05.2020 and e-mail communication dated 04.06.2020 being communications made between the Registrar (SAT), Mumbai and the Deputy Director, Ministry of Finance, in response thereto. It has thus been pointed out that the Ministry of Finance has itself allowed the proposed arbitrator (herein) to continue to complete such arbitration cases as are mentioned in the communication dated 14.05.2020 written by the Registrar (SAT). Referring to the case mentioned at item no. 10 of that list, it has been submitted that the present arbitration matter is included in that list of arbitrations allowed to be conducted and concluded by the nominated arbitrator. Having addressed the propriety issue, Sri Rahul Agarwal has also brought to the attention of the Court the pronouncement of the Supreme Court in **Madras Bar Association Vs. Union of India & Anr.; 2020 SCC OnLine SC 962**, wherein it has been held has below :

"The 2020 Rules which came into force from the date of their publication in

the Official Gazette, i.e. 12.02.2020, cannot be given retrospective effect. The intention of Government of India to make the 2020 Rules prospective is very clear from the notification dated 12.02.2020. In any event, subordinate legislation cannot be given retrospective effect unless the parent statute specifically provides for the same."

He submits, undisputedly, the proposed arbitrator was appointed Presiding Officer of the SAT before enforcement of the aforesaid Rules on 12.02.2020. Therefore, those Rules do not apply to him. There is no legal impediment found to be existing in his continuance as an arbitrator.

35. In view of such facts, the objection raised by Sri Tripathi is found to be lacking in force. Neither on ground of legality nor of propriety, the learned proposed arbitrator is inconvenienced. There being no other objection, the order dated 24.10.2019 is confirmed, as above.

36. Accordingly, **Mr. Justice Tarun Agarwala, Chief Justice (Retired), Meghalaya High Court, residing at Delhi/NCR: A-5, Sector 14, NOIDA, Tel. (0120) 2510066, 1515596 (Mob. No. 9415307976, 7705007976**), is appointed the arbitrator to enter upon the reference and adjudicate the dispute in accordance with the provisions of Arbitration and Conciliation Act, 1996.

37. The arbitrator shall be entitled to fees and expenses, in accordance with the provisions of the Fourth Schedule inserted by Act No.3 of 2016.

38. Accordingly, the present application under Section 11 of the Act thus, stands allowed.

Case :- ARBITRATION AND CONCILI. APPL.U/S11(4) No. - 68 of 2019

Applicant :- Tata Projects Ltd.

Opposite Party :- Central Organization Far Railway Electrification

Counsel for Applicant :- Rahul Agarwal

Counsel for Opposite Party :- Navneet Chandra Tripathi

Hon'ble Saumitra Dayal Singh,J.

Re: Civil Misc. Application No. 6 of 2020

For the reasons contained in the order of the same date passed in Arbitration and Conciliation Application U/S 11(4) No. 68 of 2019, the present application stands **disposed of.**

(2021)02ILR A680

REVISIONAL JURISDICTION

CIVIL SIDE

DATED: LUCKNOW 08.02.2021

BEFORE

THE HON'BLE JASPREET SINGH, J.

Civil Revision No. 31 of 2020

Dalveer Singh ...Revisionist

Versus

State of U.P. & Ors. ...Opp. Parties

Counsel for the Revisionist:
Avadhesh Kumar, Samarth Saxena

Counsel for the Opp. Parties:
Sarvesh Kumar Dubey

A. Code of Civil Procedure,1908-Section 80(1)-Where section 80(2) C.P.C. provides that even though if the leave is granted yet no interim relief will be granted without hearing the State-respondents-in the instant case the leave had been refused-the plaintiff preferred the instant revision and the interim order was passed

without notice to the State-respondents-prior to the grant of leave, the suit itself is not before the Court hence, in absence of suit, there was no occasion to pass any order much less an interim order-the court grants leave to the revisionist to institute the suit without complying with the provision of section 80(1) C.P.C.(Para 34 to 37)

The revision is allowed. (E-5)

List of Cases cited:

1. St. of A.P. & ors. Vs Pioneer Builder A.P. (2006) 12 SCC 119

2. St. of Ker. & ors. Vs Sudhir Kumar Sharma & ors. (2013) 10 SCC 178

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

1. Heard Sri Samarth Saxena, learned counsel for the revisionist and the learned Standing Counsel for the State-respondents. Sri Vivek Raj Singh, learned Senior Counsel assisted by Sri Shantanu Sharma and Ms. Anantika Singh for respondent no. 4.

2. The instant Civil Revision has been preferred under Section 115 C.P.C. against the order dated 15.07.2020 passed in Misc. Case No. 133 of 2020 by Civil Judge, Senior Division, Lakhimpur Kheri whereby the leave to institute the Suit as prayed by the revisionist under Section 80 (2) of the C.P.C. was refused.

3. Briefly, the facts giving rise to the above civil revision are being noticed first:-

4. The revisionist as plaintiff before the Court of Civil Judge, Senior Division, Lakhimpur Kheri had filed an application under Section 80 (2) C.P.C. along with the copy of the proposed plaint seeking leave of the Court to institute the suit without serving the notice on the State-respondents as provided under Section 80 (1) C.P.C.

5. The averments as disclosed in the plaint are that the revisionist has been a lessee of the disputed land in question. The aforesaid land, the details of which were mentioned in paragraph 1 of the proposed plaint, copy of which has been brought on record as Annexure No. 6 with the memo of revision, the same vested with Sri Rajagopal Mandir Trust situate in District Lakhimpur Kheri along with many other properties. Since there was a dispute in respect of the properties belonging to the aforesaid trust, hence, in Regular Civil Appeal No. 64 of 2016 pending before this High Court at Lucknow, as an interim measure the Court had appointed the Chief Secretary, Department of Religious Affairs, State of U.P. as the Receiver. In furtherance thereof the SDM, Lakhimpur Kheri was appointed to look after the properties and was also entitled to receive the rent in respect of the properties which were leased out to various persons. In the aforesaid backdrop, 25.44 acres of the land belonging to the Trust was leased out to the revisionist for which he was paying Rs. 14,000/- per acre as lease rent. The aforesaid lease was on yearly basis commencing from the 1st of July till 30th of June of each year.

6. It was stated that the State-respondents had attempted to dispossess the revisionist some time in the year 2017 and a notice was sent by the revisionist in reply whereof the SDM had admitted the revisionist to be a lessee and also accepted the rent from him.

7. The cause of action for the instant suit was mentioned in Paragraph 9 of the proposed plaint wherein it was stated that the defendant no. 1 of the suit namely

SDM, Lakhimpur Kheri on 02.07.2017 stated that now the plaintiff/revisionist would be given only 12.5 acres of land and the other part would be measured and separated which shall be leased out to some other person. The aforesaid act was not within the domain of the S.D.M. and since he was attempting to dispossess the plaintiff in the aforesaid circumstances, the suit for permanent injunction was sought to be filed.

8. The application under Section 80 (2) C.P.C. along with the proposed plaint was filed on 04.07.2020 in the Court of Civil Judge, Senior Division, Lakhimpur Kheri registered as Misc. Case No. 133 of 2020. Upon the said application, notice was issued to the State authorities who filed their objections on 14.07.2020, a copy of which has been brought on record as Annexure No. 8.

9. Referring to the said objections, the learned counsel for the revisionist submits that in paragraph 5 it was pleaded that the plaintiff had not impleaded the District Magistrate nor the Chief Secretary, Religious Affairs, State of U.P. as a party. For the aforesaid non-joinder of parties, the application under Section 80 (2) was liable to be rejected. However, in paragraph 6 of their objection the State-respondents stated that the lease period of the plaintiff was uptil June, 2020 which had expired. The possession from the plaintiff has been taken and has been given to some other persons on twice the lease rent which was being paid by the plaintiff and since the plaintiff has not mentioned the aforesaid facts rather has concealed the same, consequently, no leave as provided under Section 80 (2) C.P.C. could be granted.

10. It is submitted by the learned counsel for the revisionist that in the aforesaid backdrop the Trial Court has committed a jurisdictional error in rejecting the application of the revisionist on the ground that since the property in question belonged to the Trust and that the High Court in First Appeal No. 64 of 2016 had appointed the Chief Secretary, Department of Religious Affairs, State of U.P. as a caretaker/receiver and as the SDM was exercising delegated powers, hence, without impleading the appropriate party and for the reason that the plaint did not disclose that any leave was granted by the High Court to institute the suit, hence, there did not appear to be any urgency in the matter, consequently, the application has been rejected.

11. It is further stated that the only issue before the Court was regarding the urgency which was specifically pointed out that the plaintiff was in possession and his possession was being disturbed by the State-respondents which required to be protected and this urgency was sufficient for the Court to have dispensed with the requirement of Notice under Section 80 (1) C.P.C. and this aspect of the matter not having been considered rather the Court below has been swayed by irrelevant consideration and has committed a jurisdictional error.

12. The learned Standing Counsel appearing for the State-respondents submits that the Trial Court was justified in rejecting the application under Section 80 (2) C.P.C. as the plaint was not appropriately framed and it suffered from the vice of non-joinder of necessary parties. Since as already indicated in the objections that the possession had been taken from the plaintiff, accordingly, there was no urgency in the matter and the Trial Court has not committed any error rather it has exercised its jurisdiction appropriately and the revision for the aforesaid reason deserves to be dismissed.

13. Sri V.R. Singh, learned Senior Counsel assisted by Sri Shantanu Sharma

has urged that the revisionist has not approached the Court with clean hands, inasmuch as, by means of the order dated 31.08.2020, this Court had directed the aforesaid revision to be connected with First Appeal No. 64 of 2016.

14. Be that as it may, nothing further transpired, however, the revisionist made an application bearing C.M.A. No. 52619 of 2020 seeking interim relief, the copy of the said application was not served on the State-respondents and upon the averments made by the revisionist that he had deposited the rent in question till 30.06.2020 and the SDM is deliberately not accepting the rent only to artificially create the default and moreover the crop of the revisionist was standing over the land in question and in the aforesaid circumstances, the revisionist sought the protection that his crop may be protected from destruction.

15. It is in this view of the matter that on 06.10.2020 as an interim measure, this Court provided that in case the revisionist deposited rent up to date including all arrears within a period of 10 days from today then the respondents shall not interfere and shall not destroy the standing crop on the property in question.

16. It is submitted by the learned Senior Counsel that taking the benefit of the order though the petitioner had been dispossessed yet on the strength of the said order, he again trespassed over the land which had been leased out w.e.f. 01.07.2020 to the private respondent no. 4 and who had also sown his crop. In this fashion, the revisionist has misused the order and has also stated incorrect facts. The private respondent has also made an application under Section 340 Cr.P.C. and has impressed upon the Court that once the lease of the revisionist had expired and the private respondent had been granted lease on 01.07.2020, these facts were concealed by the revisionist when he moved an application under Section 80 (2) C.P.C. along with the proposed plaint. Even though the said facts were brought to the notice of the Trial Court by the State-respondents while filing objections and in the aforesaid circumstances, the Court had rightly rejected the application. It is further submitted that on account of order dated 06.10.2020 passed by this Court, the private respondents has suffered losses and his crops/produce worth Rs. 4.5 lakhs have been taken away by the revisionist in such circumstances, appropriate orders be passed against the revisionist.

17. In rejoinder, the learned counsel for the revisionist has denied the submissions of both the State counsel as well as the learned Senior Counsel for the private respondent. It is submitted that though the arguments of the learned Senior Counsel raises contentious issues which are not the subject matter of the instant revision as the scope is only to adjudge the validity of the order dated 15.07.2019 by which the leave to institute the suit by exempting Section 80 (1) C.P.C. was refused. Nevertheless, it is submitted by the learned counsel for the revisionist that even while filing the objections on 14.07.2020, the State did not disclose to whom the alleged lease was given nor it indicated that what was the lease rent. The only avement in paragraph 6 of the objection was that the lease has been granted to some other person on twice the lease rent as paid by the revisionist. He has pointed out that the record would indicate that the lease rent paid by the private respondents is Rs. 19,000/- per acre whereas the revisionist

was paying Rs. 14,000/- per acre, hence the statement made by the State in their objections that the lease rent was twice the lease rent paid by the revisionist is apparently false and was stated only to create prejudice as the State-authorities are in connivance with the private respondent no. 4.

18. It is also submitted that the revisionist had 25.44 acres of land under his lease, if at all the lease was given to the private respondent no. 4, it was first incumbent on the State-authorities to have demarcated the actual extent since the record indicates that only 13 acres of land has been given on paper to the private respondent no. 4. Thus, without demarcating the actual 13 acres which was sought to be given to the private respondent no. 4, it was not open for the State-authorities to forcibly dispossess or take any action against the standing crop of the revisionist. Hence the revision deserves to be allowed.

19. The Court has considered the rival submissions as well as meticulously perused the record.

20. Despite various allegations and counter allegations made by the parties, this Court finds that the only issue to be considered is whether the Civil Judge, Senior Division, Lakhimpur Kheri was justified in refusing the leave to institute the suit as provided under Section 80 (2) C.P.C.

21. Before embarking upon the aforesaid inquiry in this revision, it is apposite to notice the law laid down by the Apex Court in respect of the aforesaid issue in the case of ***State of A.P. And Others Vs. Pioneer Builders A.P. reported in 2006 (12) SCC 119*** wherein the Apex Court considered the legislative background of Section 80 C.P.C. and its scope and has held in paras 14, 16, 17, 18 as under:-.

14. From a bare reading of sub-section (1) of Section 80, it is plain that subject to what is provided in sub-section (2) thereof, no suit can be filed against the Government or a public officer unless requisite notice under the said provision has been served on such Government or public officer, as the case may be. It is well settled that before the amendment of Section 80 the provisions of unamended Section 80 admitted of no implications and exceptions whatsoever and are express, explicit and mandatory. The section imposes a statutory and unqualified obligation upon the court and in the absence of compliance with Section 80, the suit is not maintainable. (See Bhagchand Dagadusa v. Secy. of State for India in Council [(1926-27) 54 IA 338 : AIR 1927 PC 176] ; Sawai Singhai Nirmal Chand v. Union of India [(1966) 1 SCR 986 : AIR 1966 SC 1068] and Bihari Chowdhary v. State of Bihar [(1984) 2 SCC 627] .) The service of notice under Section 80 is, thus, a condition precedent for the institution of a suit against the Government or a public officer. The legislative intent of the section is to give the Government sufficient notice of the suit, which is proposed to be filed against it so that it may reconsider the decision and decide for itself whether the claim made could be accepted or not. As observed in Bihari Chowdhary [(1984) 2 SCC 627] the object of the section is the advancement of justice and the securing of public good by avoidance of unnecessary litigation.

16. Thus, in conformity therewith, by the Code of Civil Procedure (Amendment) Act, 1976 the existing Section 80 was

renumbered as Section 80(1) and sub-sections (2) and (3) were inserted with effect from 1-2-1977. Sub-section (2) carved out an exception to the mandatory rule that no suit can be filed against the Government or a public officer unless two months' notice has been served on such Government or public officer. The provision mitigates the rigours of sub-section (1) and empowers the court to allow a person to institute a suit without serving any notice under sub-section (1) in case it finds that the suit is for the purpose of obtaining an urgent and immediate relief against the Government or a public officer. But, the court cannot grant relief under the sub-section unless a reasonable opportunity is given to the Government or public officer to show cause in respect of the relief prayed for. The proviso to the said sub-section enjoins that in case the court is of the opinion that no urgent and immediate relief should be granted, it shall return the plaint for presentation to it after complying with the requirements of sub-section (1). Sub-section (3), though not relevant for the present case, seeks to bring in the rule of substantial compliance and tends to relax the rigour of sub-section (1).

17. Thus, from a conjoint reading of sub-sections (1) and (2) of Section 80, the legislative intent is clear, namely, service of notice under sub-section (1) is imperative except where urgent and immediate relief is to be granted by the court, in which case a suit against the Government or a public officer may be instituted, but with the leave of the court. Leave of the court is a condition precedent. Such leave must precede the institution of a suit without serving notice. Even though Section 80(2) does not specify how the leave is to be sought for or given, yet the order granting leave must indicate the ground(s) pleaded and application of mind thereon. A restriction on the exercise of power by the court has been imposed, namely, the court cannot grant relief, whether interim or otherwise, except after giving the Government or a public officer a reasonable opportunity of showing cause in respect of relief prayed for in the suit.

18. Having regard to the legislative intent noticed above, it needs little emphasis that the power conferred on the court under sub-section (2) is to avoid genuine hardship and is, therefore, coupled with a duty to grant leave to institute a suit without complying with the requirements of sub-section (1) thereof, bearing in mind only the urgency of the relief prayed for and not the merits of the case. More so, when want of notice under sub-section (1) is also made good by providing that even in urgent matters relief under this provision shall not be granted without giving a reasonable opportunity to the Government or a public officer to show cause in respect of the relief prayed for. The provision also mandates that if the court is of the opinion that no urgent or immediate relief deserves to be granted it should return the plaint for presentation after complying with the requirements contemplated in sub-section (1).

22. Again in the case of ***State of Kerala and Others Vs. Sudhir Kumar Sharma and Others*** reported in ***2013 (10) SCC 178***, the Apex Court referred to the earlier cases and in paras 19 and 21 has held as under:-

19. It is an admitted fact that no order had been passed on the application filed under Section 80(2) CPC whereby leave of the court had been sought for filing the suit without complying with the provisions of Section 80(1) CPC. In our opinion, a suit filed without compliance with Section 80(1)

cannot be regularised simply by filing an application under Section 80(2) CPC. Upon filing an application under Section 80(2) CPC, the court is supposed to consider the facts and look at the circumstances in which the leave was sought for filing the suit without issuance of notice under Section 80(1) to the government authorities concerned. For the purpose of determining whether such an application should be granted, the court is supposed to give hearing to both the sides and consider the nature of the suit and urgency of the matter before taking a final decision. By mere filing of an application, by no stretch of imagination can it be presumed that the application is granted. If such a presumption is accepted, it would mean that the court has not to take any action in pursuance of such an application and if the court has not to take any action, then we failed to understand as to why such an application should be filed.

21. We reiterate that till the application filed under Section 80(2) CPC is finally heard and decided, it cannot be known whether the suit filed without issuance of notice under Section 80(1) CPC was justifiable. According to the provisions of Section 80(2) CPC, the court has to be satisfied after hearing the parties that there was some grave urgency which required some urgent relief and therefore, the plaintiff was constrained to file a suit without issuance of notice under Section 80(1) CPC. Till arguments are advanced on behalf of the plaintiff with regard to urgency in the matter and till the trial court is satisfied with regard to the urgency or requirement of immediate relief in the suit, the court normally would not grant an application under Section 80(2) CPC. We, therefore, come to the conclusion that mere filing of an application under Section 80(2) CPC would not mean that the said application was granted by the trial court.

23. In light of the aforesaid decisions which has succinctly noticed the scope of Section 80 (1) and (2) C.P.C. it would reveal that the purpose of enacting Sub Section 2 of Section 80 is to mitigate the hardship which may be caused to a party who would be required to comply with Sub Section 1 of Section 80 C.P.C. even in the face of urgency and to ensure that a meritorious case regarding urgent relief is not non-suited.

24. The only consideration before the Court concerned is to ascertain whether in the given facts and circumstances, there is urgency for a party to seek relief against State and its claim may not be frustrated for compliance of Section 80 (1) C.P.C. and this would entitle the Court to exercise its jurisdiction to exempt the issuance of notice under Section 80 (1) and grant the leave to the party to institute the suit.

25. Applying the principles as laid down by the Apex Court and testing the order passed by the Trial Court, it would indicate that the reasons given in the order are that the plaintiff had not impleaded the Chief Secretary, Religious Affairs, State of U.P. as the property belonged to the Trust and in First Appeal No. 64 of 2016, the High Court appointed the Chief Secretary as the Receiver. Without impleading the Chief Secretary, the SDM was not a competent authority, moreover, the Trial Court has also noticed that there was nothing to indicate that the revisionist had sought any leave from the High Court and in view of the aforesaid, the Trial Court has recorded that there is no urgency.

26. This Court upon considering the material on record as well as the reasons contained in the impugned order finds that the approach of the Trial Court was completely erroneous. The issue regarding mis-joinder or non-joinder of the parties is something which has to be considered on the merit of the matter. At the stage of considering the the application under Section 80 (2) C.P.C., the only focus of the Court should be on the aspect of urgency. It must be remembered that at this stage, the plaint is not before the Court to enable it to enter into merits.

27. Apparently, where the revisionist was apprehending dispossession at the behest of the State-respondents and had pleaded that he had been a lessee in possession and especially when the State-respondent in their objections dated 14.07.2020 could not indicate or express how the State-authorities had taken possession nor was it the case of the State as set up in their objections that the revisionist was never a lessee or in its possession. If a person who is or who has been in lawful possession of a property and is under a threat of being dispossessed definitely has a right to institute a suit and threat of dispossession is undoubtedly a circumstance which enables a person to seek an urgent relief from the Court.

28. It is one thing to say that there is no urgency and it is another thing to say that in a given fact situation the plaint may not be properly framed and the person may not be entitled to any interim relief.

29. There is another way to view it. Even when a plaint is before the Court and there is any defect regarding mis-joinder or non-joinder of parties, this ipso facto does not render the plaint as non-maintainable nor can it be rejected forthwith. Thus in the present case, where the question of urgency is to be considered by the trial court but it misdirected itself towards merits of the matter which at that point of time was not even before the Court as the plaint in its sense was not yet registered/admitted by the Court.

30. At the stage of consideration of an application under Section 80 (2) C.P.C., the role of the Court is only confined to examine that whether the facts pleaded give rise to a cause of action upon which the plaintiff is entitled to seek an urgent remedy which otherwise would frustrate the claim or cause of the plaintiff if the suit is not entertained for want of compliance of Section 80 (1) C.P.C.

31. In the totality of the facts and circumstances, this Court is of the definite view that the impugned order cannot be sustained and the leave ought to have been granted. The refusal of the leave by the trial court was not proper and the Trial Court has failed to exercise jurisdiction vested in it in law.

32. Before parting another aspect of the matter needs attention. This Courts finds that while filing the aforesaid revision the first order passed by the Court is dated 31.08.2020 wherein the revision was directed to be connected with First Appeal No. 64 of 2016. Thereafter upon the C.M.A. No. 52619 of 2020 an interim order was passed by this Court is 06.10.2020 which reads as under:-

"(C.M. Application No.52619 of 2020- Application for interim relief)

Learned counsel for the revisionists/petitioners states that his Revision is pending and in terms of the

order passed in the earlier Revision passed by this Court, the petitioners are continuing in possession till date. They have deposited rent of the property in dispute till 30.06.2020 thereafter the Sub Divisional Magistrate is not taking rent only to make out the revisionists as defaulter. The SDM has sent his officials to get the land vacated. The petitioners' crop is standing on the land in question and his Revision is pending before this Court, his crop may be protected from destruction by the Authorities.

Let counter affidavit be filed to the Revision as well as to the application for interim relief filed today by the office of the learned Chief Standing Counsel within three weeks. The petitioners shall file rejoinder affidavit within one week thereafter.

It is provided as an interim measures, in case the petitioners deposit rent upto date including all arrears within a period of ten days from today then the respondent shall not interfere and shall not destroy the crop standing on the property in dispute.

List this matter on 09.11.2020."

33. From the perusal of the aforesaid order dated 06.10.2020, it would indicate that this is the first time when the respondent was required to file their counter affidavit. Prior to 06.10.2020, no notice was issued to the State-respondents nor a copy of the revision was served on them and practically they were not even aware of the aforesaid revision. It is only thereafter in the month of November,2020 that the private respondents made an application for impleadment and filed an application for vacation of the order dated 06.10.2020.

34. In the aforesaid backdrop what is evident is the fact that on 06.10.2020 an interim order was passed without notice to the State-respondents. It is a legal maxim that what cannot be done directly cannot be done indirectly either. Where Section 80 (2) C.P.C. provides that even though if the leave is granted yet no interim relief will be granted without hearing the State-respondents and in the instant case, the leave had been refused. The plaintiff preferred the instant revision and the interim order dated 06.10.2020 was passed without notice to the State-respondents. It is also to be noticed that prior to the grant of leave, the suit itself is not before the Court hence in absence of suit, there was no occasion to pass any order much less an interim order.

35. Thus, this Court is of the view that the interim order dated 06.10.2020 could not have been passed without first grant of leave to institute the suit and then only after hearing the State-respondents, hence, this Court has no hesitation in recalling the order dated 06.10.2020. However, the parties shall be free to raise all their claims and counter claims if any before the Competent Court.

36. In view of the above, revision deserves to be allowed. The order dated 15.07.2020 passed by the Civil Judge, Senior Division, Lakhimpur Kheri is set aside. However, , there shall be no order as to costs.

37. In the facts and circumstances, This Court hereby grants leave to the revisionist to institute the suit without complying with the provisions of Section 80 (1) C.P.C. The revisionist shall be at liberty to file the plaint within three weeks from today and if it is so filed, the same shall be considered by the Court on its own merits.

38. It is made clear that this Court has not adjudicated the rights of either of the parties and any observations made in this order is limited only for the purposes of considering the scope of Section 80 (1) and (2) C.P.C. and it may not be taken as any expression of opinion on merits of the case of either of the parties.

(2021)02ILR A689
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 11.01.2021

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE GAUTAM CHOWDHARY, J.

Criminal Appeal No. 1302 of 2015
with Criminal Appeal 821 of 2015

Shahab Alam & Ors. ...Appellants
Versus
State of U.P. ...Opp. Party

Counsel for the Appellants:
Sri S.D. Singh Jadaun, Sri M.A.S. Alam Khan

Counsel for the Opp. Party:
A.G.A., Sri Abhinav Singh

A. Criminal Law - Indian Penal Code – Sections 304(1)/34, 323/34 – Culpable homicide – Conduct of accused and witnesses – Relevancy – Presence of all the accused is identified – To make out a case under Section 304(I)/34 I.P.C. conduct of accused and the witnesses must be also looked into – Heated altercation between parties, main accused brought a knife and stabbed the deceased, which proved fatal causing death – Held, involvement of the appellants is proved beyond reasonable doubt. (Para 3, 13, 14, 17 and 24)

B. Criminal Law - Indian Penal Code – Section 34 – Common intention – Ingredients – To convict accused with aid of Section 34 I.P.C., apart from the fact that there should be two or more accused, two factors must be established: 1. Common intention, and 2. Participation of the accused in the commission of an offence is not a must. (Para 20)

C. Criminal Law - Indian Penal Code – Section 34 – Common intention – Collective participation – Pre-mediation before incident – Section 34 pre-supposes that there must be common intention and participation of the accused in commission of an offence – Incident occurred at the residence of main-accused, which means that he had not gone to the place of the incident – There was no common intention nor there was collective participation – Offence was committed without any common intention and all they had attacked the other injured in different ways – Punishment of life imprisonment to the main accused u/s 304(1) IPC held liable to be substituted with sentence of imprisonment already undergone – Other accused were held guilty u/s 324, not u/s 304(1) IPC. (Para 16 , 24, 26, 29 and 30)

Criminal Appeal partly allowed. (E-1)

Cases relied on :-

1. Criminal Appeal No. 2108 of 2003, Aflatoon Vs St. of U.P. decided on 18.8.2017

2. Criminal Appeal No. 5441 of 2003, Arvind Sharma Vs St. of U.P. decided on 19.8.2017

3. Criminal Appeal No. 3032 of 2004, Munna @ Nikkhlesh Sharma Vs St. of U.P. decided on 31.07.2017

4. Criminal Appeal No. 5095 of 2004, Furqan Vs St. of U.P. decided on 31.08.2017

5. Subed Ali & ors. Vs St. of Assam, (2020) 10 SCC 517

6. Ilangovan Vs St. of T.N., (2020) 10 SCC 533

7. Subal Ghorai Vs St. of W.B., (2013) 4 SCC 607

8. Jai Bhagwan Vs St. of Har., 1999 Cr.L.J. (S.C.)

9. Parasa Raja Manikyala Rao & anr. Vs St. of A.P., (2003) 12 SCC 306

10.St. of Haryana Vs Tej Ram, 1980 (Supp) SCC 323

11. Ram Prasad & ors. Vs The S t. of U.P., (1976) 1 SCC 406

12.St. of Har. Vs Tej Ram, AIR 1980 SC 1496

(Delivered by Hon'ble Dr. Kaushal Jayendra Thaker, J. & Hon'ble Gautam Chowdhary, J.)

1. Both these appeals challenge the judgement and order dated 18.2.2015, passed by Additional District & Sessions Judge, Court No.16, Muzaffar Nagar, in S.T. No. 595 of 2007 (State of U.P. Vs. Shahab Alam and others), S.T. No. 1140 of 2007 (State of U.P. vs. Kallu), both arising out of Case Crime No. 1422 of 2006, under Sections- 302/34, 323/34, 506 I.P.C., and S.T. No. 596 of 2007 (State of U.P. vs. Samoon), arising out of Case Crime No. 1477 of 2006, under Section 25/4 Arms Act, registered at Police Station- Nai Mandi, District Muzaffar Nagar. All these sessions trials were tried jointly and were decided by common judgment, acquitting all the accused for offence under Section 506 I.P.C. and accused- Samoon for offence u/s 25/4 Arms Act and convicting all the four accused for the offence under Section 304(I)/34 I.P.C. for life imprisonment with a fine of Rs. 20,000/- and for offence under Section 323/34 I.P.C., for one year rigorous imprisonment with fine of Rs. 1000/-. All the sentences were directed to run concurrently. In furtherance, the fine of Rs. 25,000/- has been imposed upon them to pay as compensation to the informant side.

2. The trial of accused Shahab Alam, Samoon and Yaseen, in respect of offence punishable under Section 302/34, 323/34, 506 I.P.C. was the subject matter of adjudication in Sessions Trial No. 595 of 2007 and the trial in respect of accused Kallu for the offences punishable under Sections 302/34, 323/34, 506 I.P.C. was the subject matter of adjudication in Sessions Trial No. 1140 of 2007 whereas the trial in respect of accused Samoon for offence punishable under Section 25/4 of the Arms Act was the subject matter of adjudication in Sessions Trial No. 596 of 2007. All the cases being triable by Court of Sessions were committed to it by the Chief Judicial Magistrate, vide orders dated 10.4.2007, 31.7.2007 and 17.11.2020, respectively. The accused, on being produced before the Sessions Court, pleaded not guilty and, therefore, were arraigned as accused.

3. As per prosecution version, on the date of incident, the complainant and the deceased went to the house of Samoon (accused) so as to enquire as to why they had beaten and misbehaved with their grand mother in the morning on which some altercation took place between the parties and all of a sudden, Samoon from somewhere brought a knife and stabbed the deceased. This stabbing proved fatal and he died on way to hospital. The other accused got themselves armed with what can be said to be sticks and rods and all of them, in unition so as to bring home their common intention, assaulted the other injured.

4. On the accused pleading not guilty, they were tried and the prosecution led its evidence by examining about 11 witnesses which are as follows:

1	Deposition of Mohd. Dilshad Deposition of Mohd. Dilshad	17.8.2007 20.8.2007	PW1 PW1
2	Deposition of Mohd. Tazul	12.11.2007	PW2 PW2

	Deposition of Mohd. Tazul Deposition of Mohd. Tazul Deposition of Mohd. Tazul Deposition of Mohd. Tazul	2.6.2008 17.2.2009 26.5.2009 27.7.2009	PW2 PW2 PW2
3	Deposition of Dr. Rakesh Kumar	6.10.2009	PW3
4	Deposition of Dr. Chandra Prasad Singh	23.11.2009	PW4
5	Deposition of Dr. Vikram Singh	7.1.2010	PW5
6	Deposition of Rajesh Kumar	29.1.2010	PW6
7	Deposition of Alok Singh Deposition of Alok Singh	13.9.2011 8.5.2013	PW7 PW7
8	Deposition of Sukhpal Singh Deposition of Sukhpal Singh	9.11.2013 4.7.2014	PW8 PW8
9	Deposition of Virendra Singh	24.5.2013	PW9
10	Deposition of Omvir Singh	1.7.2013	PW10
11	Deposition of Head Constable Tejpal Singh	13.11.2013	PW 11

5. In support of their ocular version following documents were filed:

1	F.I.R.	8.11.2006	Ex.Ka.9
2	F.I.R.	16.11.2006	Ex.Ka.25
3	Written Report	8.11.2006	Ex.Ka.1
4	Application	11.11.2006	Ex.Ka.2
5	Arrest Memo	16.11.2006	Ex.Ka.14
6	Recovery memo of knife	16.11.2006	Ex.Ka.13
7	Injury report	8.11.2006	Ex.Ka.3
8	Injury report	8.11.2006	Ex.Ka.4
9	Injury report	8.11.2006	Ex.Ka.5
10	Letter		Ex.Ka.6
11	Physical Examination	8.11.2006	Ex.Ka.7
12	P.M. Report	10.11.2006	Ex.Ka.8
13	Panchayatnama	10.11.2006	Ex.Ka.18
14	Charge sheet Mool	29.11.2006	Ex.Ka.16
15	Charge sheet Mool	26.4.2007	Ex.Ka.17
16	Charge sheet Mool	22.11.2006	Ex.Ka.28
17	Site Plan with Index	9.11.2006	Ex.Ka.12
18	Site Plan with Index	23.11.2006	Ex.Ka.15
19	Site Plan with Index	19.11.2006	Ex.Ka.27
20	G.D. Report		Ex.Ka. 10
21	G.D. Report		Ex.Ka.11
22	Letter to C.M.O.		Ex.Ka.19
23	Letter		Ex.Ka.20
24	Photo Lash		Ex.K

			a.21
25	Chalan Lash		Ex.K a.22
26	G.D. Report		Ex.K a.23
27	Information to Meerut Medical		Ex.K a.24
28	G.D. Report		Ex.K a.26

6. We have heard Sri V.M. Zaidi, learned counsel for accused- Kallu accused and Sri S.D. Singh Jadaun, learned counsel for rest of the accused and the learned A G.A. for the State.

7. Learned counsel for the appellants have taken us through the records, have read the testimony of each and every witness and have made their submissions.

8. It is submitted by the counsel in unition that the appellants were not aggressors; they were in their own home. It was the deceased and the injured who came to the residence of Samoon. It is further submitted by the counsel for the appellants that so as to bring home the charges there should have been a common intention to do away with the deceased which is absent. He has relied on the testimony of the doctor to contend that even from the testimony of the doctor, it cannot be culled out that the deceased had been done to death and that the appellants had any common intention. There was no participation of the accused in unition. Learned counsel for the appellants has also requested the Court to exercise what can be said to be our power under Section 357(3) Cr.P.C. as long time has elapsed and one of the accused is in jail for more than 10 years and, in the alternative, it is submitted that the Court may reduce the sentence looking to the gravamen of the offence.

9. It is further submitted by Sri Zaidi that no independent witness has been examined except P.W. 1 and, therefore, they can not be convicted as per section 34 IPC. It is further submitted that Yasin, Sahab Alam and Kallu are on bail.

10. Learned counsel for the appellants has relied on the judgements of **Aflatoon Vs. State of U.P. passed on 18.8.2017 in Criminal Appeal No. 2108 of 2003; Arvind Sharma Vs. State of U.P. passed on 19.8.2017 in Criminal Appeal No. 5441 of 2003; Munna @ Nikkhlesh Sharma Vs. State of U.P. passed on 31.07.2017 in Criminal Appeal No. 3032 of 2004 and Furqan Vs. State of U.P. passed on 31.08.2017 in Criminal Appeal No. 5095 of 2004,** so as to contend that the case does not fall within the definition of section 34 I.P.C. The persons who have been named as accused did not carry any weapon. Unfortunately, the other except P.W. 2, who has been injured, is not examined. The F.I.R. also no where brings out that it was an assault by deadly weapon.

11. Per contra the counsel for the State has heavily relied on the judgement of the trial Court. He has further submitted that the circumstances go to show that the chain of circumstances is against the appellants. The evidence of altercation between the deceased and the accused is borne out from the record itself. The presence of eye witnesses cannot be said to be vitiated in any manner.

12. It would be relevant for us to take ourselves to the evidence of PW-3 first. The lacerated wound is 1.3 cm on the injured can be said to be caused by a weapon as opined in oral testimony. He has also been cross-examined. The doctor Rakesh Kumar's evidence clinches the

issue. It can be seen that one of the injured, namely, Mohd. Tajul (PW-2) was examined on oath but the other injured, namely, Gulfam was not examined on oath.

13. So as to make out a case under Section 304(I)/34 I.P.C. conduct of accused and the witnesses must be also looked into.

14. We are concerned with the punishment. The involvement of the appellants is proved beyond reasonable doubt. However, whether they had same object and intention of doing away with will have to be seen on the touchstones of the principles enunciated by the Apex Court and reiterated in **Subed Ali and Ors. Vs. State of Assam, 2020 (10) SCC 517** and the judgement in the case of **Ilangovan vs. State of Tamil Nadu, (2020) 10 SCC 533.**

15. The evidence which is before us goes to show that there was earlier dispute regarding land by and in between the parties. The deceased along with the injured had gone to the house of accused where they have altercation and one single blow was given by Samoon which proved fatal. The other three cannot be said to have had a common intention even Samoon has not been held guilty for offence u/s 302 I.P.C.

16. The learned Judge, in our opinion can be said to have not sifted the evidence as should be done for convicting people with the aid of Section 34 I.P.C. The act of all the accused cannot be said to have resulted out of what is known as common intention, therefore, the fact that four people were present but there was any existence of common intention or there was commission of overt act was not established in the present case. Only presence of the accused at the scene of occurrence is there. There was no common intention nor there was collective participation. The offence was committed without any common intention and all they had attacked the other injured in different ways. The motive was absent and relevance of proving motive is on the State as held by the Apex Court in **Subal Ghorai vs. State of West Bengal, (2013) 4 SCC 607.**

17. At the end of the oral submissions and the judgements cited by the counsel for the appellants, two things emerge - one that the incident occurred and it cannot be said that this is a case of clean acquittal. The reason being the presence of all the accused has been identified, which brings down the edifice of Sri Zaidi's submission that the incident occurred at night and there was no light. The submission of learned counsel for State that they were known to each other is accepted. It is submitted by counsel for appellants that the court below has convicted all accused under Section 304(I) I.PC. read with section 34 I.P.C.

18. In our opinion, we have to go into the genesis of the incident so as to see whether there was a common intention of doing away with the deceased as the deceased and other injured had come to the home of Samoon. It is nobody's case that Samoon and all were waiting for the injured to come and it is submitted that it cannot be said that there was any common intention to injure the injured or do away with the deceased.

19. The ingredients of Section 34 read as follows:

"34. Acts done by several persons in furtherance of common intention.--When a criminal act is done by several persons in

furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone."

20. It was held in **Jai Bhagwan Vs. State of Haryana, 1999 Cr.L.J. (S.C.)**, that to convict accused with aid of Section 34 I.P.C., apart from the fact that there should be two or more accused, two factors must be established:

1. Common intention, and
2. Participation of the accused in the commission of an offence is not a must.

21. In Parasa Raja Manikyala Rao and another Vs. State of A.P., (2003) 12 SCC 306, the Apex Court has held as under :-

"In appeal, the High Court affirmed the conviction of A-1 but reversed the acquittal of the appellants and held them guilty of the offence punishable under Section 302 read with Section 34 I.P.C.

Section 34 really means that if two or more persons intentionally do a common thing jointly, it is just the same as if each of them had done it individually."

22. In **State of Haryana Vs. Tej Ram, 1980 (Supp) SCC 323**, the Apex Court has held as under:-

"These circumstances unerringly point to the conclusion that both the appellant and his brother had a common intention to cause death of the deceased and in pursuance of such intention and a prearranged plan, they participated in the assault on the deceased killing him at the spot. Therefore, the appellant must be convicted under Section 302 read with Section 34 I.P.C.

If the author of the two injuries on the head of H was a single person, then it was difficult to found upon this basis the conviction of others with the aid of Section 34"

23. In **Ram Prasad and others Vs. The State of U.P., (1976) 1 SCC 406**, the Apex Court has held as under:-

"That all the four appellants came together to the scene of occurrence does not show that H and K shared the common intention of R and M at the time of their giving the lathi blows. That all the appellants ran away in the same direction is inconsequential. That the lathis would be effectively used in forcible occupation of land would have been relevant under Section 149 I.P.C. and not under Section 34"

24. Once we hold that there is no attraction of Section 34 I.P.C., we will have to see what was the role played by each accused. The incident cannot be said to have happened on account of sharing of a common intention as submitted by the counsel for the State as the incident was never pre-meditated. There was a heated altercation between the parties. The incident occurred at the residence of Samoon, meaning thereby that he had not gone to the place of the incident. However, we are unable to accept the submission of Sri Jadaun that the complainant and other injured were at the aggression.

25. As far as role of all the accused is concerned, it can be seen that they have injured other witnesses as is clear from the statements of PW-3, PW-2 and PW-1 and , therefore, the offence which they have committed will also have to be classified. They were armed with what can be said to be weapons. They have caused what can be said to be grievous hurt. Sections 319 and

320 I.P.C. read with Sections 324 and 323 I.P.C. read as follows:

"319. Hurt.--Whoever causes bodily pain, disease or infirmity to any person is said to cause hurt.

320. Grievous hurt.--The following kinds of hurt only are designated as "grievous":--

(First) -- Emasculation.

(Secondly) --Permanent privation of the sight of either eye.

(Thirdly) -- Permanent privation of the hearing of either ear,

(Fourthly) --Privation of any member or joint.

(Fifthly) -- Destruction or permanent impairing of the powers of any member or joint.

(Sixthly) -- Permanent disfiguration of the head or face.

(Seventhly) --Fracture or dislocation of a bone or tooth.

(Eighthly) --Any hurt which endangers life or which causes the sufferer to be during the space of twenty days in severe bodily pain, or unable to follow his ordinary pursuits.

324. Voluntarily causing hurt by dangerous weapons or means.--Whoever, except in the case provided for by section 334, voluntarily causes hurt by means of any instrument for shooting, stabbing or cutting, or any instrument which, used as weapon of offence, is likely to cause death, or by means of fire or any heated substance, or by means of any poison or any corrosive substance, or by means of any explosive substance or by means of any substance which it is deleterious to the human body to in-hale, to swallow, or to receive into the blood, or by means of any animal, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

323. Punishment for voluntarily causing hurt.

--Whoever, except in the case provided for by section 334, voluntarily causes hurt, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine which may extend to one thousand rupees, or with both."

26. Section 34 of the IPC pre-supposes, there must be common intention and participation of the accused in commission of an offence.

2. Participation of the accused in the commission of an offence.

Criminal intention is the highest form of blameworthiness of mind or mens rea. Intention occupies a symbolic place in criminal law. As the highest form of the mental element, it applies in murder and the gravest form of crimes in the criminal justice system. The terms ''intention' is not defined in Indian Penal Code but section 34 of IPC deals with common intention. The intention made among several people to do something wrong and act done in that manner in which it was formulated comes under the sanction of Section 34 of IPC

The distinction between similar intention or criminal intention was brought forth by the Supreme Court in Pandurang V State of Hyderabad. Supreme Court emphasized on this point that prior concert need not be something always very much prior to the incident, but could well be something that may develop on the spot, on te spur of the moment. In this case Ramchander Shelke (deceased) with his wife's sister went to the field. While Ramchander went to the river side the five

persons including thre appellant (Pandurang, Tuka, and Bilia) attacked him.

27. On appreciation of evidence and the decisions cited before us, we are convinced that the prosecution does not bring home that accused are required to be punished with aid of section 34 I.P.C. There was no intention to any act which was well planned. The incident occurred all of a sudden.

28. In **State of Haryana Vs. Tej Ram, AIR 1980 SC 1496**, it is held that circumstances which un-erringly comes to the conclusion that accused had common intention to cause death only then they must be convicted. We are convinced that the offence which is made out is not under section 304(1) read with 34 I.P.C. The decision in **Ram Prasad Vs. State of U.P**. will help the accused.

29. This takes us to the question of punishment. As far as Samoon is concerned, he is in jail for more than 14 years. We substitute the life imprisonment to that of already undergone and he shall be released forthwith if not required in any other offence. However, this would be coupled with the fine imposed by the court below and he would pay the total fine out of which 80 percent will go to the family of the bereaved. The fine be deposited within 12 weeks of his release failing which he shall undergo 6 months simple imprisonment in default.

30. As long time has elapsed, the other co-accused, namely, Shahab Alam, Yaseen and Kallu, whose role as scribed about is not that of commission of murder or rather murder amounting to culpable homicide but have caused injuries which would fall within the provisions of Section 324 I.P.C. The punishment is that which they have undergone and the fine would be enhanced to Rs. 5000/- to each looking to their age, failing which three months further imprisonment.

31. The appeals are **partly allowed**. As far as Samoon is concerned he be released from jail immediately if not wanted in any other offence.

32. The record be sent back to the trial court.

33. The judgement be sent to the jail authorities.

34. The fine, which is already deposited by the accused, will be given a set off.

(2021)02ILR A696
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 22.01.2021

BEFORE

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

Crl. Revision No. 1961 of 2016

Munshi Singh ...Revisionist
Versus
State of U.P. ...Opp. Party

Counsel for the Revisionist:
Sri Anil Kumar Srivastava, Sri P.N. Singh

Counsel for the Opp. Party:
A.G.A.

A. Criminal Law - Code of Criminal Procedure, 1973-Section 401/397 - Indian Penal Code,1860-Sections 279, 304A-upholdig the sentence-the informant boarded a 'Jugar'(an unauthorised vehicle) of the revisionist-the vehicle

overturned by driving negligentely in which informant's son died on the spot and other passengers also sustained injuries-the act of plying a privately fabricated contraption of a motor vehicle, 'Jugar' on a public road, then permitting anyone to ride it, or driving it himself, is an act utterly rash on the part of revisionist-by the act of the revisionist's rashness, the deceased met an untimely demise-no vehicle can be plied without a licence under the Act,1988-the person driving motor vehicles should not take a chance thinking that even if he is convicted he would be dealt with leniently by the court.(Para 1 to 21)

B. It is settled law that sentencing must have a policy of correction. If anyone has to become a good driver, must have a better training and moral responsibility. Offences relating to motor accidents, the criminal courts cannot treat the nature of offence u/s 304A IPC as attracting the benevolent provisions of section 4 of the Probation of Offenders Act,1958 (Para 12 to 19)

The revision is dismissed. (E-5)

List of Cases cited: -

1. St. of Punj. Vs Balwinder Singh & ors.(2012) 2 SCC 182

2. Sunil Suman Kaushik Vs St. of Har. & ors.(1997) 1 RCR (Civil) 591

3. Cherubin Gregory Vs St. of Bih.,(1964) AIR SC 205

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

1. This revision is directed against a judgment and order of Mr. Vivek, the then Additional District and Sessions Judge, Court No. 6, Agra dated 07.06.2016, partly allowing Criminal Appeal No. 233 of 2013, and modifying the revisionist's conviction and sentences awarded by the Additional Chief Judicial Magistrate, Court No. 11, Agra, vide judgment and order dated 02.07.2013 in Criminal Case No. 572 of 2010, State v. Munshi Singh, acquitting him of the charge under Section 337 of the Indian Penal Code, 18601, but upholding his conviction for offences punishable under Sections 279 and 304A IPC.

2. Heard Mr. Anil Kumar Srivastava, learned Senior Advocate, assisted by Mr. P.N. Singh, learned counsel for the revisionist and Mr. Nitin Kesarwani, learned A.G.A. appearing on behalf of the State.

3. The prosecution case, set out in the First Information Report2, is that on 08.06.2001, the informant, Tunda Ram, along with his son Mukesh, besides Pratap Singh, son of Sohran Singh, a native of Village - Nagla Veer Bhan, Police Station - Jagner, and another Gopi Chand, son of Bhanwar Singh, a resident of Singaich, Police Station - Jagner, District - Agra, was on way to his Village - Gopalpura. He was waiting for a conveyance at Saraindhi Chauraha. The party could not find a vehicle to undertake the journey. In consequence, they boarded a "*Jugar*" (an unauthorised and illegal contraption of a powered vehicle) that was headed towards Sahpau. This vehicle of sorts, stated to be driven at a high speed and negligently, overturned near the Siddh Baba Mandir, at about 12 noon. In consequence of this accident, the informant's son, Mukesh, a boy of 23 years, died on the spot. The other passengers on board the contraption also sustained injuries.

4. It was mentioned in the FIR that the informant had come to report the incident at the station, after informing his relatives. It was also stated that he could identify the driver, if confronted. Based on the aforesaid written information, Crime

No. 103 of 2001, under Sections 279, 337, 304 IPC was registered at Police Station - Jagner, District - Agra.

5. After investigation, the police submitted a charge-sheet against the revisionist. The Magistrate took cognizance of the offence. The revisionist, who is the sole accused of the case, denied the charges, and was put on his trial. The prosecution examined four witnesses, that is to say, P.W.1 Pratap Singh, P.W.2 Tunda Ram (father of the deceased), P.W.3 Dr. A.K. Singh, and P.W.4 Gopi Chand. The documentary evidence, that was produced, included the charge-sheet, the site-plan, the written information received, and the chik FIR.

6. The accused, in his statement under Section 313 of the Code of Criminal Procedure, 1973, stated that the prosecution was false, but declined to enter defence. It was P.W.2, the deceased's father, who supported the prosecution, testifying to all the facts in issue and the relevant facts. He identified the revisionist in the dock as the driver, apart from testifying to facts relating to boarding the vehicle, the fact about it being driven at a high speed and with negligence, the fact about the accident, and the resultant death of Mukesh, the victim.

7. It appears that before the Magistrate, it was urged on behalf of the revisionist that he was moving in the Jugar along with his family, when the deceased and the other injured voluntarily boarded it as gratuitous passengers. The revisionist did not offer them a ride, or compelled them to board it. It was, therefore, contended that there was no such duty of care owed, which may invite a prosecution under Section 304A or 279 IPC. The Magistrate found the fact about the accident and the resultant death in the circumstances, stated by the prosecution, to be proved. The Magistrate held that it is established that the revisionist was driving a Jugar, regarding which a report of accident has been submitted. She further held that a Jugar has no registration number. It is illegal to ply it. The testimony of witnesses show that, at the time of the incident, there were passengers on board. The Magistrate has noticed that there were about 25 passengers, according to the testimony of P.W.2, whereas according to P.W.4, there were 7-8 passengers. The Magistrate rejected the revisionist's contention that he was out on a sojourn with his family. The Magistrate has disbelieved the fact that there were family members of the revisionist on board, because none of the witnesses mentioned the fact about the revisionist's family members riding the contraption. The Magistrate has concluded that the vehicle was ferrying passengers for hire, inviting them to board his vehicle. It was also concluded that he drove the vehicle negligently, resulting in the fatal accident.

8. The Magistrate convicted the revisionist for offences punishable under Sections 279, 337 and 304A IPC, sentencing him to terms of two months, two months and six months of rigorous imprisonment on each count in that order, with a direction that the sentences would run concurrently. The revisionist carried an appeal to the learned Sessions Judge, which was allowed in part, acquitting the revisionist of the charge under Section 337 IPC, but affirming his conviction and sentence for the offences under Sections 279 and 304A IPC.

9. Aggrieved, this revision has been brought.

10. It is urged before this Court by Mr. Anil Kumar Srivatava, learned Senior Counsel appearing for the revisionist, that no responsibility can be fastened upon the revisionist because he was not plying his vehicle for any commercial gain, hire or reward. The deceased and his father had asked for a lift, that was given out of humanitarian considerations. The revisionist was out with his family, when the deceased and his father sought his assistance to ferry them, as there was no vehicle around. It is urged that in these circumstances, even if a case of accident involving the vehicle in question is to be believed, no liability under Section 304A or 279 IPC can be fastened. It is further submitted that the courts below held in manifest error that the accident happened the way it is claimed by the prosecution, involving the revisionist's vehicle, inasmuch as there is no substantive evidence available on record to sustain that finding; and a fortiori the revisionist's conviction. The orders of conviction passed by the two courts below are termed as perverse. It is urged that the conviction be overturned.

11. Mr. Nitin Kesarwani, learned A.G.A., has supported the orders impugned. He submits that the findings of the courts below are based on a just, plausible and logical inference, from the evidence available on record. It is not for this Court to interfere with these findings of facts, in exercise of its revisional jurisdiction.

12. So far as the contention based about the incident taking place the way it has been found by the two courts below to have occurred, it is not open to this Court to reappraise evidence. This Court finds that the two courts below have believed the evidence of the deceased's father, who was a co-passenger on board the ill-fated contraption of a vehicle, and there is no reason to discard the findings of the two courts below on the fact in issue and the relevant facts attending it. The submission of the learned Senior Counsel appearing for the revisionist that he was not plying his vehicle for hire or reward, but acceded to a request by the informant and his son for a lift, rendering him not liable for the offences, cannot be accepted. The distinction between a gratuitous passenger riding a vehicle, not meant for ferrying passengers, may have some relevance in a claim under the Motor Vehicles Act, 19883 but that is quite irrelevant, so far as an offence under Section 304A IPC, or, for that matter, Section 279 IPC is concerned. The offence under Section 304A IPC is about death caused by doing any rash or negligent act, that is short of culpable homicide. The gist of the offence has been elucidated by the Supreme Court in **State of Punjab v. Balwinder Singh & Others**4 where it has been held :

10. Section 304-A was inserted in the Penal Code by Penal Code (Amendment) Act 27 of 1870 to cover those cases wherein a person causes the death of another by such acts as are rash or negligent but there is no intention to cause death and no knowledge that the act will cause death. The case should not be covered by Sections 299 and 300 only then it will come under this section. The section provides punishment of either description for a term which may extend to two years or fine or both in case of homicide by rash or negligent act. To bring a case of homicide under Section 304-A IPC, the following conditions must exist, namely,

(1) there must be death of the person in question;

(2) the accused must have caused such death; and

(3) that such act of the accused was rash or negligent and that it did not amount to culpable homicide.

13. It would, thus, appear that there is nothing in the ingredient of an offence punishable under Section 304A IPC that would connect it to the fine principle of torts, regulating the right of an injured party to recover, in case of a motor accident governed by the provisions of the Act of 1988. The distinction in compensation cases between a gratuitous passenger riding a non-passenger vehicle vis-à-vis the liability of the insurer, will have no application here. All that is relevant is the causing of death by a rash or negligent act - whether a motor vehicle is involved or not, is not at all relevant. But, it is relevant whether the act of the revisionist in permitting the deceased and his companions to board a motor vehicle, which he knew was not authorized to ply under the Act of 1988, is rash enough to invite the consequences contemplated under the Statute. A Jugar is a privately fabricated motor vehicle, which cannot be registered under the Act of 1988. No license is issued to ply such a vehicle. There is a direction about these contraptions called Jugar to be found, in a decision of the Punjab and Haryana High Court in **Sunil Suman Kaushik v. State of Haryana & Others**5 while dealing with a Public Interest Litigation inter-alia seeking prohibition of plying such contraptions in pubic places. It was held and directed :

5. The petitioner has also prayed for the stoppage of unauthorised use of vehicles such as "Jugars' on the road. Jugar is a vehicle fitted with an engine. Under sub-section (28) of Section 2 of the Motor Vehicles Act, 1988, motor vehicle has been defined as follows:--

"2(28) "motor vehicles" 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 any other enclosed premises or a vehicle having less than four wheels fitted with engine capacity of not exceeding (twenty five) cubic centimeters."

6. Therefore, any vehicle which is mechanically propelled for use on roads comes within the definition of motor vehicle. Under the provisions of the said Act, no vehicle can be plied without a licence. Therefore, respondents Nos. 1 and 3 are directed to take effective steps to prevent the plying of the "Jugars' on the public places without getting them registered and obtaining necessary licence under the provisions of Motor Vehicles Act.

14. The registration of a motor vehicle is a sine qua non, for it being driven in any public place or any place, as mandated by Section 39 of the Act of 1988. The Registration Authorities ensure strict standards of manufacture in terms of safety to the occupants of a motor vehicle, and to third parties, without which, vehicles would not be admitted to registration. Generally speaking, if at all, privately done contraption of a motor vehicle would not be registered under Chapter IV of the Act of 1988. Whatever the standards of safety insisted upon by the Registration Authorities, unless a vehicle is registered, it cannot be plied anywhere. Thus, the act of plying a privately fabricated contraption of

a motor vehicle, popularly called a Jugar on a public road, and then permitting anyone to ride it, or driving it himself, is an act utterly rash on the revisionist's part. By that act of the revisionist's rashness, the deceased met an untimely demise. It must be also noted that rashness and negligence are no mere synonyms. An act may not be negligent, and yet utterly rash. This was precisely the case in **Cherubin Gregory v. State of Bihar6. In Cherubin Gregory (supra)** the facts there can be best recapitulated in the words of their Lordships, which read :

....The facts, as found are that in order to prevent the ingress of persons like the deceased into his latrine by making such ingress dangerous (1) the accused fixed up a copper wire across, the passage leading up his latrine, (2) that this wire was naked and uninsulated and carried current from the electrical wiring of his house to which it was connected (3) there was no warning that the wire was live., (4) the deceased managed to pass into the latrine without contacting the wire but that as she came out her hand happened to touch it and she got a shock as a result of which she died soon after. ....

15. It was held in the context of these facts in **Cherubin Gregory**, thus :

4. The voltage of the current passing through the naked wire being high enough to be lethal, there could no dispute that charging it with current of that voltage was a "rash act" done in reckless disregard of the serious consequences to people coming in contact with it.

16. The distinction between "negligence" and "rashness" has been elucidated in the Law Lexicon by **P. Ramanatha Aiyer (3rd Edition)**, where at Page 1188-1189, it is adumbrated :

There is a clear distinction between 'negligence and rashness' and that distinction is contemplated even by S. 279, IPC. In the case of negligence, the party does not do an act which he was bound to do, because he adverts not to it. In the case of rashness, the party does an act and breaks a positive duty. He thinks of the probable mischief, but in consequence, of a missupposition begotten by insufficient advertence, he assumes that the mischief will not ensue in the given instance or case. The radical idea denoted is always this. The party runs a risk of which he is conscious. Culpable rashness is often explained as acting with the consciousness that dangerous consequences will follow, but with the hope that they will not follow and with the belief that the actor has taken sufficient precautions to prevent the happening of such consequence. Similarly, culpable negligence is acting without the consciousness that dangerous consequences will follow, but in the circumstances which show that the actor has not exercised the caution that was incumbent of him. J.C. May, In re, MLJ: QD (1956-1960) Vol. IV C144: 1960 CrLJ 239 : AIR 1960 Mad 50 : 1960 Mad LJ (Cri) 570. [Motor Vehicles Act (4 of 1939), S. 116]

17. This Court is of opinion that the act of the revisionist in fabricating or causing to be fabricated a contraption of a motor vehicle, and moving out on the road, was an inherently rash act, unless that vehicle was certified to be according to safety norms by an authorized government agency and then registered under Section 39 of the Act of 1988. This vehicle, in whatever manner, if the cause of death of any person, regardless of the fact whether

the victim was a gratuitous passenger, a family member, or a third party, would render the revisionist liable for an offence of death by negligence.

18. Here, there are further findings that the contraption was indeed driven negligently at high speed, resulting in an accident, leading to the victim's death. In the face of these facts and the position of law, the charge of causing death by negligence is well established against the revisionist. So far as the evidence under Section 279 IPC is concerned, that, on evidence too, is proven beyond doubt. There is no scope for interference with the findings of the two courts below, who are ad idem about the revisionist's guilt.

19. Now, turning to the question of sentence, Mr. Srivastava, learned Senior Counsel appearing for the revisionist, submits that it is not a case where anything was intentioned by the revisionist. He was himself the driver of the vehicle and what happened was a pure accident. Looking to the nature of the vehicle that the revisionist employed to venture out on the roads, and the evidence about negligence forthcoming against him, this Court does not think that the revisionist is entitled to leniency in the matter of sentence. Accident on roads that are caused by rashness or negligence are a specie of pernicious conduct that has devastating consequences for not only for the victim, but the entire family. It is an offence which impacts the society by rendering women destitute, children orphans and old parents staring at the darkness of a lost progeny, just on the rush of adrenaline capturing the man, who manouvers the steering of a motor vehicle and presses the accelerator. Here, the case is worse, because the vehicle involved is one that ought never to have been fabricated, much less driven in a public place. In this connection, it would again be relevant to mention the authority of their Lordships in **Balwinder Singh (supra)** where adopting a deterrent stance in sentencing in matters of rash and negligent driving, it was held :

11. Even a decade ago, considering the galloping trend in road accidents in India and its devastating consequences, this Court in Dalbir Singh v. State of Haryana [(2000) 5 SCC 82 : 2004 SCC (Cri) 1208] held that, while considering the quantum of sentence to be imposed for the offence of causing death by rash or negligent driving of automobiles, one of the prime considerations should be deterrence. A professional driver should not take a chance thinking that even if he is convicted, he would be dealt with leniently by the court.

12. The following principles laid down in that decision are very relevant: (Dalbir Singh case [(2000) 5 SCC 82 : 2004 SCC (Cri) 1208] , SCC pp. 84-85 & 87, paras 1 & 13)

"1. When automobiles have become death traps any leniency shown to drivers who are found guilty of rash driving would be at the risk of further escalation of road accidents. All those who are manning the steering of automobiles, particularly professional drivers, must be kept under constant reminders of their duty to adopt utmost care and also of the consequences befalling them in cases of dereliction. One of the most effective ways of keeping such drivers under mental vigil is to maintain a deterrent element in the sentencing sphere. Any latitude shown to them in that sphere would tempt them to make driving frivolous and a frolic.

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13. Bearing in mind the galloping trend in road accidents in India and the devastating consequences visiting the victims and their families, criminal courts

cannot treat the nature of the offence under Section 304-A IPC as attracting the benevolent provisions of Section 4 of the Probation of Offenders Act. While considering the quantum of sentence to be imposed for the offence of causing death by rash or negligent driving of automobiles, one of the prime considerations should be deterrence. A professional driver pedals the accelerator of the automobile almost throughout his working hours. He must constantly inform himself that he cannot afford to have a single moment of laxity or inattentiveness when his leg is on the pedal of a vehicle in locomotion. He cannot and should not take a chance thinking that a rash driving need not necessarily cause any accident; or even if any accident occurs it need not necessarily result in the death of any human being; or even if such death ensues he might not be convicted of the offence; and lastly, that even if he is convicted he would be dealt with leniently by the court. He must always keep in his mind the fear psyche that if he is convicted of the offence for causing death of a human being due to his callous driving of the vehicle he cannot escape from a jail sentence. This is the role which the courts can play, particularly at the level of trial courts, for lessening the high rate of motor accidents due to callous driving of automobiles."

The same principles have been reiterated in B. Nagabhushanam v. State of Karnataka[(2008) 5 SCC 730 : (2008) 3 SCC (Cri) 61].

13. It is settled law that sentencing must have a policy of correction. If anyone has to become a good driver, must have a better training in traffic laws and moral responsibility with special reference to the potential injury to human life and limb. Considering the increased number of road accidents, this Court, on several occasions, has reminded the criminal courts dealing with the offences relating to motor accidents that they cannot treat the nature of the offence under Section 304-A IPC as attracting the benevolent provisions of Section 4 of the Probation of Offenders Act, 1958. We fully endorse the view expressed by this Court in Dalbir Singh[(2000) 5 SCC 82 : 2004 SCC (Cri) 1208] .

14. While considering the quantum of sentence to be imposed for the offence of causing death or injury by rash and negligent driving of automobiles, one of the prime considerations should be deterrence. The persons driving motor vehicles cannot and should not take a chance thinking that even if he is convicted he would be dealt with leniently by the court.

20. In view of what this Court has found above, there is no good ground to interfere with the orders impugned.

21. In the result, this revision **fails** and is **dismissed.** The revisionist shall surrender before the Trial Court within a week, to serve out the remainder of the sentence. Upon the revisionist's surrender, the sureties shall stand discharged.

22. Let this judgment be communicated to the Additional Chief Judicial Magistrate, Court No. 6, Agra through the learned Sessions Judge, Agra forthwith, along with a copy of this judgment. Let the lower court records be sent down at once.

(2021)02ILR A704
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 29.01.2021

BEFORE

THE HON'BLE SAMIT GOPAL, J.

Crl. Revision No. 2156 of 2016

Mahboob & Ors. ...Revisionists
Versus
State of U.P. & Anr. ...Opp. Parties

Counsel for the Revisionists:
Sri Chandra Prakash Singh, Sri Rajeev Kumar Rai

Counsel for the Opp. Parties:
A.G.A., Sri Gaurav Kakkar, Sri Vipul Kumar Singh, Sri Ashutosh Tiwari

A. Criminal Law - Code of Criminal Procedure, 1973-Section 401/397 - Indian Penal Code,1860-Sections 498-A, 323, 504,506 & Dowry Prohibition Act,1961-Section ¾- setting aside the conviction-Parties settled their disputes and decided for a one time alimony and live separately with their husbands-the dispute between the parties was a matrimonial dispute- the revisionists have been acquitted of the charges levelled against them. (Para 1 to 26)

B. The invocation of the jurisdiction of the High Court to quash a FIR or Criminal proceedings on the ground that a settlement has been arrived at between the offender and the victim is not the same as the invocation of jurisdiction for the purpose of compounding an offence u/s 320 of the Code. The power to quash u/s 482 is attracted even if the offence is non-compoundable. (15 to 22)

C. Criminal cases involving offences which arise from commercial, financial, mercantile, partnership or similar transactions with an essentially civil flavour may in appropriate situations fall for quashing where parties have settled the dispute. (Para 16)

The revision is allowed. (E-5)

List of Cases cited:-

1. Gian Singh Vs St. of Punj.,(2012)10 SCC 303

2. Parbatbhai Aahir @ Parbatbhai Bhimsinhbhai Karmur & ors. Vs St. of Guj. & anr. (2017) 9 SCC 641

3. Bitan Sengupta & anr. Vs St. of W. B. & anr. (2018) 18 SCC 366,

4. B.S. Joshi Vs St. of Har. (2003) 4 SCC 675

5. A.R. Antulay Vs R. S. Nayak (1988) 2 SCC 602

6. Montreal Street Rly. Co. Vs Normadin (1917) AC 170

7. St.of Guj. Vs Ram Prakash P. Puri (1969) 3 SCC 156

(Delivered by Hon'ble Samit Gopal, J.)

1. Heard Chandra Prakash Singh, learned counsel for the revisionists, Sri Ashutosh Tiwari, learned Advocate holding brief of Sri Gaurav Kakkar, learned counsel for the Opposite Party No. 2 and Sri Sanjay Kumar Singh, learned A.G.A. for the State and perused the record.

2. The trial court record was summoned which has been received on 11.01.2018, as per the office report. The same has also been perused.

3. The present revision has been preferred against the judgment and order dated 06.08.2015 passed by the Judicial Magistrate, Gautam Budh Nagar in Criminal Case No. 68 of 2013 (State of U.P. Vs. Mahboob and others) under

Sections 498-A, 323, 504, 506 I.P.C. and Section 3/4 D.P. Act, Police Station Rabpura District Gautam Budh Nagar (concerning Case Crime No. 101 of 2012, under Sections 498-A, 323, 504, 506 I.P.C. and Section 3/4 D.P. Act, Police Station Rabpura, District Gautam Budh Nagar), whereby, the revisionists have been convicted and sentenced under Section 498-A I.P.C. to 2 years simple imprisonment, fine of Rs. 1000/- and in default of payment of fine to one month simple imprisonment, under Section 323 I.P.C. to 06 months simple imprisonment, fine of Rs. 500/- and in default of payment of fine to one week simple imprisonment, under Section 3/4 Dowry Prohibition Act to 1 year simple imprisonment, fine of Rs. 1000/- and in default of payment of fine to one month simple imprisonment. The sentences have been ordered to run concurrently. The accused persons have been acquitted of the charges levelled against them under Sections 504, 506 I.P.C. vide the same judgment also against the judgement and order dated 24.05.2016 passed by Additional Sessions Judge / F.T.C., Gautam Budh Nagar in Criminal Appeal No. 62 of 2015 (Mahboob and Others Vs. State of U.P.) by which the accused persons have been convicted and sentenced under Section 498-A I.P.C. to 2 years simple imprisonment, fine of Rs. 1000/- and in default of payment of fine to one month simple imprisonment, under Section 323 I.P.C. to 06 months simple imprisonment, fine of Rs. 500/- and in default of payment of fine to one week simple imprisonment, under Section 4 Dowry Prohibition Act to 1 year simple imprisonment, fine of Rs. 1000/- and in default of payment of fine to one month simple imprisonment.

4. The issue in the present matter raised is on a very small compass. The Opposite Party No.2 / Kallu Khan is the first informant of the present matter. As per the first information report lodged by the opposite party No.2, his daughters namely Meena and Gulshan were married on 07.05.2006 to Mahboob and Shahid respectively, who are real brothers and in the marriage he had spent money and given gifts and dowry as per his status. Out of the wedlock of Mahboob and Smt. Meena, a girl child named Heena was born and from the wedlock of Shahid and Smt. Gulshan, a boy named Kauki was born. They were living peacefully. Later on, when it came to be known that the land of the first informant is being acquired, the in-laws of his daughters started troubling them and started beating them and used to demand of Rs. 5 lakhs each and a plot each for both the husbands and stated that the same be given or else they will not be permitted to live in the house. There used to be regular beating of the daughters of the first informant who continued to face the same due to social fears and used to console their in-laws but they did not mend their ways. On 17.11.2010, both the daughters of the first informant were assaulted and were left at a crossing at Rabpura from where they with great difficulty reached their maternal house and while crying and narrated the entire incident to her father on which many people of the society were called and with the help of them tried to settle the dispute in their matrimonial house but their in-laws did not accept the same and continued to press their demand and said that till the time money and plot is not given they will not keep his daughters. It is further stated that Mahboob the husband of Smt. Meena married some other lady for which his family members also agreed and the family members of the first informant were even threatened of dire consequences. The first information report was thus registered.

5. In the trial Kallu Khan the first informant and the father of the two daughters was examined as P.W.-1, Smt. Gulshan was examined as P.W.-2, Smt. Meena was examined as P.W.-3 and Sub Inspector Kaluram Chaudhary was examined as P.W.-4 who was the Investigating Officer of the matter. The accused persons in their defense had come up with a denial.

6. After conviction by the trial court, the appeal filed by the accused persons was also dismissed by the Appellate Court but from perusal of the judgement and order dated 24.05.2016 passed by the Appellate Court, it is apparent that the accused persons have not been convicted under Section 4 of the Dowry Prohibition Act though the Appellate Court in its judgement and order dated 24.05.2016 has stated that the appeal is dismissed and the judgement and order of the court below is affirmed but it appears that the conviction and sentence under Section 4 of the Dowry Prohibition Act has been maintained but there is no reference of the conviction and sentence under Section 3 of the Dowry Prohibition Act.

7. The present revision has been admitted vide order dated 02.08.2016 passed by this Court, though on the question of sentence only.

8. During the pendency of the present revision, Smt. Gulshan filed an affidavit dated 01.08.2017 before the competent officer mentioning therein that she has entered into compromise with her husband and in-laws and she does not want anyone to be convicted. The said affidavit is filed as Annexure- 1 at page 8 of the supplementary affidavit dated 14.8.2017. A compromise was reduced to writing which has been entered into between the parties in which Shahid is the first party and Smt. Gulshan is the second party and the same was filed before the Principal Judge, Family Court, Gautam Budh Nagar in Application No. 215 of 2016. The certified copy of the same is annexed at page 16 of the said supplementary affidavit. The concerned court verified the said compromise and passed an order of verification of the same on 01.08.2017. The parties therein were identified by their respective counsels.

9. Even, Smt. Meena filed an affidavit dated 01.08.2017 before the competent officer mentioning therein that she has entered into compromise with her husband and in-laws and she does not want anyone to be convicted. The said affidavit is filed as Annexure- 1 at page 9 of the supplementary affidavit dated 14.08.2017. A compromise was reduced to writing which has been entered into between the parties in which Mahboob is the first party and Smt. Meena is the second party and the same was filed before the Principal Judge, Family Court, Gautam Budh Nagar in Application No. 215 of 2016. The certified copy of the same is annexed at page 11 of the said supplementary affidavit. The concerned court verified the said compromise and passed an order of verification of the same on 01.08.2017. The parties therein were identified by their respective counsels.

10. Since two cases under Section 125 Cr.P.C. were filed by the two ladies and the court below had passed an order directing their husbands to pay maintenance and subsequently proceedings under Section 128 Cr.P.C. were filed which were pending before the court below, the said compromise was filed in the said proceedings.

11. A joint affidavit dated 03.02.2018 sworn by Noor Mohammad the revisionist

No. 3 and Kallu Khan, the opposite party No. 2 has also been filed in the present revision annexing the said two affidavits. The compromise as filed in the court of the Principal Judge, Family Court, Gautam Budh Nagar and the orders of verification of the said compromise as passed by the said court has also been filed in the said affidavit.

12. In paragraph 2 of both the compromises, it has been specifically mentioned that Case Crime No. 101 of 2012, under Sections 498-A, 323, 504, 506 I.P.C. and 3/4 Dowry Prohibition Act, Police Station Rabpura District Gautam Budh Nagar which was lodged resulted into an order of conviction which has been passed and the matter is pending before this Court and the parties have settled the said case also and will assist the accused persons in getting the said case decided. By means of the said compromise, both the ladies have decided for a one time alimony and have decided to live separately with their husbands.

13. This Court under its revisional jurisdiction has been knocked to set-aside the conviction of the revisionists as the parties have entered into a settlement. The dispute between the parties was a matrimonial dispute.

14. The Apex Court in the case of ***Gian Singh Vs. State of Punjab: (2012) 10 SCC 303*** in para 58 has held as under:-

"58. Where High Court quashes a criminal proceeding having regard to the fact that dispute between the offender and victim has been settled although offences are not compoundable, it does so as in its opinion, continuation of criminal proceedings will be an exercise in futility and justice in the case demands that the dispute between the parties is put to an end and peace is restored; securing the ends of justice being the ultimate guiding factor. No doubt, crimes are acts which have harmful effect on the public and consist in wrong doing that seriously endangers and threatens well-being of society and it is not safe to leave the crime- doer only because he and the victim have settled the dispute amicably or that the victim has been paid compensation, 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 Prevention of Corruption Act or the offences committed by public servants while working in that capacity, the settlement between 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 victim and the offender and victim have settled all disputes between them amicably, irrespective of the fact that such offences have not been made compoundable, the High Court may within the framework of its inherent power, quash the criminal proceeding or criminal complaint or F.I.R if it is satisfied that on the face of such settlement, there is hardly any likelihood of offender being convicted and by not quashing the criminal proceedings, justice shall be casualty and ends of justice shall be defeated. The above list is illustrative and not exhaustive. Each case will depend on its own facts and no hard-and-fast category can be prescribed."

15. Further in para 61 of the judgment in the case of ***Gian Singh (supra),*** the Apex Court has further held that where the parties have entered into compromise particularly in the matters predominantly of civil nature, matrimonial relating to dowry and family dispute etc. which are of private and personal nature, the High Court may quash the proceedings in such matters. Para 61 of the said judgment is extracted herein-below:

"61. The position that emerges from the above discussion can be summarised thus: the power of the High Court in quashing a criminal proceeding or FIR or complaint in exercise of its inherent jurisdiction is distinct and different from the power given to a criminal court for compounding the offences under Section 320 of the Code. Inherent power is of wide plenitude with no statutory limitation but it has to be exercised in accord with the guideline engrafted in such power viz; (i) to secure the ends of justice or (ii) to prevent abuse of the process of any Court. In what cases power to quash the criminal proceeding or complaint or F.I.R may be exercised where the offender and victim have settled their dispute would depend on the facts and circumstances of each case and no category can be prescribed. However, before exercise of such power, the High Court must have due regard to the nature and gravity of the crime. Heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. cannot be fittingly quashed even though the victim or victim's family and the offender have settled the dispute. Such offences are not private in nature and have serious impact on society. Similarly, any compromise between the victim and offender in relation to the offences under special statutes like Prevention of Corruption Act or the offences committed by public servants while working in that capacity etc; cannot provide for any basis for quashing criminal proceedings involving such offences. But the criminal cases having overwhelmingly and predominatingly civil flavour stand on different footing for the purposes of quashing, particularly the offences arising from commercial, financial, mercantile, civil, partnership or such like transactions or the offences arising out of matrimony relating to dowry, etc. or the family disputes where the wrong is basically private or personal in nature and the parties have resolved their entire dispute. In this category of cases, High Court may quash criminal proceedings if in its view, because of the compromise between the offender and victim, the possibility of conviction is remote and bleak and continuation of criminal case would put accused to great oppression and prejudice and extreme injustice would be caused to him by not quashing the criminal case despite full and complete settlement and compromise with the victim. In other words, the High Court must consider whether it would be unfair or contrary to the interest of justice to continue with the criminal proceeding or continuation of the criminal proceeding would tantamount to abuse of process of law despite settlement and compromise between the victim and wrongdoer and whether to secure the ends of justice, it is appropriate that criminal case is put to an end and if the answer to the above question(s) is in affirmative, the High Court shall be well within its jurisdiction to quash the criminal proceeding."

16. Further, in the case of ***Parbatbhai Aahir @ Parbatbhai Bhimsinhbhai Karmur and others Vs. State of Gujarat***

and another: (2017) 9 SCC 641, the Apex Court has laid down the category of cases in which the offences can be compounded, the said guidelines are extracted herein-below:

"16. The broad principles which emerge from the precedents on the subject, may be summarised in the following propositions:

(16.1) Section 482 preserves the inherent powers of the High Court to prevent an abuse of the process of any court or to secure the ends of justice. The provision does not confer new powers. It only recognises and preserves powers which inhere in the High Court.

(16.2) The invocation of the jurisdiction of the High Court to quash a First Information Report or a criminal proceeding on the ground that a settlement has been arrived at between the offender and the victim is not the same as the invocation of jurisdiction for the purpose of compounding an offence. While compounding an offence, the power of the court is governed by the provisions of Section 320 of the Code of Criminal Procedure, 1973. The power to quash under Section 482 is attracted even if the offence is non-compoundable.

(16.3) In forming an opinion whether a criminal proceeding or complaint should be quashed in exercise of its jurisdiction under Section 482, the High Court must evaluate whether the ends of justice would justify the exercise of the inherent power.

(16.4) While the inherent power of the High Court has a wide ambit and plenitude it has to be exercised; (i) to secure the ends of justice or (ii) to prevent an abuse of the process of any court.

(16.5) The decision as to whether a complaint or First Information Report should be quashed on the ground that the offender and victim have settled the dispute, revolves ultimately on the facts and circumstances of each case and no exhaustive elaboration of principles can be formulated.

(16.6) In the exercise of the power under Section 482 and while dealing with a plea that the dispute has been settled, the High Court must have due regard to the nature and gravity of the offence. Heinous and serious offences involving mental depravity or offences such as murder, rape and dacoity cannot appropriately be quashed though the victim or the family of the victim have settled the dispute. Such offences are, truly speaking, not private in nature but have a serious impact upon society. The decision to continue with the trial in such cases is founded on the overriding element of public interest in punishing persons for serious offences.

(16.7) As distinguished from serious offences, there may be criminal cases which have an overwhelming or predominant element of a civil dispute. They stand on a distinct footing in so far as the exercise of the inherent power to quash is concerned.

(16.8) Criminal cases involving offences which arise from commercial, financial, mercantile, partnership or similar transactions with an essentially civil flavour may in appropriate situations fall for quashing where parties have settled the dispute.

(16.9) In such a case, the High Court may quash the criminal proceeding if in view of the compromise between the disputants, the possibility of a conviction is remote and the continuation of a criminal proceeding would cause oppression and prejudice; and

(16.10) There is yet an exception to the principle set out in propositions 16.8 and 16.9. above. Economic offences involving

the financial and economic well-being of the state have implications which lie beyond the domain of a mere dispute between private disputants. The High Court would be justified in declining to quash where the offender is involved in an activity akin to a financial or economic fraud or misdemeanour. The consequences of the act complained of upon the financial or economic system will weigh in the balance."

17. In the case of ***Bitan Sengupta and another Vs. State of West Bengal and another: (2018) 18 SCC 366***, the Apex Court has held that since the parties have settled the matter and they have decided to keep harmony between them to enable them to live with peace and love and have no grievance whatsoever and want the accused persons to get acquitted from the case and have undertaken not to indulge in any other litigation against each other and withdraw all the complaints pending between them before the court as such going by the spirit of the law laid down in the case of B.S. Joshi Vs. State of Haryana: (2003) 4 SCC 675, the Apex Court held that the High Court should have accepted the settlement and compounded the offence. Paragraph 6 and 7 of the said judgement are quoted herein below:-

"6. As per the appellants, the parties have settled the matter, as they have decided to keep harmony between them to enable them to live with peace and love. The compromise records that respondent no.2 have no grievances whatsoever against the appellants and want both the appellants to get acquitted from the cases. Further, both the parties have undertaken not to indulge in any litigation against each other and withdraw all the complaints pending between them before the court.

7. In the aforesaid circumstances and going by the spirit of the law laid down by this Court in the case of B.S. Joshi & Ors. V. State of Haryana , we are of the opinion that the High Court should have accepted the settlement and compounded the offences. It is, more so, when the settlement between the parties, who were husband and wife, was even acted upon as the parties took mutual divorce on that basis."

18. In the present case, the situation as emerges is what was in the case of ***Bitan Sengupta*** (supra) wherein the parties had settled their dispute and had entered into a settlement, whereby, it was expressly decided that the accused persons be acquitted from the case. The said compromise has been duly verified in the proceedings before the Family Court.

19. This Court while exercising powers under Section 397 Cr.P.C. is also vested with powers under Section 482 of the Code of Criminal Procedure, 1973. The Court can also exercise its powers ex-debito justitiae to reach to a judgment to secure the ends of justice between the parties.

20. A Bench of Seven Judges of the Apex Court in the case of ***A.R. Antulay Vs. R.S. Nayak: (1988) 2 SCC 602*** have pointed out that no man is above the law, but at the same time no man can be denied his rights under the constitutions and the laws, and no man should suffer a wrong by technical and procedure irregularities. It was observed referring to the judgment of ***Montreal Street Railway Company Vs. Normadin: 1917 AC 170*** as follows:

"All rules of court are nothing but provisions intended to secure proper administration of justice. It is, therefore,

essential that they should be made to serve and be subordinate to that purpose".

It is further observed in the said judgment referring to the judgment of ***State of Gujarat Vs. Ram Prakash P.Puri: (1969) 3 SCC 156*** as follows:-

"Procedure has been described to be a handmaid and not a mistress of law, intended to subserve and facilitate the cause of justice and not to govern or obstruct it. Like all rules of procedure, this rule demand a construction which would promote this cause."

21. This Court thus by exercising its powers sets aside the judgment and order of conviction dated 06.08.2015 passed by the Judicial Magistrate, Gautam Budh Nagar in Criminal Case No. 68 of 2013 (State of U.P. Vs. Mahboob and others) under Sections 498-A, 323, 504, 506 I.P.C. and Section 3/4 D.P. Act, Police Station Rabpura District Gautam Budh Nagar (concerning Case Crime No. 101 of 2012, under Sections 498-A, 323, 504, 506 I.P.C. and Section 3/4 D.P. Act, Police Station Rabpura, District Gautam Budh Nagar and the judgement and order dated 24.05.2016 passed by the Additional Sessions Judge / F.T.C., Gautam Budh Nagar in Criminal Appeal No. 62 of 2015 (State Vs. Mahboob and Others). The revisionists are acquitted of the charges levelled against them.

22. The revision is thus allowed.

23. This Court vide its order dated 05.01.2021 had cancelled the bail of the revisionists granted to them vide order dated 02.08.2016 passed by this Court. In compliance of the order dated 05.01.2021, the revisionist No.1 / Mahboob has been arrested on 16.01.2021.

24. An application for recall of the order dated 05.01.2021 being Criminal Misc. Recall Application No. 9 of 2021 has been filed in which vide order dated 25.01.2021, the operation of the order dated 05.01.2021 passed by this Court has been directed to be kept in abeyance in so far as it relates to the revisionist No.2 / Shahid, revisionist No.3 / Noor Mohammad and revisionist No.4 / Rahishan only.

25. The revisionist No.1 / Mahboob is in jail in compliance of the order dated 05.01.2021. The order in so far it relates to revisionist No. No.2 / Shahid, revisionist No.3 / Noor Mohammad and revisionist No.4 / Rahishan are concerned has been stayed to be in operation vide order dated 25.01.2021.

26. Since the present revision has been allowed and the revisionists have been acquitted of the charges levelled against them, the revisionist No.1 / Mahboob is directed to be released from jail forthwith unless wanted in any other case.

27. In so far as the revisionist No. No.2 / Shahid, revisionist No.3 / Noor Mohammad and revisionist No.4 / Rahishan are concerned, as they have also been acquitted of the charges levelled against them, the order dated 05.01.2021 issuing non-bailable warrants is recalled in so far as they are concerned.

28. Office is directed to return the trial court records to the trial court forthwith.

29. A copy of this judgment be also certified to the concerned District and Sessions Judge for its compliance and necessary action.

30. The party shall file computer generated copy of such order downloaded from the official website of High Court Allahabad.

31. The computer generated copy of such order shall be self attested by the counsel of the party concerned.

32. 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.

Court No. - 68

Case :- CRIMINAL REVISION No. - 2156 of 2016

Revisionist :- Mahboob And 3 Others

Opposite Party :- State of U.P. and Another

Counsel for Revisionist :- Chandra Prakash Singh

Counsel for Opposite Party :- G.A.,Gaurav Kakkar

Hon'ble Samit Gopal,J.

In Ref: Criminal Misc. Recall Application No. 9 of 2021

Recall Application is allowed.

For order, see order of date 29.01.2021 passed in separate sheet.

(2021)02ILR A712
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 27.01.2021

BEFORE

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

Crl. Misc. W.P. No. 14647 of 2020

Indrakali ...Petitioner

Versus

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

Counsel for the Petitioner:
Sri D.K. Ojha

Counsel for the Respondents:
A.G.A.

Civil Law-Petition to direct respondent to hand over possession of land -to Petitioner-in compliance to order of SDM u/s 145 Cr.P.C.-property was attached and delivered into joint supardagi-when case came for determination -S.H.O. directed by SDM to ensure delivery of possession of attached property to Petitioner -Court's commissioner appointed for delivering of possession.

W.P. disposed. (E-7)

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

1. The petitioner has come up praying that a mandamus be issued, directing the respondent Authorities to hand over possession of *Arazi no*.148-Kha, admeasuring 120ft. X 35ft. back to the petitioner, in compliance with the order of the Sub-Divisional Magistrate, Meja, Prayagraj, dated 12.08.2011, passed in Case no. *4/4/4/9/12/13/14/27/30 of 2010-11,* Indrakali vs. Uchit Narayan and others, within a determinate period of time.

2. Heard Mr. D.K. Ojha, learned Counsel for the petitioner, Mr. Anurag Rai, learned Advocate appearing on behalf of non-party, Smt. Gudiya, under Chapter XXII Rule 5A of the Rules of the Court and Mr. Dinesh Kumar Srivastava, learned A.G.A. appearing on behalf of respondent nos.1 to 4. No one appears on behalf of respondent nos.5 to 8.

3. The facts, leading to the present writ petition, are that the Sub-Divisional

Magistrate, Meja, Prayagraj passed a preliminary order, under Section 145(1) of the Code of Criminal Procedure (for convenience, "Cr.P.C.), requiring the first party, Smt. Indrakali (the petitioner) and the second party, Uchit Narayan and his three sons, to appear on 05.07.2018 and put in their respective written statements about their claims to possession of the property in dispute. The parties were also directed to produce evidence. This order was passed in Case no.15 of 1998, under Section 145 Cr.P.C. The dispute was about a piece of land, admeasuring 120ft. X 35ft., located in front of the door leading to Indrakali's house. This is how the property is described in the preliminary order.

4. The proceedings under Section 145 Cr.P.C. were initiated on the basis of a report from the Station House Officer, Police Station Khiri, District Prayagraj, dated 10.07.1998, that the dispute between parties relating to possession of the property, above described, had led to a mounting of tension inter se the parties, which could precipitate a breach of peace at any time.

5. About a year after the issue of the preliminary order, the Sub-Divisional Magistrate, Meja, relying on the same report dated 10.08.1998, invoked his powers to attach pending decision of the case under Section 145 Cr.P.C. on ground of urgency and directed attachment of the property in dispute by his order dated 23.07.1999. The Sub-Divisional Magistrate, Meja directed the S.H.O. to attach the property, detailed at the foot of the order under Section 146(1) and hand over the same to a respectable man, about which a compliance report was directed to be filed by 09.08.1999. In compliance, the S.H.O., P.S. Khiri attached the property in dispute on 01.09.1999 and delivered it into the joint *supurdagi* of one Vishnu Datt son of Paras Nath and another Lallu Ram son of Bandhu Lal.

6. The case under Section 145 Cr.P.C. came up for determination before the Sub-Divisional Magistrate, Meja on 12.08.2011. The S.D.M. found for the petitioner and directed release of the attached property in favour of *Indrakali*. The S.H.O. was ordered to ensure delivery of possession of the attached property to *Indrakali* after taking it back from the supurdgar's possession. It is the non-compliance of this order dated 12.08.2011, that has led the petitioner to institute this writ petition. She says that the order dated 12.08.2011 was never carried out. The petitioner moved an application on 16.08.2011 before the S.D.M. to ensure compliance of his order dated 12.08.2011. The application was pursued with repeat requests.

7. The Sub-Divisional Magistrate passed an order on 29.12.2015, directing the S.H.O., Khiri to carry out the order dated 12.08.2011, by causing possession of the attached property to be delivered to Indrakali. It is remarked in the Sub-Divisional Magistrate's order dated December the 29th, 2015 that his predecessors too had passed several orders to the same effect. A copy of the Sub-Divisional Magistrate's order dated 29.12.2015 is on record as Annexure no.5 to the writ petition. This order of the Sub-Divisional Magistrate did not move the S.H.O. and the petitioner did not get back her property.

8. The petitioner made a slew of representations dated 24.08.2016, 24.07.2017, 26.10.2017, 14.09.2018, 10.11.2018 and 04.06.2020, all addressed

to the Sub-Divisional Magistrate, Meja to the same end, but in vain. A copy of each of these representations, above detailed, are on record as Annexure no.6 to the writ petition. It appears that on 29.08.2017, the S.H.O., Khiri wrote a memo to the Sub-Divisional Magistrate that a team of Revenue Officials be directed to assist him, so that the attached property may be demarcated and handed over to the petitioner. Acting on the said memo, the Sub-Divisional Magistrate detailed a Lekhpal to demarcate the property in dispute. The Lekhpal submitted a report dated 05.12.2018 that there was an issue between parties about the identity of the property in dispute. This report of the Lekhpal, dated 05.12.2018 was forwarded to the Sub-Divisional Magistrate by the Registrar-Kanoongo, and in turn, by the Tehsildar on 11.12.2018 and 14.12.2018, respectively.

9. It is the petitioner's case that the Sub-Divisional Magistrate passed successive orders on various dates, right upto 16.04.2019 addressed to the S.H.O., Khiri to ensure compliance with his order dated 12.08.2011, but the S.H.O. and the Tehsildar did not carry out the order. Copy of those various orders passed by the Sub-Divisional Magistrate are on record. This matter is, therefore, a classical case for the issue of a writ of mandamus to subordinate Authorities to carry out the orders of a superior made in statutory proceedings, which they have failed to implement.

10. When this petition came up before this Court for admission on 11.01.2011, the Court required the Sub-Divisional Magistrate, Meja to submit a report within 48 hours, indicating why he has not caused his order dated 12.08.2011 to be carried into effect. The Sub-Divisional Magistrate submitted a report dated 12.01.2021, which indicates that the attached property/ property in dispute had been measured on the spot and found to be short in area, because a part of it has been purchased by one Smt. Gudiya Devi wife of Harish Chandra, a resident of Saidabad, Tehsil Handia, District Prayagraj through a registered sale deed and that she was in possession of that part. It was also reported that some construction work was going on, which has been caused to be halted. It was also indicated that the petitioner was called over on 12.01.2021 at 11:00 O' clock in the morning to take possession, but she did not appear until 2:00 O' clock that day. It was reported that for all these reasons, it was not possible to deliver possession to the petitioner on 12.01.2021.

11. This Court thereupon directed the Sub-Divisional Magistrate to cause possession of the property in dispute to be delivered back to the petitioner and a report in that regard submitted to the Court. If that was not done, the Sub-Divisional Magistrate, Meja was directed to appear before the Court in person on 21.01.2021; but not, if the order was carried out and possession delivered.

12. On 21.01.2021, Ms. Renu, the Sub-Divisional Magistrate, Meja, Prayagraj appeared before the Court. She assured the Court that possession would be delivered to the petitioner at site by the following day at 12:00 noon. This Court directed that possession will be given to the petitioner of land as much was attached under the process issued under Section 146(1) Cr.P.C. It was also directed that the identity of the land shall be ascertained with reference to the map drawn up at the time of attachment, comparing it with the memo of attachment/ panchanama. The case was

directed to be put up on the following day at 2:00 p.m.

13. On 22.01.2021 when the matter again came up, the learned Counsel for the petitioner submitted that the Sub-Divisional Magistrate, Meja was offering land different from the land in dispute or what was attached under Section 146(1) Cr.P.C. It was indicated that boundaries were different. This Court indicated in the order dated 22.01.2021 that all that was required to be done is to hand over back to the petitioner possession of property, that was attached in proceedings under Section 145/ 146 Cr.P.C., in consequence of the order of attachment being withdrawn on 12.08.2011.

14. That State, on the other hand, took a stand that the petitioner is not accepting delivery of possession of the land, which the Sub-Divisional Magistrate and other Authorities are offering her on the spot.

15. That Court was of opinion that there was no good reason for the petitioner not to accept possession of land, which she had all along been asking for. The issue between the petitioner and the Authorities appeared to be about the identity of land, which was attached and that being given back to her.

16. In the circumstances, this Court to give effect to the Sub-Divisional Magistrate's order dated 12.08.2011 and to secure the ends of justice consistent with the parties' right directed a commission to be issued to the learned Civil Judge (Sr. Div.), Allahabad, charging the Officer with the duty to demarcate the land/ property earlier attached in proceedings under Section 146(1) Cr.P.C. and now required to be delivered back to the petitioner. Certain ancillary directions, in aid of the commission, were issued to the parties, including the Sub-Divisional Magistrate. It was indicated further that the other party to the proceedings under Section 145 Cr.P.C. shall also be associated in the execution of the commission.

17. In compliance with this Court's order dated 22.01.2021, Ms. Babita Pathak, learned Civil Judge (Sr. Div.), Allahabad executed the commission on 24.01.2021. She submitted her commission report to this Court on 25.01.2021 in a sealed cover along with a memo dated 25.01.2021. The commission report was opened under directions of the Court. A perusal of the commission report shows that the learned Civil Judge has drawn up minutes of the commission dated 24.01.2021 and an inventory of commission/ commission report also dated 24.01.2021. It also carries with it a memo of possession with a map enclosed (not to scale). The commission report is a very detailed document and clearly indicates that possession of all that property which was attached under Section 146(1) Cr.P.C. has been identified, measured, demarcated and handed over to the petitioner. It would be of particular relevance to refer to the minutes of the commission, recorded by the learned Commissioner/ Civil Judge (Sr. Div.), Allahabad, that read:

"1. I proceeded in compliance of the Order of The Hon'ble High Court dated 22.1.21 passed in Crl. Misc. W.P. No. 14647/2020 Indrakali Vs. State of U.P. & 3 Ors., to the site which is situated in village Sirhir, Tahsil Khiri, Meja, Allahabad, along with Amin Daya Shankar Tripathi on Sunday 24-01-21 and reached the spot at 10.56 AM.

2. All Concerned persons including the petitioner Indrakali, O.P. No. 1 S.D.M. Meja Mrs. Renu Singh, Tahasildar Mrs.

Dipika Singh, S.H.O. Meja Sunil Kumar Bajpai, Baramdeen S/o Uchit Narayan on behalf O.P. No. 5, Indrakali on behalf of O.P. No. 6 Jeet Narayan, O.P. No. 7 Raj Narayan were present on the spot as the Notice of commission was served upon them by special messenger. Only O.P. No. 8 Ram Narayan was not present. However later on at 2.20 PM O.P. No. 8 also reached on the spot. The notices served to concerned parties by special messenger are annexed herewith as Annexure No. E/1 to E/8.

3. I requisitioned/ summoned the necessary records from the SDM concerned. Perused the records and orders passed. The Photo copy of the preliminary order U/s 145 Cr.P.C., the copy of attachment order dt. 23.07.99 U/s 146. Cr.P.C. and the Photo copy of release order dt. 12.08.2011 U/s 146 Cr.P.C. are attached herewith as Annexure No.F/1 to F/3.

4. Thereafter, I identified the disputed plot as per the records & release order dt. 12.08.2011 U/s 146 (1)(a) Cr.P.C. in presence of the parties.

5. Thereafter I and the Amin measured the plot in presence of the parties as per the boundaries mentioned in the records, which were measured as AB as 120 ft., AD as 35 ft. to which the petitioner said that in half portion of the disputed plot towards East, some illegal construction is being made. The petitioner Indrakali also said that Annexed to & behind BC She had a house which has been forcefully occupied by Gudiya. Since I was acting as a Court Commissioner for the disputed plot 148Kh 120 x 35 ft. as per the release order dt. 23.07.99 I was bound by the boundaries mentioned in the release order. The petitioner agreed upon the boundaries measured by me during commission.

6. Thereafter, I along with the amin prepared the Inventory of commission as well as the map of the disputed plot.

7. O.P. No. 8 Ram Narayan S/o Govardhan arrived at the disputed plot at 2.20 P.M. and participated in the proceedings.

8. Consequently, after measuring the disputed plot i.e. 148Kh, 120 X 35 ft. the disputed plot was handed over to the petitioner in presence of all the opposite parties present over there.

9. The Inventory of commission, the memorandum of handing over the possession of the disputed plot was signed by all the concerned persons, two witnesses and Amin in my presence. The duly executed inventory of commission and memorandum of possession are annexed herewith as C/1 to C/2 and D/1 to D/3.

The Commission proceeding was conducted peacefully coupled with a peaceful handover of the possession of the disputed plot to the petitioner, which the petitioner Indrakali willfully accepted."

18. The entire report of the commission, which carries seven documents together with an index is made a part of the record. It is stated by the learned Counsel for the petitioner that possession has been delivered to the petitioner over Arazi No. 148 kha, 120ft. x 35ft. in compliance with the order dated 12.08.2011 passed by the Sub-Divisional Magistrate, Meja, District Allahabad (now Prayagraj) in Case No. 4/4/4/9/12/13/14/27/30 of 2010-11, Indrakali vs. Uchit Narayan and others under Section 145/146 Cr.P.C. This possession has been delivered to her by the learned Civil Judge (Senior Division), Allahabad acting as this Court's Commissioner.

19. Mr. Anurag Rai, learned Advocate appearing on behalf of non-party, Smt. Gudiya states that possession of his land has been taken away and given to the petitioner, contrary to her rights.

20. It is beyond the scope of the present writ petition to go into the aforesaid question. The Commissioner has executed the order of the Sub-Divisional Magistrate, Meja, Prayagraj passed in proceedings under Section 145 Cr.P.C. In case, Smt. Gudiya or any other party respondent(s) or any other person is aggrieved by this delivery of possession made by the learned Commissioner, giving effect to the orders of the Sub-Divisional Magistrate, it will be open to the person concerned to file an appropriately framed suit before the Court of competent jurisdiction and establish his/ her rights.

21. Before parting with this matter, this Court places on record our appreciation for the steadfast and flawless execution of commission by Ms. Babita Pathak, the learned Civil Judge (Sr. Div.), Allahabad in compliance with the Court's orders and aid of justice.

22. This writ petition is **disposed of** in terms of the aforesaid orders. There shall be no order as to costs.

(2021)02ILR A717
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.01.2021

BEFORE

THE HON'BLE VIPIN CHANDRA DIXIT, J.

Crl. Misc. W.P. No. 17692 of 2020

Yogeshwar Tyagi & Anr. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Santosh Kumar Shukla, Sri Amul Kumar Tyagi

Counsel for the Respondents:
A.G.A.

Criminal Law-Order of externment passed by the District Magistrate-only on the basis of one criminal case-grounds in appeal and affidavits of several village pradhans not considered-impugned quashed.

W.P. allowed. (E-7)

List of Cases cited:-

1. Imran alias Abdul Quddus Khan Vs St. of U.P. & ors., Criminal Misc. Writ Petition No.7111 of 1999.

(Delivered by Hon'ble Vipin Chandra Dixit, J.)

1. The instant writ petition has been filed by the petitioners challenging the order dated 30.9.2020 passed by District Magistrate, Hapur in Case No.796 of 2019 by which externment order has been passed under Section 3/4 of Uttar Pradesh Control of Goondas Act, 1970 (hereinafter referred to as 'Act') against the petitioner no.1 and the order dated 30.9.2020 passed by District Magistrate, Hapur in Case No.795 of 2019 by which externment order has been passed against petitioner no.2 as well as order dated 21.10.2020 passed by Commissioner, Meerut Division, Meerut in Case No.938 of 2020 by which appeal filed by petitioner no.1 was rejected and order dated 21.10.2020 passed by Commissioner, Meerut Division, Meerut in Case No.939 of 2020 by which appeal preferred by petitioner no.2 was rejected.

2. The brief facts of the case are that District Magistrate, Hapur had issued notices dated 16.10.2019 under Section 3/4 of the Act to the petitioner no.1 in Case No.796 of 2019 and to the petitioner no.2 in Case No.795 of 2019, calling upon them

to submit their reply as to why the externment order have not been passed against them. The District Magistrate has relied on the report of Incharge Inspector, P.S. Hapur Dehat, District Hapur which was sent on the basis of one criminal case being Case Crime No.42 of 2019, under Sections 147, 148, 149, 452, 307, 323, 504, 506 I.P.C. The petitioners had appeared before the District Magistrate and filed their objections on 25.11.2019 denying the allegations of show cause notice and it was specifically mentioned that the petitioners having no criminal history except Case Crime No.42 of 2019 which was lodged by one Sri Pankaj Tyagi against the petitioners on false allegations due to election rivalry. It is specifically stated that wife of petitioner no.1 and Bhabhi of petitioner no.2 is the Village Pradhan and only to harass the petitioners, the F.I.R. was lodged altogether with incorrect facts which was registered as Case Crime No.42 of 2019. The police after investigation had submitted the charge-sheet and the trial is pending. It is further submitted that petitioners have already been released on bail in the aforesaid case.

3. The petitioners had also filed several certificates issued by village Pradhans of different villages to the effect that petitioners are men of good character and one case has been registered on account of election rivalry against the petitioners and the petitioners are not habitual criminals and they are belonging to a respectful family. The District Magistrate, Hapur vide impugned order dated 30.9.2020 had passed the order for externment against the petitioners in Case Nos.796 of 2019 and 795 of 2019 respectfully for the period of six months. The appeals preferred by petitioners before the Commissioner, Meerut Division, Meerut were registered as Case No.938 of 2020 and 939 of 2020 which were also dismissed by the Commissioner, Meerut Division, Meerut vide order dated 21.10.2020 and both the orders passed by District Magistrate, Hapur as well as of Commissioner, Meerut Division, Meerut have been challenged by the petitioners by means of the present writ petition.

4. Heard Sri Amul Kumar Tyagi, learned counsel for petitioners, learned A.G.A. for the State and perused the record.

5. It is submitted by learned counsel for petitioners that District Magistrate, Hapur while passing the order of externment has not considered that the petitioners are not habitual to commit crime and they do not come under the meaning of 'Goondas'. The District Magistrate in a routine manner has passed the orders of externment. It is further submitted that Commissioner, Meerut Division, Meerut also had not applied its judicial mind and has dismissed the appeals preferred by petitioners. Both the authorities have failed to consider that petitioners are not habitual in committing crime and they do not come under the meaning of 'Goondas'. It is further submitted that District Magistrate has failed to consider that there was only one case registered against the petitioners which was lodged by informant only to harass the petitioners on account of election dispute. The petitioners on the basis of only one case cannot be held to be a Goonda within the meaning of Section 3 of the Act. The findings recorded by both the authorities i.e. District Magistrate as well as Commissioner to the effect that petitioners are Goondas, is illegal and are liable to be quashed.

6. Learned A.G.A. has opposed the prayer of writ petition and has submitted that there was terror of the petitioners in the district and no person was ready to give

evidence against them in the criminal case registered against both the petitioners and as such the order of externment has rightly been passed by the District Magistrate and after considering the grounds taken by the petitioners, the Commissioner has passed a detailed order by which appeals preferred by the petitioners were rejected.

7. The externment order has been passed by the District Magistrate under Section 3 of the Act. The Section 3 of the Act is reproduced as under:-

*"**3. Externment, etc. of Goondas**. - (1) Where it appears to the District Magistrate.-*

(a) that any person is a Goonda; and

(b) (i) that his movements or acts in the district or any part thereof are causing, or are calculated to cause alarm, danger or harm to persons or property;or

[(ii) that there are reasonable grounds for believing that he is engaged or about to engage, in the district or any part thereof, in the commission of an offence referred to in sub clauses (i) to (iii) of clause (b) of Section 2, or in the abetment of any such offence; and]

(c) that witnesses not willing to come forward to give evidence against him by reason of apprehension on their part as regards the safety of their person or property.

The District Magistrate shall by notice in writing, inform him of the general nature of the materials allegations against him in respect of clauses (a), (b) and (c) and give him a reasonable opportunity of tendering an explanation regarding them.

(2) The person against whom an order under this Section is proposed to be made shall have the right to consult and be defended by a Counsel of his choice and shall be given a reasonable opportunity of examining himself, if he so desires, and also of examining any other witness that he may wish to produce in support of his explanation, unless for reasons to be recorded in writing the District Magistrate is of opinion that the request is made for the purpose of vexation or delay.

(3) Thereupon the District Magistrate on being satisfied that the conditions specified in clauses (a), (b) and (c) of sub-section (1) exist may by order in writing-

[(a) direct him to remove himself outside the area within the limits of his local jurisdiction or such area and any district or districts or any part thereof, contiguous thereto, by such route, if any, and within such time as may be specified in the order and to desist from entering the said area and such contiguous district or districts or part thereof, as the case may be, from which he was directed to remove himself until the expiry of such period not exceeding six months as may be specified in the said order.]

(b)(i) require such person to notify his movements, or to report himself, or to do both, in such manner at such time and to such authority or person as may be specified in the order;

(ii) prohibit or restrict possession or use by him or any such article as may be specified in the order;
(iii) direct him otherwise to conduct himself in such manner as may be specified in the order,
until the expiration of such period, not exceeding six months as may be specified in the order."

8. Section 3 of the Act empowered the District Magistrate to pass the order of externment if he is satisfied that any person is engaged or about to engage in the district or any part thereof in the commission of offence referred to in sub clause (i) to (iii) of clause b of Section 2.

9. The word 'Goonda' is defined in sub clause b of Section 2 of the Act which is reproduced as under:-

"2(b) "Goonda" means a person who-

(i) either by himself or as a member or leader of a gang, habitually commits or attempts to commit, or abets the commission of an offence punishable under Section 153 or Section 153-B or Section 294 of the Indian Penal Code or Chapter XV, or Chapter XVI, Chapter XVII or Chapter XXII of the said Code; or

(ii) has been convicted for an offence punishable under the Suppression of Immoral Traffic in Women and Girls Act, 1956; or

(iii) has been convicted not less than thrice for an offence punishable under the U.P. Excise Act, 1910 or the Public Gambling Act, 1867 or Section 25, Section 27 or Section 29 of the Arms Act, 1959; or

(iv) is generally reputed to be a person who is desperate and dangerous to the community; or

(v) has been habitually passing indecent remarks or teasing women or girls; or

(vi) is a tout;"

10. From bare perusal of Section 2(b) of the Act it is apparent that Goonda means a person who is either by himself or is a member or leader of a gang, habitually commits or attempts to commit, or abets the commission of an offence punishable under Section 153 or Section 153-B or Section 294 of IPC or Chapter XV, or Chapter XVI, Chapter XVII or Chapter XXII of the Indian Panel Code.

11. From perusal of impugned orders it is apparent that externment order has been passed only on the basis of single case whereas the word habitual is used in the definition of word 'Goonda'. There was no evidence or material before the District Magistrate that the petitioners were habitual to commit crimes or were members or leader of any gang which involved in criminal activities. The word habitual means that by habit they were involved in commission of such offences. On the basis of one or two offences the petitioners cannot be treated as Goonda. The word 'Goonda' has been considered by the Division Bench of this Court in the case of ***Imran alias Abdul Quddus Khan Vs. State of U.P. and others, Criminal Misc. Writ Petition No.7111 of 1999***. The words 'Goonda' and 'habitual' have been considered. The relevant paragraphs 13, 14, 15 of the said judgment are quoted hereunder:-

"13. Ex facie, a person is termed as a 'goonda' if he is a habitual criminal. The provisions of Section 2(b) of the Act are almost akin to the expression 'anti social element' occurring in Section 2(d) of Bihar Prevention of Crimes Act, 1981. In the context of the expression 'anti social element' the connotation 'habitually commits' came to be interpreted by the apex Court in the case of Vijay Narain Singh v. State of Bihar and others, (1984) 3 SCC-14 : AIR 1984 SC 1334. The meaning put to the aforesaid expression by the apex court would squarely apply to the expression used in the Act, in question. The majority view was that the word 'habitually' means 'repeatedly' or 'persistently'. It implies a thread of continuity stringing together similar repetitive acts. Repeated, persistent and similar but not isolated, individual and dissimilar acts are necessary to justify an inference of habit. It connotes frequent commission of acts or omissions of the same kind referred to in

each of the said sub-clauses or an aggregate of similar acts or omissions. Even the minority view which was taken in Vijay Narain's case (supra) was that the word 'habitually' means 'by force of habit'. It is the force of habit inherent or latent in an individual with a criminal instinct with a criminal disposition of mind, that makes a person accustomed to lead a life of crime posing danger to the society in general. If a person with criminal tendencies consistently or persistently or repeatedly commits or attempts to commit or abets the commission of offences punishable under the specified chapters of the Code, he should be considered to be an 'anti social element'. There are thus two views with regard to the expression 'habitually' flowing from the decision of Vijay Narain's case (supra). The majority was inclined to give a restricted meaning to the word 'habitually' as denoting 'repetitive' and that on the basis of a single act cannot be said to be forming the habit of the person. That is to say, the act complained of must be repeated more than once and be inherent in his nature. The minority view is that a person in habitual criminal who by force of habit or inward disposition inherent or latent in him has grown accustomed to lead a life of crime. In simple language, the minority view was expressed that the word 'habitually' means 'by force of habit'. The minority view is based on the meaning given in Stroud's Judicial Dictionary, Fourth Ed. Vol. II-1204 - habitually requires a continuance and permanence of some tendency, something that has developed into a propensity, that is, present from day to day. Thus, the word 'habitual' connotes some degree of frequency and continuity.

14. The word 'habit' has a clear well understood meaning being nearly the same as 'accustomed' and cannot be applied to single act. When we speak of habit of a person, we prefer to his customary conduct to pursue, which he has acquired a tendency from frequent repetitions. In B.N. Singh v. State of U.P., AIR 1960 All 754 it was observed that it would be incorrect to say that a person has a habit of anything from a single act. In the Law Lexicon - Encyclopedic Law Dictionary, 1997 Ed. by P. Ramanatha Aiyer, the expression 'habitual' has been defined to mean as constant, customary and addicted to a specified habit; formed or acquired by or resulting from habit; frequent use or custom formed by repeated impressions. The term 'habitual criminal', it is stated may be applied to any one, who has been previously more than twice convicted of crime, sentenced and committed to prison. The word 'habit' means persistence in doing an act, a fact, which is capable of proof by adducing evidence of the commission of a number of similar acts. 'Habitually' must be taken to mean repeatedly or persistently. It does not refer to frequency of the occasions but rather to the invariability of the practice.

15. The expression 'habitual criminal' is the same thing as the 'habitual offender' within the meaning of Section 110 of the Code of Criminal Procedure, 1973. This preventive Section deals for requiring security for good behaviour from 'habitual offenders'. The expression 'habitually' in the aforesaid section has been used in the sense of depravity of character as evidenced by frequent repetition or commission of offence. It means repetition or persistency in doing an act and not an inclination by nature, that is, commission of same acts in the past and readiness to commit them again where there is an opportunity."

12. The sole purpose of the Act, 1970 is to protect the citizens from the habitual criminals and to secure future of the citizens but it should be used very sparingly

and in very clear cases of public disorder or for maintenance of public order and so this Act should not be used against innocent people.

13. It is well settled law that before passing the order of externment the District Magistrate should be satisfied that the person against whom the externment order has been passed, is habitual to commit crimes and there are several materials before him to the effect that there was terror in the public and no one has come forward to give evidence against that person.

14. From perusal of impugned order passed by District Magistrate it is apparent that only on the basis of one criminal case, the externment order for six months have been passed by the District Magistrate. The District Magistrate has failed to consider the affidavits filed by several village Pradhans in favour of petitioners that they are belonging to a respectful family and are not criminals and one case registered against them, was lodged due to election dispute as the wife of petitioner no.1 was elected as village Pradhan. The Commissioner has also failed to consider the grounds taken by the petitioners in their appeals and in a routine manner has dismissed the appeals preferred by the petitioners.

15. In view of the aforesaid discussions, since there was no sufficient material before the District Magistrate in holding that the petitioners are Goondas and are habitual to commit crimes, the order of externment is bad in law and deserves to be quashed and the writ petition is liable to be allowed.

16. Accordingly, the writ petition is **allowed** and the order of externment passed by District Magistrate dated 30.9.2020 as well as the order dated 21.10.2020 passed by Commissioner, Meerut Division, Meerut are quashed.

(2021)02ILR A722
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 03.02.2021

BEFORE

THE HON'BLE MRS. SANGEETA CHANDRA, J.

Misc. Single No. 350 of 2021

Ravindra Kumar & Ors. ...Petitioners
Versus
Board of Revenue Lucknow & Ors. ...Respondents

Counsel for the Petitioners:
Anoop Kumar Upadhyay, Narayan Dutt Awasthi

Counsel for the Respondents:
C.S.C., Mohan Singh

Civil Law-At the admission stage of appeal-no question of law was framed-and impugned orders were stayed-impugned appellate order set aside.

W.P. disposed. (E-7)

List of Cases cited:-

1.V. Ramaswamy Vs Ramachandran & anr., reported in 2009 AIR SCW 4335

2.Subramaniaswamy Temple, Ratnagiri Vs V. Kanna Gounder (Dead) through LRs 2009 (27) LCD 517.

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

(Oral)

1. Heard learned counsel for the petitioners, Sri Mohan Singh, learned

counsel appearing on behalf of the Gaon Sabha and Sri Raj Baksh Singh, learned standing Counsel.

2. No notice is being issued to the private respondents at this stage, as the order proposed to be passed shall not affect the interest of the private respondent as they shall be heard by the Board of Revenue on substantial question of law, if any framed by it.

3. This petition has been filed challenging the order dated 17.07.2019 passed by the Board of Revenue in *Second Appeal No.1320 of 2019, computerized case No.R20191714001320 (Shailendra Kumar & anotherVs. Commissioner Basti Mandal*, Basti and others) filed under Section 331 of U.P.Z.A. & L.R. Act.

4. It has been submitted by learned counsel for the petitioners that by means of the impugned order, the Board of Revenue has entertained the Appeal and stayed the operation and implementation of the orders dated 13.06.2019, 22.01.2019 and 21.07.2016 passed by the Commissioner, Basti Mandal and by the SDM Sadar Basti.

5. It is the case of the petitioners that certain land situated in village Padri Tappa Gaur, Pargana Basti Paschim, Tehsil Harraiya, District Basti, was recorded in the name of one Surya Narayan Lal, who executed a sale deed in favour of the petitioners as well as private opposite party nos. 2 and 3. On receipt of consideration, the possession was handed over by the said recorded tenure holder. An R.C.C. road was constructed in the village as a result whereof the land came on the road side and the opposite party nos.2 and 3 started creating hindrance in the peaceful possession of the petitioners. They also filed a suit for partition under Section 176 which was registered as Case No.314/732/15. After giving full opportunity of hearing, the case was decided on 22.01.2019. The opposite party nos.2 and 3 preferred an Appeal before the Commissioner which was also decided in favour of the petitioners on 13.06.2019. Before both the learned Courts below, the parties were given their shares so that all of them had some land touching the road side. The opposite party nos.2 and 3 challenged the order by filing Second Appeal before the Board of Revenue without framing substantial questions of law. A certified copy of the memo of the Second Appeal has been filed as annexure-4 to the petition, which shows that the memo states only grounds and after the grounds the prayer has been made. There is no substantial question of law framed by the Board of Revenue while admitting the Appeal and issuing notice to the petitioners and staying the operation of the impugned order.

6. Learned counsel for the petitioners has placed reliance upon the language of Section 331 (4), which is as follows:-

"(4) A second appeal shall lie on any of the grounds specified in Section 100 of the Code of Civil Procedure, 1908 (V of 1908) from the final order or decree, passed in an appeal under sub-section (3), to the authority, if any, mentioned against it in Column 6 of the Schedule aforesaid."

7. It has been submitted that under Section 100 of the Civil Procedure Code, it has been provided under Sub-Section 3 that in an Appeal under this section, the memorandum of appeal shall precisely state the substantial question of law involved in the appeal. In Sub-Section 4, it has been provided that where the High Court is

satisfied that a substantial question of law is involved in any case, it shall formulate that question. Sub-Section 5 says that the appeal shall be heard on the question so formulated and the respondent shall, at the hearing of the appeal, be allowed to argue that the case does not involve such question. A liberty has also been granted to the Court to hear the Appeal on any other substantial question not formulated by it earlier, if it is satisfied that the case involves such question.

8. Learned counsel for the petitioners has also placed reliance upon the judgment of Co-ordinate Bench in Writ Petition No.2001 (M/S) of 2001: Mohan Singh and others Vs. The Board of Revenue, U.P. Allahabad and others; decided on 04.09.2009.

9. This Court was considering a similar question where this Court relied upon an observation made by Hon'ble Supreme Court in V. Ramaswamy Vs. Ramachandran and another, reported in **2009 AIR SCW 4335** and Subramaniaswamy Temple, Ratnagiri Vs. V. Kanna Gounder (Dead) through LRs ***2009 (27) LCD 517***. The Supreme Court observed thus:-

"The High Court, while exercising its jurisdiction under Section 100 of the Code of Civil Procedure, was required to formulate a substantial question of law which might have arisen for its consideration. No question of law was framed far less any substantial question of law relating to identification of the property. The High Court, therefore, in our opinion completely misdirected itself in passing the impugned judgment."

10. Learned counsel for the petitioner has also placed before this Court the judgement of Subramaniaswamy Temple, Ratnagiri (supra), where the Court was considering the Appeal arising out of Section 100 of the C.P.Cc.

11. This Court has gone through the judgments as cited by the learned counsel for the petitioner and has also gone through the memo of the Appeal filed as annexure-4 to the petition and the order passed by the BoR on 17.07.2019. It is apparent that no substantial questions of law were framed in the Memo of the Appeal.

12. At the time of the admission of the Appeal, the Board of Revenue also did not also feel it appropriate to frame any question of law, much less a substantial question of law. It admitted the Appeal, issued notices to the petitioners, respondents therein, and stayed the orders impugned.

13. The order dated 17.07.2019 is thus vitiated and is set aside.

14. It shall be open for the Board of Revenue to consider the admissibility of the Second Appeal which has been filed without any specific substantial question of law being framed in the Memo of appeal and then pass appropriate orders in accordance with law.

15. This petition is accordingly ***disposed of.***

(2021)02ILR A724
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 17.02.2021

BEFORE

THE HON'BLE DEVENDRA KUMAR UPADHYAYA, J.
THE HON'BLE MANISH KUMAR, J.

Misc. Bench No. 2581 of 2021

M/S Bushrah Export House ...Petitioner
Versus
U.O.I. & Ors. ...Respondents

Counsel for the Petitioner:
Vibhanshu Srivastava, Jayant Kumar

Counsel for the Respondents:
A.S.G., Kuldeepak Nag (K.D. Nag), Mahendra Kumar Mishra

Civil Law-Petitioner-proprietorship firm-export of apparel-seeks provisional refund and return u/R90(2) of CGST Rules,2017-order withholding refund be passed only if prerequisites of recording of opinion is present-impugned order quashed.

W.P. disposed. (E-7)

Held, *the refund can be withheld by the authority only once he is of the opinion that grant of such refund is likely to adversely affect the revenue in some appeal or any other proceedings because of malfeasance or fraud committed by the applicant. Thus, what we find is that for exercising the authority vested by sub section 11 of section 54 of the Act for withholding the refund, the officer concerned has to form an opinion regarding refund having the tendency of adversely affecting the revenue in some proceedings.* **(para10)**

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

1. Heard Shri Jayant Kumar and Shri Vibhanshu Srivastava, learned counsel for the petitioner and Shri K. D. Nag, learned Standing counsel appearing for the respondents.

2. The petitioner is a proprietorship firm and is engaged in the business of export of apparels. These proceedings by the petitioner have been instituted under Article 226 of the Constitution of India with the following prayers:

(a) Issue a writ of mandamus or any other appropriate writ or direction to the respondent no.2 directing to disburse the provisional refund in terms of Rule 90(2) of CGST Rules, 2017 immediately.

(b) Issue a writ of mandamus or any other appropriate writ or direction to the respondent no.2 directing to disburse the full return in terms of Rule 92(1) of CGST Rules, 2017.

(c) Issue a writ of mandamus or any other appropriate writ or direction to the respondent no.2 directing to conclude the refund process in a time bound manner as per the provisions of CGST Rules, 2017.

(d) Issue a writ of mandamus or any other appropriate writ or direction to the respondent no.2 directing to unblock the Electronic Credit Ledger of the petitioner.

(e) Issue any other appropriate writ, order or direction which this Hon'ble Court may deem just and necessary in the circumstances of the case may also be passed.

3. The petitioner, thus, appears to be aggrieved by non-disbursement of the provisional refund, non completion of the proceedings to disburse the full refund and also by an order whereby Electronic Credit Ledger of the petitioner has been blocked.

4. Learned counsel representing the respondents, Shri Nag has submitted that after giving due opportunity of hearing to the petitioner the Principal Commissioner, Central Goods and Services Tax and Central Excise has taken a decision on 13.10.2020 whereby it has been ordered that the refund to the petitioner may be withheld till completion of investigation in the case. Since it appeared to us on previous dates of hearing of this matter that no such order or decision was communicated to the petitioner, we required Shri Nag to produce the original file containing the said decision taken by the Principal Commissioner on 13.10.2020.

In deference to our said order the original record has been produced by the learned Standing Counsel today which we have perused as well.

5. From a perusal of the file, it appears that vide letter dated 25.09.2020 the petitioner was required to participate in the hearing through Video Conference. The said letter also prescribed that the submissions which may be made by the petitioner/its representative through Video Conference will be reduced in writing and a statement of the same to be known as "record of personal hearing" shall also be prepared. It is not denied on behalf of the petitioner that pursuant to the said notice/letter dated 25.09.2020 the petitioner's representative was provided opportunity of hearing through Video Conference and submissions made during the said hearing were also reduced in writing as "record of personal hearing". The said record of personal hearing has also been annexed as annexure-5 to the writ petition. Thus, there cannot be any complaint on behalf of the petitioner that before taking the decision dated 13.10.2020 whereby the refund has been ordered to be withheld, opportunity of hearing to the petitioner was not provided. However, we now need to examine as to whether the said decision dated 13.10.2020 can be said to be in conformity with the provisions contained in section 54(11) of the Central Goods and Services Tax Act, 2017 (hereinafter referred to as "GST, Act") and the Rules framed thereunder.

6. It is not in dispute that as per the requirement of law the petitioner had made an application on 26.05.2020 seeking refund and acknowledgment in respect whereof was also issued by the respondent-department in terms of the provisions contained in Rule 90 of the Central Goods and Services Tax Rules, 2017 (hereinafter referred to as "the Rules"). It is not that the department had noted any deficiency in the application filed by the petitioner seeking refund; rather the application appears to be in order and therefore, acknowledgment was issued. Rule 91 of the said Rules makes a provision for grant of provisional refund according to which the proper officer, after scrutiny of the claim and the evidence and on being prima facie satisfied that the amount claimed is due to the applicant in accordance with section 54(6) of the Act, shall make an order sanctioning the amount of refund on a provisional basis. The time period provided for passing an order for refund on provisional basis as provided under Rule 91(2) is seven days from the date of the acknowledgment under sub-rule (1) or sub-rule (2) of the Rule, 90.

7. It has been submitted by the learned counsel for the petitioner that the application was made by the petitioner on 26.05.2020 and after scrutiny, acknowledgment in Form RFD-02 was issued by the department within 2-3 days from the date of submission of the application and as per the statutory requirement of sub rule 2 of rule 91 the proper officer ought to have passed an order regarding provisional refund within seven days, however, despite long period having elapsed since the acknowledgment was issued, no such order has yet been passed.

8. As observed above, the submission of the learned counsel for the respondents is that neither orders sanctioning the provisional refund, nor orders sanctioning final refund in this case has been passed for the reason that the Principal Commissioner vide his decision dated 13.10.2020 has

ordered for withholding the refund amount on the ground that some investigation in the case is pending.

9. No doubt, section 54(11) of the Act empowers the authority concerned to withhold the refund till such time as he may be determined, however, there are certain safeguards which have been statutorily provided before passing such an order withholding the refund. In this regard, it would be relevant to extract sub section 11 of section 54 of the Act which runs as under:

"(11) Where an order giving rise to a refund is the subject-matter of an appeal or further proceedings or where any other proceedings under this Act is pending and the Commissioner is of the opinion that grant of such refund is likely to adversely affect the revenue in the said appeal or other proceedings on account of malfeasance or fraud committed, he may, after giving the taxable person an opportunity of being heard, withhold the refund till such time as he may determine."

10. A perusal of the aforequoted provision of sub section 11 of section 54 of the Act clearly reveals that the appropriate authority of the department is vested with the power to withhold the refund, however, the refund can be withheld by the authority only once he is of the opinion that grant of such refund is likely to adversely affect the revenue in some appeal or any other proceedings because of malfeasance or fraud committed by the applicant. Thus, what we find is that for exercising the authority vested by sub section 11 of section 54 of the Act for withholding the refund, the officer concerned has to form an opinion regarding refund having the tendency of adversely affecting the revenue in some proceedings.

11. It is also relevant to notice that such opinion is to be formed only if the authority opines that refund will adversely affect the revenue on account of some malfeasance or fraud committed. In this view, it is not only that the opinion of the officer concerned needs to be recorded but that opinion regarding refund adversely affecting the revenue has to be based on some malfeasance or fraud.

12. The corresponding rule for exercise of powers under section 54(11) of the Act is Rule 92 of the Rules, 2017 which is extracted herein below:

"92. Order sanctioning refund.-- (1) Where, upon examination of the application, the proper officer is satisfied that a refund under sub-section (5) of Section 54 is due and payable to the applicant, he shall make an order in Form GST RFD-06 sanctioning the amount of refund to which the applicant is entitled, mentioning therein the amount, if any, refunded to him on a provisional basis under sub-section (6) of Section 54, amount adjusted against any outstanding demand under the Act or under any existing law and the balance amount refundable:

Provided that in cases where the amount of refund is completely adjusted against any outstanding demand under the Act or under any existing law, an order giving details of the adjustment shall be issued in Part A of Form GST RFD-07.

[(1-A) Where, upon examination of the application of refund of any amount paid as tax other than the refund of tax paid on zero-rated supplies or deemed

export, the proper officer is satisfied that a refund under sub-section (5) of Section 54 of the Act is due and payable to the applicant, he shall make an order in Form RFD-06 sanctioning the amount of refund to be paid, in cash, proportionate to the amount debited in cash against the total amount paid for discharging tax liability for the relevant period, mentioning therein the amount adjusted against any outstanding demand under the Act or under any existing law and the balance amount refundable and for the remaining amount which has been debited from the electronic credit ledger for making payment of such tax, the proper officer shall issue Form GST PMT-03 re-crediting the said amount as Input Tax Credit in electronic credit ledger.]

(2) Where the proper officer or the Commissioner is of the opinion that the amount of refund is liable to be withheld under the provisions of sub-section (10) or, as the case may be, sub-section (11) of Section 54, he shall pass an order in Part B of Form GST RFD-07 informing him the reasons for withholding of such refund.

(3) Where the proper officer is satisfied, for reasons to be recorded in writing, that the whole or any part of the amount claimed as refund is not admissible or is not payable to the applicant, he shall issue a notice in Form GST RFD-08 to the applicant, requiring him to furnish a reply in Form GST RFD-09 within a period of fifteen days of the receipt of such notice and after considering the reply, make an order in Form GST RFD-06 sanctioning the amount of refund in whole or part, or rejecting the said refund claim and the said order shall be made available to the applicant electronically and the provisions of sub-rule (1) shall, mutatis mutandis, apply to the extent refund is allowed:

Provided that no application for refund shall be rejected without giving the applicant an opportunity of being heard.

(4) Where the proper officer is satisfied that the amount refundable under sub-rule (1) [or sub-section (1-A)] or sub-rule (2) is payable to the applicant under sub-section (8) of Section 54, he shall make an order in Form GST RFD-06 and issue a [payment order] in Form GST RFD-05 for the amount of refund and the same shall be electronically credited to any of the bank accounts of the applicant mentioned in his registration particulars and as specified in the application for refund [on the basis of a consolidated payment advice]:

[Provided that the order issued in FORM GST RFD-06 shall not be required to be revalidated by the proper officer:

Provided further that the [payment order] in FORM GST RFD-05 shall be required to be revalidated where the refund has not been disbursed within the same financial year in which the said [payment order] was issued.]

[(4-A) The Central Government shall disburse the refund based on the consolidated payment advice issued under sub-rule (4).]

(5) Where the proper officer is satisfied that the amount refundable under sub-rule (1) [or sub-rule (1-A)] or sub-rule (2) is not payable to the applicant under sub-section (8) of Section 54, he shall make an order in Form GST RFD-06 and issue [a payment order] in Form GST RFD-05, for the amount of refund to be credited to the Consumer Welfare Fund."

13. Sub rule 2 of rule 92 as quoted above, requires the proper officer or the Commissioner to pass an order in **Part B of FORM GST RFD-07**, if he is of the opinion that the amount of refund is liable

to be withheld under sub section 10 or sub section 11 of section 54, as the case may be. Since GST RFD-07 is appended with the rules and as such the said form also has a statutory force. **Part B of FORM GST RFD-07** is also extracted herein below:

"Part-B
ORDER FOR WITHHOLDING THE REFUND

This has reference to your refund application referred to above and information/documents furnished in the matter. The amount of refund sanctioned to you has been withheld due to the following reasons:

Refund Order No.:					
Date of issuance of Order:					
Sr. No.	***Refund calculation***	***Integrated tax***	***Central Tax***	***State/UT Tax***	***Cess***
i.	***Amount of Refund Sanctioned***				
ii.	***Amount of Refund Withheld***				
iii.	***Amount of Refund Allowed***				
Reasons for withholding of the refund					

<<Text>>

I hereby, order that the amount of claimed/admissible refund as shown above is withheld for the above mention reasons. This order is issued as per provisions under sub-section (...) of Section (...) of the Act.

Date:
Signature (DSC):
Place:
Name:
Designation
Office Address:"

14. From a perusal of Part B of FORM GST RFD-07 it is clear that the proper officer or Commissioner has to assign the reasons for withholding the refund. Passing of an order in Part B of FORM GST RFD-07 is a statutory mandate which is binding on the department for the reason that different forms appended with the Rules, 2017 are part of the Rules which are statutory in nature having been framed under section 164 of the Act, 2017.

15. What we may observe, at this juncture, is that recording of reasons while passing of the order for withholding the refund is not only statutorily requirement as per the provisions contained in Rule 92(2) of the Rules read with Part B of Form GST RFD-07 and section 54(11) of the Act but it is also required so as to make the person, aggrieved by such an order, realize his right of appeal as available under section 107 of the Act.

16. Recording of reason in this case has to be mandatory for the reasons inter alia, (i) there is such a statutory requirement flowing from section 54(11) of the Act and Rule 92(2) of the Rules and (ii) if any person aggrieved by such an order intends to file an appeal then to facilitate

the appellate authority to arrive at a correct decision, reasons are required to be indicated by the subordinate authority.

17. We have already observed above that the entire original record has been perused by the Court. Office file contains the decision dated 13.10.2020 passed by the Principal Commissioner, however, it only says "in the facts and circumstances of the case, we may withhold refund till completion of the investigation in the case". The said decision does not assign any other reason regarding on which basis the Principal Commissioner has arrived at his opinion that the refund claimed by the petitioner is likely to adversely affect the revenue in the investigation (which is said to be pending) and such opinion is based on some material indicating some malfeasance or fraud said to have been committed by the petitioner. Moreover, the order as mandated by sub rule 2 of rule 92 has not been passed in Part B of Form GST RFD-07 which as observed above, also has a column where the officer concerned has to indicate "reasons for withholding the refund". We also notice that the decision dated 13.10.2020 was not communicated to the petitioner.

18. At this juncture, Shri Nag, learned counsel representing the respondents has stated that the authorities will communicate the decision in Part B of Form GST RFD-07.

19. We are unable to agree with the said offer given by Shri Nag for the reason that Part B of Form GST RFD07 is not a form for the purposes of communicating the decision; rather it is a form in which an order has to be passed keeping in view the requirement of section 54(11) of the Act read with Rule 92(2) of the Rules. The said form contains a separate specific column where requirement is to record reasons for withholding the refund and those reasons are to be in conformity with the requirement of section 54(11) of the Act and Rules 92(2) of the Rules. The order withholding the refund can be passed only if the prerequisites of recording of the opinion in terms of the aforesaid provision is found present in a particular case.

20. Learned counsel representing the petitioner has also stated that apart from the application which has been submitted by the petitioner on 26.05.2020 the petitioner had furnished three other applications as well. However, in respect of these three applications, the department has issued a deficiency memo in Form GST RFD-03, but the petitioner is unable to make good the deficiency for the reason that on 03.12.2020 the department has blocked the Electronic Credit Ledger of the petitioner which has rendered the petitioner unable to remove the deficiency pointed out in the said application by the department. Learned counsel for the petitioner has also stated that the matter is pending consideration before the department for the last about eight months and because of non-finalization of the proceedings for refund, the petitioner-firm is suffering in its business.

21. Having regard to the aforementioned facts and circumstances as also the legal position discussed above, this petition is finally **disposed of** with the following directions:

(i) The decision by the Principal Commissioner, dated 13.10.2020 as is available in the record produced by the learned counsel representing the respondents is hereby quashed. The

Principal Commissioner or any other competent authority will take a decision in respect of withholding of the refund amount afresh within 15 days from the date a certified copy of this order is produced before him.

(ii) We also provide that the fresh decision under this order shall be taken by the competent authority of the department on the basis of record already available before it as the opportunity to the petitioner had already been provided and the submissions of the petitioner have also been reduced in writing as "record of personal hearing".

(iii) Once any order under section 54(11) of the Act is passed, keeping in view the observations made herein above, the same shall be communicated to the petitioner forthwith and shall be served upon the petitioner through appropriate mode of service.

(iv) The investigation said to be pending against the petitioner shall be expedited and completed as far as possible within a period of four months from today. Once the investigation is completed, the requisite orders for final refund shall also be passed by the competent authority.

(v) While deciding the matter afresh under this order, the authority concerned shall also pass an order on the prayer made by the petitioner for provisional refund.

(vi) For unblocking of the Electronic Credit Ledger, the petitioner shall make an application to the Principal Commissioner within 10 days from today. Once any such application is made, the Principal Commissioner or any other competent authority shall take appropriate decision which shall be communicated to the petitioner forthwith.

(2021)02ILR A731
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 10.02.2021

BEFORE

THE HON'BLE MRS. SANGEETA CHANDRA, J.

Misc. Single No. 2992 of 2021

Mahesh @ Mahesh Kumar & Ors.
...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Ajay Kumar Pandey

Counsel for the Respondents:
C.S.C., Dilip Kumar Pandey, Mohammad Ehtesham Khan

Civil Law-Proceeding for cancellation of lease initiated after more than 5 years-without delay condonation application-revision -rejected-Chief Revenue Officer recorded satisfaction after examination of documentary evidence-that rules not followed-no prior permission taken from the Collector-this fact not disputed-Impugned order need no interference.

W.P. dismissed. (E-7)

List of Cases cited:-

1. Ghanshyam Vs St., reported in 2004 (97) RD 691,

2.1986 RD 137,

3. 2000 RD Supp 77

4. 2001 RD 476,

5. Suresh Giri & ors. Vs Board of Revenue, U.P. Alld. & ors., 2010 (2) ADJ 514

6. Ram Pher Singh Vs Additional Collector, Gonda, 2014 (122) RD 168

7. U.P. Awas Evam Vikas Parishad Vs Friends Corporation Housing Society Ltd., (1995) Sup 3 SCC 456,

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

(Oral)

1. Heard Sri Ajay Kumar Pandey, learned counsel for the petitioners, Sri Upendra Singh, learned Additional Chief Standing Counsel, Sri M.E. Khan, learned counsel for the respondent no.5 and Sri Mohan Singh, learned counsel appearing for the Gaon Sabha.

2. This petition has been filed challenging the order dated 30.11.2009 passed by the Chief Revenue Officer/ Collector, Faizabad, Ayodhya and the order dated 07.01.2021 passed by the Additional Commissioner (Administration) Ayodhya Division, Ayodhya, rejecting the Revision filed by the petitioners.

3. It is the case of the petitioners that the Land Management Committee of Gaon Sabha Chandipur Nagahara, Pargana Paschim Rath, Tehsil Bikapur, District Faizabad, made a proposal for grant of agricultural lease in favour of 134 persons including the petitioners herein, and the said proposal was approved by the Sub Divisional Magistrate Bikapur on 30.03.2002. The petitioner no.2- Sukhraj and the predecessor-in-interest of petitioner nos.4, 5 and 6 Ramesh Kumar being members of the Land Management Committee were granted permission from the Collector Faizabad for grant of lease as is required under Section 28 (C) of the U.P. Panchayat Raj Act, 1947 (hereinafter referred to as "the Act of 1947").

4. It has been submitted that in pursuance of such proposal, the petitioner no.1 was granted lease on Gata No.902 of 0.150 hectare, the petitioner nos.2 and 3 were granted lease on Gata No.902 on an area of 0.01 hectare, the petitioner no.4 and the father of the petitioner nos.5 and 6 were also granted lease on plot no.902 and 0.015 hectare only. Possession was delivered in July, 2002.

5. The grandfather and father of the respondent no.5 and Ram Jag filed a case for cancellation of lease under Section 198(4) of the U.P. Z.A. & L.R. Act (hereinafter referred to as "the Act of 1950") before the respondent no.3 which was dismissed on 19.08.2002. A recall application was moved which was also rejected on 02.09.2002. The respondent no.5 thereafter himself filed an application for cancellation of patta on 03.10.2007 under Section 198(4) of the Act, 1950. The respondent no.3 called for a report from the Tehsil official and on receipt of the same on 12.04.2008, notice was issued to the petitioners. The petitioners filed objections on 01.05.2009 saying that earlier also in similar proceedings for cancellation of patta, the case of the predecessor-in-interest of the respondent no.5 had been rejected and that the application for cancellation of patta given on 30.03.2002 after the period of five years six months on 03.01.2017 without any application for condonation of delay was not maintainable under the provisions of Section 198 (6)(b) of the Act of 1950.

6. Nevertheless, the order dated 30.11.2009 was passed by the Chief Revenue Officer saying that petitioners were ineligible to be granted patta in the first place and also saying that the land in question i.e. plot no.902 had been inspected by him personally and it had been found that the land is not fit for cultivation as it

has trees standing thereon and also as two graves. In the Revision filed by the petitioners, the petitioners had taken specific ground regarding maintainability of the application for cancellation of patta filed by the respondent no.5, therefore, at the initial stage the Revision was entertained and stay of opertation of the order passed by the Chief Revenue Officer was granted on 11.12.2009. The petitioners continued to remain in possession and cultivated the land in question but later on the Revision was dismissed on 07.01.2021.

7. Hence this petition has been filed.

8. It is the case of the petitioners that the Chief Revenue Officer did not consider the objections regarding maintainability of the second application for the same cause of action and also did not consider the question of limitation under sub-clause 6 of Section 198. Learned counsel for the petitioners has referred to a judgment rendered by a Member of the Board of Revenue in Ghanshyam Vs. State, reported in **2004 (97) RD 691**, wherein after noticing Section 198 (6)(b) of the Act of 1950 and other case laws reported in **1986 RD 137, 2000 RD Supp 77 and 2001 RD 476**, the orders of the cancellation of patta were set aside on the ground of ignoring the limitation provided under Section 198 (6)(b).

9. Learned counsel for the petitioners has also referred to the judgment of this Court in Suresh Giri and others Vs. Board of Revenue, U.P. Allahabad and others, **2010 (2) ADJ 514**, wherein this Court had noticed that the time frame prescribed for issuing notice before cancelling allotment of land is provided under Section 198(6) and it is applicable both to suo motto proceedings and on the proceedings initiated on the application of the person aggrieved.

10. This Court however has also observed in the judgment of Suresh Giri (supra), that the Collector was not forbidden to initiate proceedings for cancellation even after the expiry of limitation prescribed, provided he had reason to believe that the allotment is likely to vitiate on account of fraud. Even so, the Collector had to express a satisfaction with regard to the fraud in the order passed by him cancelling the patta.

11. It has been submitted by learned counsel for the petitioners that a perusal of the order of the Chief Revenue Officer would show that the Chief Revenue Officer has not considered the ground of limitation at all. The Chief Revenue Officer has also not cancelled the allotment of patta on the ground of fraud. He has cancelled the patta only on the ground that the petitioners' being the Members of the Land Management Committee and there being no prior permission granted by the Collector, the land could not have been allotted to them and on the ground that the land was not the vacant land. He has also referred to Rules 173, 175, 176 and 177 of the Rules framed under the Act of 1950 saying that such Rules were not followed, and therefore, the allotment has become vitiated. However, while cancelling the patta of the petitioners, he has vested the land of Gata No.902 and 909 in Gaon Sabha in its original category of Naveen Parti.

12. Learned counsel for the petitioners says that in so far as the ground being taken of the land not being fit for cultivation because of the trees standing thereon is concerned, such ground is

erroneous as observed by this Court in Ram Pher Singh Vs. Additional Collector, Gonda, **2014 (122) RD 168.**

13. This Court has carefully perused the judgment cited by learned counsel for the petitioners and finds that same is inapplicable to the case of the petitioners.

14. This Court in the aforecited case of Ram Pher Singh (supra) had clearly observed that by virtue of Section 4 of the Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950, all estates vested in the State and the "estate" has been defined under Section 3 sub Section 8 of the Act which means "an area included under one entry in any of the Register described under Section 32 of the U.P. Land Revenue Act", and the land included trees standing thereupon. Trees that have been mentioned to have been planted on Gaon Sabha land would not give right of ownership of the land which belongs to the Gaon Sabha.

15. Learned Standing Counsel on the other hand has pointed out from Section 28(C) of the Act of 1947 that if a person is a Member of the Land Management Committee, he cannot derive any interest in any property belonging to the Gaon Sabha unless there is a permission in writing of the Collector. In this case, although the petitioners have alleged that the file was sent for grant of permission, but the permission was actually granted after such allotment of patta and after delivery of possession. He has argued that permission means "prior approval" and not later confirmation. It is not disputed that the petitioner no.2 was a Member of the Land Management Committee, petitioner no.3 is his wife, and predecessor-in-interest of petitioners nos.4 to 6 Ramesh Kumar was also the member of the Land Management Committee. In so far as the petitioners no.1 is concerned, he was the real brother of the said Ramesh Kumar, who was the Member of the Land Management Committee, and the predecessor-in-interest of the petitioners nos.4 to 6.

16. It has been submitted by learned standing counsel that while cancelling the patta of the petitioners, an observation has been made by the Chief Revenue Officer that the allottees have been adjusted by allotment of land at some other place to them by the Land Management Committee on 17.04.2002. It has been pointed also by the learned standing counsel that alternative land having been allotted to them by the Land Management Committee itself on 17.04.2002, there was no reason for the petitioners to approach this Court. They should have made an attempt to get the possession over the land that was allotted to them on 17.04.2002.

17. It has been pointed also by learned standing counsel and Sri M.E.Khan, learned counsel appearing on behalf of respondent no.5, that there is no pleading with regard to the limitation in the objections filed by the petitioners before the Chief Revenue Officer. However, it is not disputed that the question of limitation ought to have been considered by the Chief Revenue Officer as he was duty bound to notice Section 198 (6)(b).

18. Learned Standing Counsel on the other hand has argued that the land having been allotted to the persons who were ineligible, without prior permission of the Collector as required under Section 28(C) of the Act, 1947, such allotment was void ab initio, and therefore, there was no question of limitation being a bar in such a matter wherein initial order is nonest.

19. This Court has perused the order passed by the Chief Revenue Officer and also the order passed by the Additional Commissioner (Judicial). It has duly recorded the submission made by the petitioners and then found from the record that the allotments made to the petitioners in 2002 were against the Rules framed under the U.P.Z.A. & L.R. Act. The relevant extract of Rules 173, 176 and 177 of the U.P. Z.A. & L.R. Act Rules are being quoted herein below:-

173. Sections 195, 197 and 198 : Admission to land. - *Whenever the Land Management Committee intends to admit any person to land under Section 195 or 197, it shall announce by beat of drum in the circle of the Gaon Sabha in which the land is situate at least seven days before the date of meeting for admission of land, the numbers of plots, their areas and the date on which admission thereto is to be made.*

176. - *(1) After selecting the person or persons for admission to the land in accordance with Rule 175, the Committee shall prepare-*

(a) a list of persons so selected in Z.A. Form 57- B;

(b) a certificate of admission to land in Z.A. Form 58; and

(c) a counterpart in Z.A. Form 58-A.

(2) The documents referred to in clauses (a) and (b) of sub-rule (1) shall be duly signed by the Chairman of the Land Management Committee but the document referred to in clause (c) shall be signed by the person so selected for admission of land.

(3) The document referred to in sub-rule (1) shall then be forwarded to the Assistant Collector-in-charge of the Sub-Division along with-

(a) a copy of the proceedings of the meeting of the Committee in which the decision to settle land was taken; and

(b) a certificate from the Lekhpal concerned to the effect that the particulars of the land mentioned in the list are correct, and that the admission to the land is in accordance with the provisions of the Act and the Rules.

(4) The Assistant Collector in-charge of the Sub-Division shall, on receipt of the documents, referred to in sub-rule (3) scrutinize the decision taken by the Committee and if he is satisfied that the decision of the Committee is in accordance with the Act and the rules made thereunder, he shall record his approval on the list in Z.A. Form 57-B and return the papers to the Land Management Committee within a week of its receipt from the Chairman with the direction that the possession may be delivered to the lessees and the report of the mutation be submitted to the Supervisor Kanungo by the lekhpal immediately after delivery of possession.

(5) If the Assistant Collector in-charge of the Sub-Division finds that the whole or part of the decision taken by the Committee is not in accordance with the provisions of the Act and Rules, he shall record his disapproval on the list in Z.A. Form 57-B and return the papers to the Chairman.

177. - *(1) A certificate of admission to land under Section 195 to 197 may be attested by any Revenue Officer not below the rank of a Supervisor Kanungo.*

(2) Before attesting the certificate of admission, the Revenue Officer shall satisfy himself that-

(a) the provisions of Rules 173 to 176-A have been followed ; and

(b) the land leased out is not a part of the land which has been reserved for planned use.

(3) If the revenue officer finds that the conditions laid down in sub-Rule (2) have not been observed, he shall refer the matter, to the Assistant Collector incharge of the Sub-Division for necessary action.

20. If the Chief Revenue Officer after examination of documentary evidence has recorded his satisfaction that the aforesaid Rules were not followed in the allotment made to the petitioners, this Court has no reason to disbelieve this observation in the order impugned as the findings of fact recorded by the Chief Revenue Officer have not been disputed specifically in the pleadings in the writ petition.

21. This Court has also considered the argument raised by the learned standing counsel that under Section 28(C) of the Act of 1947, prior approval of the Collector in writing should have been taken before allotment of Gaon Sabha land to the petitioners. The relevant Section 28(C) is being quoted hereinbelow:-

"28-C. ***Members and officers not to acquire interest in contracts, etc., with Bhumi Prabandhak Samiti.-***

(1) No member or office bearer of [Gram Panchayat] or Bhumi Prabandhak Samiti shall, otherwise than with the permission in writing of the Collector, knowingly acquire or attempt to acquire or stipulate for or agree to receive or continue to have himself or through a partner or otherwise any share or interest in any licence, lease, sale, exchange, contract or employment with, by or on behalf of the Samiti concerned :

Provided that a person shall not be deemed to acquire or attempt to acquire or continue to have or stipulate for or agree to receive any share or interest in any contract or employment by reason only of his-

(a) having acquired any interest before he became a member or office bearer;

(b) having a share in a joint stock company which makes the contract; and

(c) having a share or interest in the occasional sale through the Samiti concerned of an article in which he regularly trades up to a value not exceeding Rs. 50 in any one year.

(2) No Court or other authority shall enforce at the instance of any person a claim based upon a transaction in contravention of the provisions of sub-section (1)."

22. In ***U.P. Awas Evam Vikas Parishad Vs. Friends Corporation Housing Society Ltd., (1995) Sup 3 SCC 456***, the Supreme Court has observed that there is a distinction between permission or "prior approval" or "approval". The difference between approval and permission is that in the first case the action hold good until it is disapproved, while in the other case it does not become effective until permission is obtained. No prior permission in writing was taken from the Collector to allot and deliver the possession of Gaon Sabha land to the petitioners or their family members.

23. This Court finds no good ground to show interference in the order impugned.

24. The petition is ***dismissed.***

25. No order as to costs.

(2021)02ILR A737
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 03.02.2021

BEFORE

THE HON'BLE MRS. SANGEETA CHANDRA, J.

Misc. Single No. 2995 of 2021

Exec. Committ. of The Thauri Edu. Trust & Anr. ...Petitioners
Versus
Addl. Commissioner (J) Ayodhya Mandal, Ayodhya & Ors. ...Respondents

Counsel for the Petitioners:
Sridhar Awasthi

Counsel for the Respondents:
C.S.C., Ajay Pratap Singh, Pankaj Gupta

Civil Law-Alternative remedy-where rights and liabilities determined under statute-remedy provided in the statute-no gross injustice in the impugned order for court to exercise judicial review.

W.P. dismissed. (E-7)

List of Cases cited: -

1. Balkrishna Ram Vs U.O.I. & anr., 2020 (2) SCC 442,

2. L. Chandra Kumar Vs U.O.I.; 1997 (3) SCC 261

3. St. of Tripura Vs Manoranjan Chakraborty & ors.; 2001 (10) SCC 740

4. U.O.I. Vs St. of Haryana & anr.; 2000 (10) SCC 482

5. Gujarat Agro Industries Co. Ltd. Vs. Municipal Corporation of the City of Ahmedabad; 1999 (4) SCC 468

6. Shyam Kishore Vs Municipal Corporation of Delhi; 1993 (1) SCC 22

7. N.P. Ponnuswami Vs Returning Officer, AIR 1952 SC 64

8. Mool Chand & ors. Vs D.D.C. & ors.; 1995 (5) SCC 631

9. Ram Adhar Vs Ram Roop Singh; 1968 (2) SCR 95

10. Chattar Singh & ors. Vs Thakur Pal Singh 1975 (4) SCC 457

11. Satyanarayan Prasad Sah & ors. Vs St. of Bih. & anr. 1980 Supp SCC 474

12. Bibi Rahmani Khatoon & ors. Vs Harkoo Gope & ors. 1981 (3) SCC 173

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

(Oral)

1. Heard Sri Sudeep Seth, learned Senior Advocate, assisted by Sri Sridhar Awasthi, learned counsel for the petitioners, Sri Upendra Singh, learned Standing Counsel, Sri Ajay Pratap Singh, learned counsel appearing on behalf of respondent nos.3 and 4 and Sri Pankaj Gupta, learned counsel appearing on behalf of the respondent no.6.

2. This petition has been filed challenging the order dated 02.03.2020 passed by the Additional Commissioner (Judicial), Ayodhya Mandal, Ayodhya in Appeal No.01825 of 2019: *The Thauri Educational Trust Vs. Intermediate College, Thauri and others*, and also the ex parte order dated 06.01.2015 passed by the respondent no.2-Sub Divisional Magistrate, Musafirkhana, District Amethi in Case No.285/38/60/107/32 under Section 229-B of the U.P.Z.A. & L.R. Act: *Intermediate College Thauri Vs. State of U.P. and others*. The petitioner also prays for mandamus to be issued to the Sub-

Divisional Magistrate to record the name of "The Thauri Educational Trust through its Manager, Shri Suresh Chandra Srivastava, son of Late Girija Prasad Srivastava" in the revenue records by mutation, in place of "Educational Trust Thauri Interimediate College, through Manager, Shri Rajeshwar Pratap Singh, son of Virendra Nath Singh", with respect to Gata No.488, 889 and 2305 situated in Village Thauri, Pargana Jagdishpur, Tehsil Musafirkhana, District Amethi.

3. It has been submitted by learned counsel for the petitioners that the order dated 02.03.2020 passed in Revision has ignored the order dated 05.03.2019 passed in Writ Petition No.6321 (M/S) of 2019 and the order dated 08.04.2019 passed in Special Appeal No.124 of 2019: *Rajeshwar Pratap Singh Vs. Suresh Chandra Srivastava and others*, where the Division Bench has affirmed the interim order granted by the Writ Court and directed that till the writ petition is decided, status quo with respect to the property of the Trust, as it existed on that day to be maintained.

4. Learned counsel for the petitioners has also referred to another order passed by this Court in Writ Petition No.17339 (M/S) of 2020: *Executive Committee of "The Thauri Educational Trust" & Another Vs. Union of India Through Secretary Ministry of Road Transport & National Highways and others,* wherein the Division Bench had observed that the dispute regarding the Society was pending in Writ Petition No.6321 (M/S) of 2019 and in case compensation amount is disbursed to Rajeshwar Pratap Singh on acquisition of land of the Trust, the said writ petition would become infructuous and it will also lead to multiplicity of the proceedings and it will be very difficult to recover the compensation of more than Rs.3 crores from the respondent no.4, who is a private party. This Court while granting time to the respondents in the said writ petition had directed the operation of the notice dated 14.09.2020 challenged in the petition to remain stayed during the pendency of the writ petition. The notice dated 14.09.2020 was issued under National Highways Act, 1956 to the respondent no.4 to complete formalities for payment of compensation amount for the land acquired for national highway.

5. It has been submitted that the orders of this Court were mentioned in the pleadings and annexed with the Revision No.01825 of 2019. It has also been submitted that the Additional Commissioner had earlier by an order dated 07.01.2020 condoned the delay in filing of the Revision by the petitioners against the order dated 06.01.2015, but by the order impugned dated 02.03.2020 the Additional Commissioner had allowed the objections of the private respondent and recalled his order dated 07.01.2020 and rejected the Revision on merits and also on delay, and at the same time has also observed that since consolidation operations are underway in the village concerned, the matter be decided by the consolidation courts and the case before he Revenue Courts to have been abated under Section 4/5 of the Consolidation of Holdings Act.

6. Learned Senior Advocate has pointed out other errors also in the order dated 02.03.2020, which this Court does not find appropriate to mention in detail in this order as they are not germane to the order proposed to be passed by this Court.

7. A preliminary objection has been raised by the counsel for the Gaon Sabha

and the State Respondent that against the order dated 02.03.2020 passed by the Additional Commissioner (Judicial), a Second Appeal lies before the Board of Revenue under Section 331(4) read with Schedule I of the U.P. Z.A. & L.R. Act, corresponding Sections 206, 208 of the IIIrd Schedule of the U.P. Revenue Code.

8. It has also pointed out that since consolidation operations have begun in the village concerned, the remedy for the petitioner lies before the Consolidation Officer. If he has any grievance regarding title being wrongly declared, he may file his objection under Section 9 before the Consolidation Officer.

9. Learned Senior Advocate on the other hand has pointed out that it has been held by Hon'ble Supreme Court in several judgments that alternative remedy is not always a bar to exercise writ jurisdiction.

10. Learned counsel for the petitioners has referred to the judgment of Hon'ble Supreme Court in Balkrishna Ram Vs. Union of India and another, 2020 (2) SCC 442, wherein the statutory remedy before the Supreme Court was available against the order passed by the Armed Forces Tribunal, instead of before the High Court.

11. Learned counsel for the petitioners has referred to paragraph-11 of the judgment which refers to Constitution Bench observation in **L. Chandra Kumar Vs. Union of India; 1997 (3) SCC 261**, and also paragraph-14 of the judgment, which has been read out to say that the writ court normally refrains from exercising its extraordinary power if the petitioner has an alternative efficacious remedy. The existence of such remedy however does not mean that the jurisdiction of the High Court is ousted. At the same time, it is a well settled principle that such jurisdiction should not be exercised when there is an alternative remedy available. The rule of alternative remedy is a rule of discretion and not a rule of jurisdiction. Merely because the Court may not exercise its discretion, is not a ground to hold that it has no jurisdiction. There may be cases where the High Court would be justified in exercising its writ jurisdiction because of some glaring illegality committed by AFT. One must also remember that the alternative remedy must be efficacious and in case of a Non-Commissioned Officer (NCO), or a Junior Commissioned Officer (JCO); to expect such a person to approach the Supreme Court in every case may not be justified. It is extremely difficult and beyond the monetary reach of an ordinary litigant to approach the Supreme Court. Therefore, it would be open for the High Court to decide in the peculiar facts and circumstances of each case whether it should exercise its extraordinary writ jurisdiction or not. There cannot be a blanket ban on the exercise of such jurisdiction because that would effectively mean that the writ court is denuded of its jurisdiction to entertain such writ petitions which is against the law laid down in L. Chandra Kumar.

12. Learned counsel for the petitioners has also referred to two orders of Hon'ble Supreme Court, namely, **State of Tripura Vs. Manoranjan Chakraborty and others; 2001 (10) SCC 740**, where the Supreme Court entertained the Appeal of the State against the judgment of High Court which had struck down the provisos to Section 20 (1) and Section 21 (2) of the Tripura Sales Tax Act. The Hon'ble Supreme Court observed in

paragraph-4 that the provisions impugned before the High Court were valid and also observed that when gross injustice is done by an order of the Writ Court then the Supreme Court should interfere notwithstanding the alternative remedy which may be available by way of an Appeal under Section 20 or Revision under Section 21. A Writ Court can in an appropriate case exercise its jurisdiction to do substantive justice.

13. Learned counsel for the petitioners has also placed reliance upon another order of Hon'ble Supreme Court in Union of India Vs. State of Haryana and another; **2000 (10) SCC 482**, where the Supreme Court considered the grievance of the Union of India that the alternative remedy is not an appropriate remedy. The Union of India in discharge of its statutory functions under the Indian Telegraph Act, 1885, for the purpose of providing telecommunication facilities was providing telephone connections to the subscribers. The respondents were the respective States of Haryana, Orissa, Uttar Pradesh and Andhra Pradesh. In their respective Sales Tax statutes, the State Governments had made amendments so as to redefine the words "purchase" and "sale" in order to bring those in conformity with the definitions given in Article 366 of the Constitution. As a result of which, respective Assessing Authorities under the amended laws started assessing sales tax on the rentals being charged for supply of telephones. The Union of India had filed several writ petitions in the respective High Courts challenging the levy. The writ petitions were dismissed by the High Court on the ground of alternative remedy being available in the form of statutory Appeal. The statutory Appeal being before the officers of Sales Tax Department was also not found efficacious.

The Supreme Court had observed that the question raised by the Union of India in its writ petitions were fundamental in character, as the respective Sales Tax statute on amendment had redefined the terms "purchase" and "sale". The Supreme Court had further observed that the question raised was pristinely legal which required determination as to whether the provision of telephone connection and its instrument amounted to "sale" and even so why the Union of India was not exempted from the payment of Sales Tax under the respective Statute.

14. This Court has carefully perused the order passed by the Hon'ble Supreme Court in the case of Union of India and another Vs. State of Haryana and another (supra), which is only an order entertaining and allowing the SLP and directing the respective High Courts to consider the grievance raised by the Union of India on its merits.

15. As is evident from the narration of the facts made by this Court hereinabove, the order passed by Hon'ble Supreme Court in the aforecited case of *Union of India Vs. State of Haryana (supra)* was passed as Union of India had questioned the very applicability of Sales Tax to action taken by Union of India under its statutory liability under the Telegraph Act. Such an order which is not a judgment passed in the peculiar facts and circumstances of the case, cannot be said to be laying down the law that even when statutory remedy is available which is equally efficacious, the High Court should entertain a writ petition.

16. This Court has also carefully examined and perused the order passed by Hon'ble Supreme Court in the case of *State of Tripura Vs. Manoranjan Chakraborty and others (supra),* where the statutory requirement of pre-deposit for entertaining the Appeal or Revision against the order passed by the Assessing Authority was held to be invalid. The Hon'ble Supreme Court observed that the statutory provisions are valid as the question of pre-deposit being a condition for entertainment of Appeal or Revision had already been decided by the Supreme Court in Gujarat *Agro Industries Co. Ltd. Vs. Municipal Corporation of the City of Ahmedabad; 1999 (4) SCC 468* and also in the case of **Shyam Kishore Vs. Municipal Corporation of Delhi; 1993 (1) SCC 22**.

The order of the Supreme Court clearly was in relation to an order passed by the High Court which had struck down the provisos relating to pre-deposits in Tripura Sales Tax Act. The facts of the case warranted the observations made by Hon'ble Supreme Court in paragraph-4 that notwithstanding the alternative remedy which may be available by way of an Appeal, a Writ Court can in an appropriate case exercise its jurisdiction to do substantive justice.

17. This Court has also carefully perused the judgment of Hon'ble Supreme Court in Balkrishna Ram Vs. Union of India and Another (supra). The Supreme Court was considering the question whether the writ jurisdiction can be exercised in respect of the orders passed by the AFT since Appeal lies to the Supreme Court against the orders of the AFT as per the provisions of the Act of 2007. The Supreme Court relied upon the judgment of *L. Chandra Kumar Vs. Union of India (supra*), to observe that the High Court under Article 226 exercises a Constitutional power of judicial review which is a fundamental and basic feature of the Constitution, and in case of Non-Commissioned Officers and Junior Commissioned Officers, if such officers approach the High Court against the order of the AFT, they should not be asked by the High Court to approach the Supreme Court as per the AFT Act of 2007.

18. The judgment of Hon'ble Supreme Court in the said case of Balkrishna Ram (supra), had been rendered taking into account the judgment of Constitution Bench in the case of *L. Chandra Kumar Vs. Union of India (supra),* where the Court has clearly stated that the power of judicial review vests with the High Court even with regard to orders passed by Central Administrative Tribunals and this power is part of the basic structure of the Constitution vested in the High Court, and could not be taken away by statutory provisions as mentioned in the unamended Administrative Tribunals Act 1985.

The Hon'ble Supreme Court in the aforecited judgment has not held that in every case where statutory remedy is available which is equally efficacious, the Writ Court should entertain a challenge by a litigant.

19. This Court is bound by the observations made by Hon'ble Supreme Court in the case of ***N.P. Ponnuswami vs. Returning Officer, AIR 1952 SC 64***, where the Supreme Court has observed that where rights and liabilities are created under the Statute and the remedy is provided in the

Statute itself, the litigant should first approach the Statutory Appellate Authority before approaching the High Court in writ jurisdiction.

20. In this case, the petitioners' rights and liabilities have been determined under the U.P.Z.A. & L.R. Act, now replaced with U.P. Revenue Code, and a statutory remedy has already been provided in the Schedule attached to the said Statute.

21. This Court does not find from the order of the Additional Commissioner (Judicial) impugned in this case that gross injustice has resulted for this Court to exercise its extraordinary jurisdiction of judicial review as the Additional Commissioner (Judicial) while rejecting the First Appeal of the petitioner, has observed that consolidation operations have begun in the village concerned and it shall be open for the petitioner to approach the consolidation courts under the appropriate sections of the Consolidation of Holdings Act.

22. The effect of Section 5(2)(a) of the Consolidation of Holdings Act has been considered by Hon'ble Supreme Court in the judgment rendered in ***Mool Chand and others Vs. Deputy Director of Consolidation and others ; 1995 (5) SCC 631***, held in paragraph 9 and 23 that suits or proceedings relating to declaration of right or interest in the land lying in the consolidation area shall stand abated. The Supreme Court had relied upon its earlier decision in the case of Ram Adhar Vs. Ram Roop Singh; **1968 (2) SCR *95***; Chattar Singh and others Vs. Thakur Pal Singh **1975 (4) SCC 457**; *Satyanarayan Prasad Sah and others Vs. State of Bihar and another* **1980 Supp SCC 474***;* Bibi Rahmani Khatoon and others Vs. Harkoo Gope and others **1981 (3) SCC 173.**

23. This writ petition is ***dismissed*** on the ground of statutory remedy alone being available to the petitioner.

24. It shall be open for the petitioner to raise all his claims before the Consolidation Courts under the Consolidation of Holdings Act.

(2021)02ILR A742
REVISIONAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 17.02.2021

BEFORE

THE HON'BLE DEVENDRA KUMAR UPADHYAY, J.
THE HON'BLE MANISH KUMAR, J.

Civil Misc. Review Application No. 4 of 2021
In Service Bench No. 1701 of 2000

State of U.P. & Ors. ...Applicants
Versus
Khushnoor Khan & Ors. ...Respondents

Counsel for the Applicants:
C.S.C.

Counsel for the Respondents:
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A. Code of Civil Procedure, 1908-Section 114-application-condonation of delay in filing review petition-rejection-the state failed to file the review petition on time and could not explain the reason of delay of 1730 days-law of limitation binds everyone including the Government-the approach of the State all along has been casual and that of manifest negligence-when the matter was referred to the Finance Department, the reasons indicating the delay for that period is not a satisfactory explanation. (Para 1 to 20)

The petition is dismissed. (E-5)

List of Cases cited:-

1. U.O.I .Vs Central Tibetan Schools Admin & ors.,SLP (Civil)19846/2020

2. Office of the Chief Post Master General & ors. Vs Living Media India Ltd & Anr.,(2012) 3 SCC 563

3. Balwant Singh (Dead) Vs Jagdish Singh & ors.,(2010) AIR SC 3043

4. St. of M.P. & ors. Vs BheruLal (2010) 10 SCC 654]

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

1. Heard Shri Raghvendra Singh, learned Advocate General appearing for the review applicants-State Authorities on the prayer for condonation of delay in filing the review petition and perused the records.

2. The State of U. P. seeks review of the judgment and order dated 19.04.2016 passed by this Court in Writ Petition No.1701 (S/B) of 2000 whereby the writ petition was dismissed. There is a delay of about 1730 days in filing the review petition from the date of judgment under review herein.

3. The judgment and order dated 19.04.2016 which is under review before us was earlier challenged by the State of U. P. by way of filing Special Leave Petition No.7563 of 2017 with a delay of 252 days and the same was dismissed on the ground of delay by Hon'ble Supreme Court vide its order dated 05.07.2017. Thus, from the date Special Leave Petition was dismissed, there is a delay of about 1335 days in preferring the review petition.

4. Writ Petition No.1701 (S/B) of 2000 was filed by the State challenging the judgment and order dated 08.10.1999 passed by the State Public Service Tribunal whereby parity in pay scale was granted to the respondents herein with the pay scale made available to one Shri Sheo Kumar Singh. The judgment of the Tribunal dated 08.10.1999 was based on an order dated 15.07.1998 passed by this Court in Writ Petition No.3055 (S/S) of 1997 which was filed by Shri Sheo Kumar Singh and Shri Shafat Ali. This writ petition was finally disposed of by this Court by means of the order dated 02.11.2007 whereby the State was directed to provide the petitioners of the said writ petition, namely, Shri Sheo Kumar Singh and Shri Shafat Ali all service benefits and pay scale which were available to them while they were discharging their duties on the post of Electrician.

5. As noticed above, against the judgment dated 19.04.2016 which is under challenge in the review petition, the State had filed the Special Leave Petition bearing No.7563 of 2017 which was dismissed by Hon'ble Supreme Court by means of the order dated 05.07.2017 on the ground that State had failed to give any justifiable reasons to condone the delay of 252 days in filing the said Special Leave Petition. It is also noteworthy that the order dated 08.10.1999 passed by the Tribunal was implemented by the State vide an order dated 18.10.2017. After dismissal of the Special Leave Petition by means of the order dated 05.07.2017 and after compliance of the order passed by the Tribunal on 18.10.2017, this matter ought to have been put at rest, however, now the review petition has been filed after lapse of a period of about 1335 days from the date when the Special Leave Petition was dismissed. As observed above, delay in preferring this review petition from the date

of judgment under review is about 1730 days, whereas such delay from the date of dismissal of Special Leave Petition is about 1335 days.

6. In the affidavit filed by the review applicants-State certain explanation has been sought to be given for such huge delay in preferring this review petition. However, on a conscious consideration of the averments made in the application seeking condonation of delay and the affidavit filed in support thereof, what we find is that the delay has not been sufficiently explained; rather in the facts of the case, what we conclude is that there has been unjustifiable laches and callousness on the part of the State in preferring this review petition.

7. It has been stated in the application seeking condonation of delay that the order dated 19.04.2016 which is under review was served upon the State on 02.05.2016 and thereafter the matter is said to have been examined by the Director General, Medical and Health Services. On 19.05.2016 the Joint Secretary of the State Government in the Department of Finance wrote a letter to the Principal Secretary of the Medical and Health Department for a meeting and thereafter on 31.12.2016 it was decided to file Special Leave Petition. The application further states that on 06.03.2017 the Directorate of Medical and Health Services requested the Advocate on Record to file Special Leave Petition and accordingly the Special Leave Petition was filed which, as already noted above, was dismissed as it was filed with unexplained delay of 252 days. The explanation given in the affidavit filed along with the application for condonation of delay is that after the judgment dated 05.07.2017 rendered by the Hon'ble Supreme Court in Special Leave Petition bearing No. 7563 of 2017, the judgment and order dated 19.04.2016 order impugned in the present petition was implemented by the State Government vide its order dated 18.10.2017.

8. It has also been stated that other similarly situated persons approached this Court by filing writ petitions for granting the parity or for extending the benefit of the judgment and order dated 19.04.2016. The judgments were passed by this Court therein from time to time against which the special appeals were preferred and the same were also dismissed by this Court by means of the orders dated 24.10.2019, 04.11.2019 and 05.11.2019 resulting in huge financial burden on the State exchequer. Thereafter the matter was referred to the Finance Department of the State Government in the month of December, 2020, after 1688 days, since the date of judgment impugned in the present review petition; after 1246 days from the judgment dated 05.07.2017 passed by the Hon'ble Supreme Court and after 393 days from 05.11.2019 when the last decision was given in the special appeal against the judgment in the writ petition preferred by the other persons.

9. The application whereby the delay has been sought to be condoned further makes averment to the effect that large number of similarly circumstanced persons started claiming parity in pay scale and since in the opinion of the State Government they were not entitled to the same and it caused huge financial burden on the State Exchequer, the matter was referred to the Finance Department of the State Government which in December, 2020 expressed certain discrepancies in the order dated 19.04.2016 passed in Writ

Petition No.1701 (S/B) of 2000 parity of which had been claimed in successive writ petitions. The application further states that the State Government after deliberations vide letter dated 11.01.2021 requested the learned Chief Standing Counsel for filing a petition seeking review of the judgment and order dated 19.04.2016 and accordingly this review petition has been filed.

10. Learned Advocate General taking the Court to aforementioned submissions made in the affidavit filed in support of the application seeking condonation of delay in filing the review petition has submitted that delay is genuine, bona fide, and unintentional. He has further submitted that review petition could not be filed as it took time in completing the administrative formalities by following certain norms and procedure of disciplined and systematic performance of official functions, including preparation of office notes etc., scrutinizing various records, movement of files step by step through different sections and lastly referring the matter to the Head of the Department. Learned Advocate General has further argued that this process takes some time as it depends upon so many factors and circumstances, such as preparation of office notes, non-availability of certain necessary information, non-availability of concerned official/officers, various holidays and certain unavoidable and unspoken circumstances. His further submission is that since large number of employees are claiming parity in pay scale on the basis of judgment dated 19.04.2016 which is under review herein, the same is causing huge financial burden on the State Exchequer and accordingly it was felt imperative to file the instant review petition.

11. We have given our conscious and serious consideration to the submissions made by the learned Advocate General, however, what we find is that the delay and laches in preferring the review petition are not satisfactorily explained. The reasons as argued by the learned Advocate General rather are, in fact, manifestation of callousness and non-seriousness on the part of the officials and officers of the State Government. What has been stated in para 24 of the affidavit filed in support of the application seeking condonation of delay reflects proverbial bureaucratic red tapism wherein the review applicants-State has attempted to take shelter in the usual functioning of the administrative machinery. We find it appropriate to extract para 24 of the affidavit filed in support of the application seeking condonation of delay which is as under:

"24. That the delay in filing of the Review Application is genuine, bonafide and unintentional. the Review Application could not be filed earlier as it took time in completing the administrative formalities by following certain norms and procedure of disciplined and systematic performance of official functions, which includes preparation of office notes etc., after scrutinizing various records, movement of files step by step through different sections and to different officers and lastly to the head of the department and thereafter forwarding the matter to the Administrative Department in the Government for appropriate decision. The similar procedure is adopted in the Administrative Department also. The aforesaid process takes some time as it depends upon so many factors/circumstances, such as preparation of office notes etc., as stated above, non-availability of certain necessary informations, non-availability of concerned official/officers, various

holidays in between and certain unavoidable and unspoken circumstances. It also took time in obtaining the requisite permission of the law department and also in preparation of the Review Application and its appendices. "

12. Hon'ble Supreme Court time and again has not only expressed words of caution in respect of casual manner in which the State Authorities approach the Courts without any plausible ground for condonation of delay but has even counselled the State Authorities in this regard. Regard may be had at this juncture to the latest pronouncement made by Hon'ble Supreme Court on 04.02.2021 while dismissing the ***Special Leave Petition (Civil) Diary No(s). 19846/2020, Union of India vs. Central Tibetan Schools Admin & Ors.*** The Hon'ble Supreme Court dismissed the Special Leave Petition, which was preferred with the delay of 532 days from the date of rejection of restoration application and 6616 days from the date of original order and made certain observations are quoted below:

"We have heard learned Additional Solicitor General for some time and must note that the only error which seems to have occurred in the impugned order is of noticing that it is not an illiterate litigant because the manner in which the Government is prosecuting its appeal reflects nothing better! The mighty Government of India is manned with large legal department having numerous officers and Advocates. The excuse given for the delay is, to say the least, preposterous.

We have repeatedly being counselling through our orders various Government departments, State Governments and other public authorities that they must learn to file appeals in time and set their house in order so far as the legal department is concerned, more so as technology assists them. This appears to be falling on deaf ears despite costs having been imposed in number of matters with the direction to recover it from the officers responsible for the delay as we are of the view that these officers must be made accountable. It has not had any salutary effect and that the present matter should have been brought up, really takes the cake!"

13. In the case of ***Central Tibetan Schools Admin & Ors***. (supra) while observing that the appellant therein had approached the Court in casual manner without any cogent ground for condonation of delay, Hon'ble Supreme Court has referred to the cases of ***Office of the Chief Post Master General & Ors. vs. Living Media India Ltd. & Anr., reported in [(2012) 3 SCC 563*]** and also the case of ***Balwant Singh (Dead) vs. Jagdish Singh & Ors, reported in [AIR 2010 SC 3043].*** Relevant extract of the said judgment in the case of ***Central Tibetan Schools Admin & Ors. (supra)*** runs as under:

" In this behalf, suffice to refer to our judgment in the State of Madhya Pradesh & Ors. v. Bheru Lal [SLP [C] Diary No.9217/2020 decided on 15.10.2020] and The State of Odisha & Ors. v. Sunanda Mahakuda [SLP [C] Diary No.22605/2020 decided on 11.01.2021]. The leeway which was given to the Government/public authorities on account of innate inefficiencies was the result of certain orders of this Court which came at a time when technology had not advanced and thus, greater

indulgence was shown. This position is no more prevalent and the current legal position has been elucidated by the judgment of this Court in Office of the Chief Post Master General & Ors. vs. Living Media India Ltd & Anr.- (2012) 3 SCC 563. Despite this, there seems to be a little change in the approach of the Government and public authorities. "

14. In the case of ***Living Media India Ltd. & Anr. (supra)*** *Hon'ble Supreme Court* noticed the advancement in modern technology and observed that the claim of seeking condonation of delay on account of impersonal machinery and inherited bureaucratic methodology of making several notes cannot be accepted in view of the modern technologies being used and available. In the said case, it was further observed by Hon'ble Apex Court that all the government bodies, their agencies and instrumentalities need to be informed that unless they have reasonable and acceptable explanation for delay, there is no need to accept usual explanation that the file was kept pending for several months/years due to considerable degree of procedural red tape in the process.

15. Paras 28 and 29 of the judgement in the case of ***Living Media India Ltd. & Anr. (supra)*** are extracted hereinbelow:

"28. Though we are conscious of the fact that in a matter of condonation of delay when there was no gross negligence or deliberate inaction or lack of bona fides, a liberal concession has to be adopted to advance substantial justice, we are of the view that in the facts and circumstances, the Department cannot take advantage of various earlier decisions. The claim on account of impersonal machinery and inherited bureaucratic methodology of making several notes cannot be accepted in view of the modern technologies being used and available. The law of limitation undoubtedly binds everybody, including the Government.

29. In our view, it is the right time to inform all the government bodies, their agencies and instrumentalities that unless they have reasonable and acceptable explanation for the delay and there was bona fide effort, there is no need to accept the usual explanation that the file was kept pending for several months/years due to considerable degree of procedural red tape in the process. The government departments are under a special obligation to ensure that they perform their duties with diligence and commitment. Condonation of delay is an exception and should not be used as an anticipated benefit for the government departments. The law shelters everyone under the same light and should not be swirled for the benefit of a few."

16. Similarly, the Hon'ble Apex Court in the case of ***State of Madhya Pradesh and others vs. Bherulal,*** reported in ***[(2020) 10 SCC 654]*** has held that the law of limitation undoubtedly binds everybody including the Government and unless the government authorities, their agencies and instrumentalities have reasonable and acceptable explanations for the delay and there was bona fide efforts on their part, there is no need to accept the usual explanation in the garb of procedural red tape of process. The condonation of delay is an exception and should not be used as anticipated benefits for the Government.

17. When we examine the explanation of delay of 1730 days in filing the review petition from the date of judgment dated

19.04.2016 which has been sought to be reviewed and delay of 1335 days from the date of dismissal of Special Leave Petition on 05.07.2017, what we find is that the State has once again sought shelter in usual slow pace of State machinery in preparation of office notes, movement of files, non-availability of certain necessary information, non-availability of concerned officials/officers etc. The said explanation cannot be said to be sufficient in view of the law laid down by Hon'ble Apex Court in the case of ***Living Media India Ltd. & Anr. (supra).*** The State while seeking condonation of delay in this case has gone even to the extent of taking ground of certain "**unavoidable**" and "**unspoken**" circumstances. In our considered opinion such "unavoidable" and "unspoken" circumstances cannot be taken shelter of to claim condonation of delay in approaching the Courts. In fact the course adopted by the State in preferring the review petition reflects gross negligence and inaction which in our considered opinion cannot be said to be bona fide. We are aware that a liberal view needs to be adopted by the Courts to advance substantial justice. However, in the facts and circumstances of this case, what we find is that the approach of the State all along has been casual and that of manifest negligence. As observed by Hon'ble Apex Court in the case of ***Living Media India Ltd. & Anr. (supra),*** law of limitation binds every one including the Government.

18. From the date date of judgment till dismissal of Special Leave Petition by the Hon'ble Apex Court on the ground of delay of 252 days, the same period cannot be reconsidered by this Court for condoning the delay. From the date of dismissal of Special Leave Petition i.e. on 05.07.2017 till December, 2020 when the matter was referred to the Finance Department, the reasons indicating the delay for that period is not a satisfactory explanation for delay in filing this review petition. The reasons indicated in the affidavit are only the details of filing of the writ petitions by the other similarly situated persons and the judgment in the special appeals. During that period the review applicants were not stopped by any provision or law to file the review petition.

19. Considering the fact that the State has grossly failed to offer any proper explanation for huge delay other than mentioning different dates on which notes were prepared and files have been moving from one desk to other and from one officer to other, in our opinion the explanation furnished are neither sufficient nor acceptable to condone such a huge delay.

20. In the light of the discussions made above, the review petition fails and is hereby **dismissed** on the ground of delay.

21. Before parting with the case, we may express our solemn hope and trust that the State authorities shall in future be guided by the law laid down by Hon'ble Supreme Court in the case of ***Living Media India Ltd. & Anr. (supra)*** and in the case of ***Central Tibetan Schools Admins & Ors. (supra).***

(2021)02ILR A748
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 22.01.2021

BEFORE

THE HON'BLE IRSHAD ALI, J.

Service Single No. 1135 of 2009

Ramkesh Verma & Anr. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
P.N. Singh Kaushik, Krishna Madhav Shukla, Pankaj Patel

Counsel for the Respondents:
C.S.C., Jyotinjay Verma, R.P. Verma

A. Civil Law - U.P. Basic Schools (Junior High School) (Recruitment and Conditions of Services of Teachers) Rules, 1978 – Rules 7, 8, 9 and 10 – Appointment on Teacher post – Selection process – Non-following thereof – No Prior Approval – Effect – Neither papers in regard to selection were produced before the District Basic Education Officer nor the finding return has been challenged by enclosing the papers in the writ petition – No case of deemed approval pleaded – There is no provision for the grant of past approval after the appointment of the petitioners by the Committee of Management – Held, Finding recorded in regard to non-following the procedure prescribed under 1978 Rules is just and valid – Mere relying on an order of regularization, the petitioner cannot be granted relief for the payment of salary from theSt. Exchequer. (Para 8, 9, 13 and 14)

B. Civil Law - U.P. Recognised Basic Schools (Junior High Schools) (Recruitment and Conditions of Service of Ministerial Staff and Group 'D' Employees) Rules, 1984 – Rule 15 – Appointment on Peon post – Selection process – Non-following thereof – No Prior Approval – Effect – Finding of not following the provision has not been challenged by enclosing supporting documents to establish appointment – No case of deemed approval pleaded – There is no provision for the grant of past approval after the appointment of the petitioners by the Committee of Management – Held, mere relying on an order of regularization, the petitioner cannot be granted relief for the payment of salary from theSt. Exchequer. (Para 10, 11, 13 and 14)

Writ Petition dismissed. (E-1)

Cases relied on :-

1. Writ-A No. 64346 of 2007, Munendra Singh & ors. Vs St. of U.P. & ors.

2. Ram Pal Singh & ors. Vs St. of U.P. & ors. reported in (2016) 2 UPLBEC 1607

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

1. Heard learned counsel for the petitioners, Sri Anurag Kumar Maurya, learned Standing Counsel for the respondent nos.1 to 3 and Sri Jyotinjay Verma and Sri Neeraj Chaurasia, both representing respondent no.4.

2. By means of the present writ petition, the petitioners are challenging an order dated 18.11.2008 whereby the claim for the payment of salary of the petitioners has been rejected on the ground that the procedure prescribed for selection and appointment of the petitioners has not been followed nor the Manager of the Institution has submitted papers for consideration of claim of the petitioners before Assistant Regional Director of Education, Basic, Faizabad Region, Faizabad.

3. The petitioners claim that petitioner no.1 was granted appointment on the post of Assistant Teacher on 25.6.1981 in the institution and in pursuance thereof, he joined on 1.7.1981. The petitioner no.2 was granted appointment on the post of Peon by the Committee of Management on 22.6.1986 and he joined in the institution on 1.7.1986. Appointment of the petitioners has been regularized vide orders dated 2.11.1988 and 14.9.1992 respectively. The institution was brought within the purview of Payment of Salary Act on 2.12.2006. The claim was set up by the petitioners for disbursement of salary from State Exchequer on the ground that they have been duly appointed teacher and Group-'D' employee of the institution and are entitled for the payment of salary from the State

Exchequer. When no order was passed on the claim set up by them, Writ Petition No.5679 (SS) of 2008 was filed before this Court which was finally allowed with the direction to the Competent Authority to pass an appropriate order on 15.9.2008. After service of the copy of the order passed by this Court, direction was issued to the parties to file necessary documents to establish selection and appointment on the post of Assistant Teacher and Group-D post. Respondent no.3, after giving opportunity of hearing to the parties, passed an order on 18.11.2008 by recording a finding that in spite of direction issued to the Management to submit relevant papers in regard to selection and appointment of the petitioners, the same were not made available. In conclusion part of the impugned order, it has been recorded that the society was registered on 17.8.1981 which was renewed on 17.8.2005 for the period of five years. The institution which was run and managed by the Society, was granted temporary recognition by the District Basic Education Officer on 30.6.1982 and permanent recognition to the institution was granted by the Assistant Regional Director of Education Officer, Faizabad Region, Faizabad on 25.7.1987. In pursuance to the Government Order issued for taking the institution on the grand-in-aid list, applications were invited and in pursuance thereof, the institution in question applied for taking the institution in grant-in-aid list. The Manager of the Institution was directed to place necessary documents in regard to the selection and appointment of the petitioners vide letter dated 4.1.2007 along with copy of the approval but no documents in regard to the selection and appointment were produced by the Manager of the institution. The approval was also not in accordance with the provisions of the U.P. Basic Schools (Junior High School) (Recruitment and Conditions of Services of Teachers) Rules, 1978 (hereinafter referred to as '1978 Rules'). The appointment for the Group-D employee namely Sri Ram Prakash Vishwarama was also not found in accordance with U.P. Recognised Basic Schools (Junior High Schools) (Recruitment and Conditions of Service of Ministerial Staff and Group "D' Employees) Rules, 1984 (hereinafter referred to as '1984 Rules'), therefore no concurrence for payment of salary was accorded by the Competent Authority. At the time of hearing in the matter, the petitioners as well as Manager were granted time to place relevant documents to establish their selection and evidence to establish appointment in accordance with 1978 Rules, but at the said point of time also, no documentary evidence in regard to the selection and appointment were produced by the petitioner as well as Manager of the Institution, therefore, the claim for appointment and salary has been rejected by respondent no.3 vide impugned order dated 18.11.2008.

4. Assailing the aforesaid order, submission of learned counsel for the petitioners is that although the petitioners are not having requisite documents to establish their appointment in accordance with 1978 Rules as well as 1984 Rules governing appointment of Class-III and Class-IV post, the order of regularization establishes their claim for the payment of salary from State Exchequer. The statement of fact in regard to grant of regularization has been made in paragraph16 of the writ petition which has been denied in paragraph 13 of the counter-affidavit filed by the respondent no.4 (District Basic Education Officer). His next submission is that the controversy in regard to the order

of approval and order of regularization came before this Court for consideration that whether the order of regularization comes under the definition of approval or not, in **Writ-A No.64346 of 2007 (Munendra Singh and others v. State of U.P. and others)**, wherein this Court recorded that the order of regularization also terms as order of approval.

Similar view was also taken in the case of **Ram Pal Singh and others v. State of U.P. and others reported in (2016) 2 UPLBEC 1607** which was affirmed vide judgment and order dated 3.12.2013 passed by this Court. On the said basis, submission of learned counsel for the petitioner is that once the services of the petitioner have been regularized vide orders dated 2.11.1988 and 14.9.1992 respectively, then it is admitted that appointment of the petitioners was made by following the procedure prescribed under 1978 Rules as well 1984 Rules. He next submits that it is responsibility of the Manager and the Educational Authorities to keep the proceedings in safe hands in their offices in regard to selection and appointment and if required, to place before Educational Authority. The petitioners are not expected to place the material of selection which was conducted by the Committee of Management by constituting the selection committee and to make available to the District Basic Education Officer thereafter.

5. On the other hand, learned counsel appearing for the respondents submits that under 1978 Rules as well as 1984 Rules, a full-fledged procedure has been prescribed in regard to selection of teacher and Group-C and Group-D employee to be appointed in Recognized Junior High School. They have invited attention of this Court on the provisions contained in Sections 7 to 10 to submit that the order of appointment issued to petitioner no.1 on 25.6.1981 clearly demonstrates the fact that the same was issued in violation of Rule 10 of the1978 Rules. The Rules prescribe that before issuing appointment letter to the selected candidates, approval from the District Basic Education is required. It is not the case of the petitioners that after submission of papers before the District Basic Education Officer, no order was passed for granting approval to the selection and appointment of the petitioners and after expiry of 30 days' period, it is deemed that the approval has been accorded and then the Committee of Management issued appointment letter.

6. Next submission of learned counsel for the respondents is that in the impugned order, clear cut finding has been return that no papers in regard to the selection and appointment of the petitioner were placed before District Basic Education Oficer by the Manager nor the same were placed at the time of hearing before the Assistant Regional Director of Education (Basic), thus his submission is that the petitioners have not challenged the finding return by the respondent no.2 in this regard in the writ petition that the same is based on incorrect statement of fact or perverse in nature. Last submission of learned counsel for the respondents is that the impugned order is just and valid order and does not suffer from infirmity or illegality. Reliance placed by the learned counsel for the petitioners is merely on the ground that their services were regularized, which cannot be termed to be legally appointed teacher and Class-IV employee, therefore, the judgment relied upon is not applicable to the facts and circumstances of the present case.

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

8. To resolve the controversy, firstly, the validity of the appointment is to be seen that the appointment has been made by following the procedure prescribed under 1978 Rules or 1984 Rules or not.

To examine the same, provisions of Sections 7 to 10 of the 1978 Rules are being extracted hereinbelow:

*"**7. Advertisement of vacancy**. - [(1) No vacancy shall be filled, except after its advertisement in at least two newspapers one of whom must have adequate circulation all over the State and the other in a locality the school is situated.]*

(2) In every advertisement and intimation under clause (1), the Management shall give particulars as to the name of the post, the minimum qualifications and age-limit, if any, prescribed for such post and the last date for receipt of applications in pursuance of such advertisement.

***8. Age limit**. - The minimum age shall on the first day of July of the academic year following next after the year in which the advertisement of the vacancy is made under Rule 7 be :*

(1) In relation to the post of an Assistant Teacher 21 years.

(2) In relation to the post of Head Master 30 years.]

*[**9. Selection Committee**. - For appointment of Headmaster and Assistant Teacher in institutions other than minority institutions and in the minority institutions, tire Management shall constitute a Selection Committee as follows :]*

A - Institutions other than Minority Institutions :

(i) For the post of headmaster :

(1) Manager; .

(2) a nominee of the District Basic Education Officer;

(3) a nominee of the Management;

(ii) For the post of Assistant Teacher;

. (1) Manager;

(2) Headmaster of the recognised school in which appointment is to be made;

(3) a nominee of the District Basic Education Officer; .

B - Minority Institutions : .

(i) For the post of Headmaster;

(1) Manager;

(2) two nominees of Management; .

(ii) For the post of Assistant Teacher;

(1) Manager; .

(2) Headmaster of the recognised school in which the appointment is to be made;

[(3) A specialist in the subject nominee by the District Basic Education Officer.]

***10. Procedure for selection**. - (1) The Selection Committee shall, after interviewing such candidates as appear before it on a date to be fixed by it in this behalf, of which due intimation shall be given to all the candidates, prepare a list containing as far as possible the names, in order of preference, of three candidates found to be suitable for appointment.*

(2) The list prepared under clause (1) shall also contain particulars regarding the date of birth, academic qualifications and teaching experience of the candidates and shall be signed by all the members of the Selection Committee.

(3) The Selection Committee shall, as soon as possible, forward such list, together with the minutes of the proceedings of the Committee to the management.

(4) The Manager shall within one week from the date of receipt of the papers under clause (3) send a copy of the list to the District Basic Education Officer.

(5) (i) If the District Basic Education Officer is satisfied that -

(a) the candidates recommended by the Selection Committee possess the minimum qualifications prescribed for the post;

(b) the procedure laid down in these rules for the selection of Headmaster or Assistant Teacher, as the case may be, has been followed he shall accord approval to the recommendations made by the Selection Committee and shall communicate his decision to the Management within two weeks from the date of receipt of the papers under clause (4).
(ii) If the District Basic Education Officer is not satisfied as aforesaid, he shall return the papers to the Management with the direction that the matter shall be reconsidered by the Selection Committee.

(iii) If the District Basic Education Officer does not communicate his decision within one month from the date of receipt of the papers under clause (4), he shall be deemed to have accorded approval to the recommendations made by the Selection Committee."

9. On perusal of the provisions contained, it has been provided that the vacancy shall be advertised in two well known newspapers viz. one in widely circulated newspaper and one in local newspaper; thereafter, there is procedure to constitution of selection committee; after making selection, the papers ought to be submitted before District Basic Education Officer to accord approval; and then the committee of management is empowered to grant appointment.

Here, in the present case, neither papers in regard to selection were produced before respondent no.3 nor the finding return has been challenged by enclosing the papers before this Court in the writ petition, therefore, there is no hesitation to hold that the finding recorded in regard to non-following the procedure prescribed under 1978 Rules is just and valid. It is further clarified in the finding that the institution was granted temporary recognition on 30.6.1982 by the Basic Shiksha Adhikari of the district concerned. The petitioners claimed his appointment before the order of recognition to the institution on 25.6.1981. Counsel for the petitioners has not stated anywhere that without recognition of an institution, how the appointment of the petitioners has been made in the institution which was not in existence in the year 1981.

10. In regard to the appointment of the petitioner no.2, procedure of selection contained under 1984 Rules is quoted below:

"15. Procedure for selection. - (1) The Selection Committee shall, after interviewing such candidates as appear before it on a date fixed by it in this behalf, of which due intimation shall be given to all the candidates, prepare a list containing as far as possible the names, in order of preference, of three candidates found to be suitable for appointment.

(2) The list prepared under clause (1) shall also contain particulars regarding the date of birth, academic qualifications and shall be signed by all the members of the Selection Committee.

(3) The Selection Committee shall as soon as possible forward such list, together with the minutes of the proceedings of the Committee to the Management.

(4) The Manager shall, within one week from date of receipt of the papers under clause (3), send a copy of the list to the District Basic Education Officer.

(5) (i) If the District Basic Education Officer is satisfied that -

(a) the candidates recommended by the Selection Committee possess the minimum qualifications prescribed for the post;

(b) the procedure laid down in these rules for the selection of Ministerial staff and Group 'D' employees, as the case may be, has been followed, he shall accord approval to the recommendations made by the Selection Committee and shall communicate his decision to the management within two weeks from the date of receipt of the papers under clause (4).

(ii) If the District Basic Education Officer is not satisfied as aforesaid, he shall return the papers to the Management with the direction that the matter shall be reconsidered by the Selection Committee.

(iii) If the District Basic Education Officer does not communicate his decision within one month from the date of receipt of the papers under clause (4), he shall be deemed to have accorded approval to the recommendations made by the Selection Committee."

11. There is finding of fact in the order impugned that the appointment of the petitioner no.2 was also not made in accordance with the provisions contained under 1984 Rules. In the writ petition, the findings return have also not been challenged by enclosing supporting documents to establish the appointment of petitioner no.2. The statement made in paragraph 16 in regard to petitioner no.2 is also based only on the premise of an order of regularization which is dated 14.9.1992. In absence of any pleading challenging the finding of fact recorded by respondent no.3, mere relying on an order of regularization, the petitioner no.2 cannot be granted relief for the payment of salary from the State Exchequer without producing necessary documents to establish his appointment in the eye of law.

12. Counsel for the petitioners has relied upon the judgment rendered in the case of **Munendra Singh and others (supra)**, wherein there was material to establish their appointment and the subject matter was that whether taking notice of regularization can be termed as approval in the eye of law or not and on the basis of relevant documents and records in the aforesaid case, it was established that by following procedure prescribed, they were granted appointment.

13. Rule 10 of the 1978 Rules as well as 1984 Rules clearly stipulates that without prior approval of the District Basic Education Officer, no appointment letter can be issued to the petitioners. It is established that petitioner no.1 was granted appointment on the post of Assistant Teacher on 25.6.1981 and petitioner no.2 was granted appointment on the post of Peon on 22.6.1986. It is further evident that it is not the case of the petitioners that after selection, papers were submitted before the District Basic Education Officer for the grant of approval and due to non-grant of approval within one month, the selection shall be deemed to be approved in view of Rule 10 (5) of the 1978 Rules. They only relied on the orders of regularization passed on 2.11.1988 and 14.9.1992 and on the said basis, submission of learned counsel for the petitioners is that once the order of regularization had been passed, every discrepancy in making selection washed out and on the basis of regularization, the petitioners are entitled for the payment of salary. The submission advanced by the learned counsel for the petitioner is

misplaced in view of the reason that the statutory provisions prescribed under the Rules do not permit for the grant of regularization/ approval after the appointment.

14. On perusal of the provisions of Rules quoted hereinabove, there is no provision for the grant of past approval after the appointment of the petitioners by the Committee of Management. Firstly, selection proceeding placed before the District Basic Education Officer is required to be approval and thereafter, the Committee of Management can issue appointment letter to the selected candidates. In the present case, the selection of the petitioners have not been approved as per the Rules referred above nor there is a case that due to non-passing of order passed by the District Basic Education Officer on the papers submitted after selection, the appointment is deemed to have been approved.

15. The ratio of judgment relied upon does not apply to the present facts and circumstances of the case and is distinguishable in nature. In the judgment relied upon, this Court, on consideration of relevant provisions of 1978 Rules, came to the conclusion that there is no difference in order of approval or order of regularization. It is the case of the petitioners that the District Basic Education Officer has passed the order of regularization after issuance of appointment letter and after joining on the post in the institution. Under the Rules, there is no such provision for the grant of past approval. Assistant Regional Director of Education, Basic, Faizabad Region, Faizabad had recorded categorical finding that the Committee of Management in spite of notice issued to produce the necessary documents of selection, could not produce the same before him as well as there is no material to establish that prior to issuance of appointment letter to the petitioners, papers were submitted before the District Basic Education Officer for the grant of approval. The finding has been recorded by the Assistant Regional Director of Education, Basic, Faizabad Region, Faizabad in the order dated 18.11.2008 that the Committee of Management has not submitted papers before the District Basic Education Officer of the selection for the grant of approval. It has further been recorded that in spite of notice issued to the petitioners, no papers were submitted during the course of hearing at the level of the Assistant Regional Director of Education. The finding recorded in this regard has not been challenged by the petitioners in the writ petition, therefore, this Court is of the opinion that the finding return is just and valid.

15. On consideration of overall facts and circumstances of the case as well as the judgment relied upon, I am of the view that the Assistant Regional Director of Education, Basic, Faizabad Region, Faizabad has not committed any illegality in passing the impugned order. The impugned order records finding of fact which has not been challenged in the writ petition. Therefore, this Court refuses to exercise discretionary jurisdiction under Article 226 of the Constitution of India.

16. Accordingly, this writ petition lacks merit and is hereby **dismissed.**

18. No order as to costs.

(2021)02ILR A756
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 21.01.2021

BEFORE

THE HON'BLE IRSHAD ALI, J.

Service Single No. 2207 of 2013

Sant Ram ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Prem Shanker Pandey

Counsel for the Respondents:
C.S.C., Arvind Kumar Misra, Jyoti Sikka, Rajendra Pratap Singh, Rajiv Singh Chauhan, Surendra Pratap Singh

A. Civil Law- U.P. Basic Schools (Junior High School) (Recruitment and Conditions of Services of Teachers) Rules, 1978 – Rules 7, 8, 9 and 10 – Appointment on Teacher post – Selection process – Deemed Approval – Paper sent after selection – No order of District Basic Education Officer – Effect – District Basic Education Officer (DBEO) did not pass any order within a period of one month, the selection made on the post of Assistant Teacher or Head Master shall be deemed to be approved. (Para 24)

B. Service Law – Appointment on Teacher post – Selection – Complaint by third person – Re-advertisement – Validity – Mala fide of District Basic Education Officer (DBEO) – Held, Only to dislodge the claim of the petitioner of deemed approval, a concocted story has been framed by the DBEO – DBEO appears to be interested in selection of complainant – Finding returned by the DBEO in this regard, held, perverse in nature and not liable to be sustained. (Para 31, 33 and 35)

Writ Petition allowed .(E-1)

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

1. Heard learned counsel for the petitioner, learned standing counsel for respondent No.1, Sri Rajiv Singh Chauhan, learned counsel for respondent Nos.2 & 3 and Sri Rajendra Pratap Singh, learned counsel for respondent Nos.4 & 5.

2. By means of present writ petition, the petitioner is challenging the order dated 04.03.2013, whereby his claim for appointment on the post of Assistant Teacher (Scheduled Caste) as well as claim for payment of salary has been rejected.

3. Brief fact of the case is that there is an institution in the name of Janta Nimna Madhyamik Vidyalaya, Byoli, Islamabad, District Unnao, which is recognized under the provisions of U.P. Basic Education Act, 1972 and is receiving grant in aid from the State Government, thus, the provisions of U.P. Junior High School (Payment of Salaries of Teachers and other Employees) Act, 1978 as well as the provisions of The U.P. Recognised Basic Schools (Junior High Schools) (Recruitment And Conditions Of Service Of Teachers) Rules, 1978 are applicable to the said institution.

4. In the institution, there are six sanctioned posts of Assistant Teachers including the post of Head Master. Two teachers namely Ram Khelawan and Jagat Narayan retired from service on attaining the age of superannuation on 30.06.2001 and 30.06.2007, respectively. The committee of management filled aforesaid two vacancies under the category of Other Backward Class (OBC) and Scheduled Caste (SC) and requested to the District Basic Education Officer (for short, 'DBEO')

for grant of prior approval to initiate selection proceeding vide letter dated 23.07.2009 in view of the provisions contained under Rule 7(3) of the amended Rules of 1978.

5. The DBEO granted permission to issue advertisement inviting applications from eligible and qualified candidates. In compliance of the order of DBEO, vacancies were advertised in two newspapers inviting applications from eligible and qualified candidates in the year 2009 fixing date for interview on 25.10.2009.

6. Several candidates under OBC category as well as Scheduled Castes Category applied for in pursuance to the advertisement issued. The selection committee selected to Sri Saurabh Kumar under OBC Category and Sri Santram under Scheduled Castes Category on the basis of quality point marks.

7. Papers were submitted before the DBEO for grant of approval to the selection on 28.10.2009. The DBEO accorded approval to the appointment made under OBC category and rejected the appointment made under Scheduled Castes Category vide letter dated 11.11.2009 on the ground that the appointment was not in accordance with law.

8. In pursuance to the order of DBEO, vacancies were re-advertised on 17.12.2009 inviting applications for selection under Scheduled Castes Category. The advertisement is part of the writ petition as annexure-5. In pursuance to the advertisement, seven candidates applied including the petitioner and the selection committee selected the petitioner and placed him at serial No.1 under Scheduled Castes Category.

9. The papers were submitted for approval as required under Rule 10 before the DBEO on 18.01.2010. The DBEO did not pass the order disapproving or approving the selection neither raised any objection in regard to the selection for a period of one month.

10. In the meantime, a complaint was lodged by one Ramesh Chandra on 29.12.2009 before the DBOE to the effect that the committee of management without permitting him to participate in the selection proceeding has proceeded to make selection in a wholly illegal and arbitrary manner.

11. The complaint was entertained and by means of order dated 25.10.2010, the DBEO rejected the selection proceeding holding that no information in regard to selection was given to him. The proceeding was initiated in a wholly illegal and arbitrary manner and candidature of the complainant Ramesh Chandra has illegally been not considered.

12. The order passed by the DBEO was subject matter of challenge in Writ Petition No.8082 of 2010 and after hearing the parties, the writ petition was allowed vide judgment and order dated 07.08.2012 holding that the order has been passed in utter disregard of principles of natural justice and remanded the matter back to the DBEO for reconsideration and to pass appropriate order.

13. In compliance of the judgment and order passed by this court on 07.08.2012, the DBEO passed an order on

04.03.2013, whereby the claim setup by the petitioner has been rejected.

14. Assailing the impugned order, submission of learned counsel for the petitioner is that in the second advertisement, applications were invited afresh from all eligible candidates, who were interested in applying the same. There was no stipulation in the advertisement that candidates, who were part of the first selection proceeding are required not to submit the application form.

15. He submitted that the complainant - Ramesh Chandra did not apply in pursuance to the fresh advertisement issued, therefore, the complaint lodged by him was not entertainable and the DBEO without considering this aspect of the matter, has proceeded to pass the order.

16. His next submission is that after recommendation of the selection committee, the committee of management submitted papers vide letter dated 18.01.2010, which was duly received in the office of DBEO and in view of Rule 10 of Rules of 1978, the selection was deemed to be approved under the rules after lapse of one month's period. Therefore, it was not left open to the DBEO to pass the impugned order rejecting the selection of the petitioner.

17. His further submission is that it has been admitted that papers were received on 18.01.2010, which was returned by three objections but in the submission, there is no recital of date on which the papers were returned. This clearly demonstrates the ill will of the DBEO in passing the impugned order taking shelter that the selection has not been deemed to be approved.

18. On the other hand, learned standing counsel and Sri R.P. Singh, learned counsel for the committee of management submitted that the order passed by the DBEO does not suffer from any infirmity or illegality and is just and valid. They further submitted that the DBEO returned the papers to the committee of management with three objections on 24.02.2010, therefore, the provisions of deemed approval is not applicable to the facts and circumstances of the case of the petitioner.

19. In regard to submission advanced by learned counsel for the petitioner that Ramesh Chandra did not apply in pursuance to the second advertisement, no objection has been made by learned counsel for the respondents in this regard.

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

21. To resolve the controversy in hand, the provisions contained under relevant rules of The U.P. Recognised Basic Schools (Junior High Schools) (Recruitment And Conditions Of Service Of Teachers) Rules, 1978 are being quoted below:

*"**7. Advertisement of vacancy**. - [(1) No vacancy shall be filled, except after its advertisement in at least two newspapers one of whom must have adequate circulation all over the State and the other in a locality the school is situated.*

(2) In every advertisement and intimation under clause (1), the Management shall give particulars as to the name of the post, the minimum qualifications and age-limit, if any, prescribed for such post and the last date

for receipt of applications in pursuance of such advertisement.

8. Age limit. *- The minimum age shall on the first day of July of the academic year following next after the year in which the advertisement of the vacancy is made under Rule 7 be : (1) In relation to the post of an Assistant Teacher 21 years. (2) In relation to the post of Head Master 30 years.] [9.* ***Selection Committee****. - For appointment of Headmaster and Assistant Teacher in institutions other than minority institutions and in the minority institutions, tire Management shall constitute a Selection Committee as follows :] A - Institutions other than Minority Institutions :*

(i) For the post of headmaster :

(1) Manager;

(2) a nominee of the District Basic Education Officer;

(3) a nominee of the Management;

(ii) For the post of Assistant Teacher;

(1) Manager;

(2) Headmaster of the recognised school in which appointment is to be made;

.

(3) a nominee of the District Basic Education Officer;

B - Minority Institutions :

(i) For the post of Headmaster;

(1) Manager;

(2) two nominees of Management;

(ii) For the post of Assistant Teacher;

(1) Manager;

(2) Headmaster of the recognised school in which the appointment is to be made;

[(3) A specialist in the subject nominee by the District Basic Education Officer.]

10. Procedure for selection*. - (1) The Selection Committee shall, after interviewing such candidates as appear before it on a date to be fixed by it in this behalf, of which due intimation shall be given to all the candidates, prepare a list containing as far as possible the names, in order of preference, of three candidates found to be suitable for appointment. (2) The list prepared under clause (1) shall also contain particulars regarding the date of birth, academic qualifications and teaching experience of the candidates and shall be signed by all the members of the Selection Committee. (3) The Selection Committee shall, as soon as possible, forward such list, together with the minutes of the proceedings of the Committee to the management. (4) The Manager shall within one week from the date of receipt of the papers under clause (3) send a copy of the list to the District Basic Education Officer. (5) (i) If the District Basic Education Officer is satisfied that -*

(a) the candidates recommended by the Selection Committee possess the minimum qualifications prescribed for the post;

(b) the procedure laid down in these rules for the selection of Headmaster or Assistant Teacher, as the case may be, has been followed he shall accord approval to the recommendations made by the Selection Committee and shall communicate his decision to the Management within two weeks from the date of receipt of the papers under clause (4).

(ii) If the District Basic Education Officer is not satisfied as aforesaid, he shall return the papers to the Management with the direction that the matter shall be reconsidered by the Selection Committee.

(iii) If the District Basic Education Officer does not communicate his decision within one month from the date of receipt of the papers under clause (4), he shall be deemed to have accorded approval to the recommendations made by the Selection Committee."

22. On perusal of the aforesaid rules and material on record, it is reflected that requirement of prior approval as per Section 7 was taken from the DBEO and then the committee of management proceeded to advertise the vacancy in the news paper inviting applications from eligible and qualified candidates.

23. In regard to selection made against the scheduled caste category, there is no challenge on the rejection order by the DBEO directing re-advertisement and to invite the application afresh. The committee of management complied the order of the DBEO and re-advertised the vacancy inviting applications from eligible and qualified candidates belonging to scheduled caste category.

24. The selection committee constituted under Rule 9 of the Rules of 1978 selected the petitioner and recommended for appointment to the committee of management after taking approval from the DBEO. The committee of management submitted the entire papers before the DBEO on 18.01.2010. Under Rule 10(5) of Rules of 1978, it has been provided that in case the DBEO did not pass any order within a period of one month, the selection made on the post of Assistant Teacher or Head Master shall be deemed to be approved.

25. Therefore, the selection of the petitioner is deemed to be approved on 17.10.2010 in view of non passing of any order of approval or disapproval on the proposal of the committee of management neither raising objection by the DBEO in regard to the selection made.

26. The committee of management issued appointment letter to the petitioner and in pursuance thereof the petitioner is discharging duties in the institution without salary from the State Exchequer.

27. On perusal of the impugned order, it is reflected that entire proceeding has been initiated on the complaint lodged by Ramesh Chandra that he has not been permitted to participate in the selection proceeding.

28. On perusal of the record, it is evident that it is not his case that he has applied in pursuance to the second advertisement issued for selection under Scheduled Caste Category, therefore, this court has no hesitation to hold that the complaint lodged by Ramesh Chandra was not entertainable and the the DBEO for the reasons best known to him has entertained the same and has cancelled the selection.

29. On perusal of the impugned order, it is apparent that the objection is that the candidates who have appeared in the earlier selection proceeding would have been intimated in regard to interview fixed on 30.12.20009 and due to non furnishing information, the selection proceeding vitiates in law.

30. In this regard, on the said objection, I have perused the order of DBEO, whereby direction was issued to readvertise the vacancy and to invite the applications afresh.

31. In pursuance to the order of DBEO, fresh advertisement was issued inviting application from open market. Under the advertisement, it was not provided that the candidates who have applied in the earlier selection proceeding, are not required to submit application afresh, therefore, the finding returned by

the DBEO in this regard is perverse in nature and cannot be sustained.

32. The second objection that Ramesh Chandra who was candidate of earlier selection proceeding was not informed in regard to interview scheduled to be held on 30.12.2009. This objection is also wholly irrelevant and in this regard sufficient reasons have been assigned in the above referred paragraphs of the judgment.

33. On perusal of next objection, it is evident that the DBEO appears to be interested in selection of Ramesh Chandra, therefore, without going through the earlier order of cancellation of advertisement and to make fresh selection against the scheduled caste vacancy, has proceeded to record perverse and illegal finding that Ramesh Chandra was entitled for consideration for selection in the fresh selection proceeding although he did not apply in pursuance to the second advertisement.

34. In regard to last objection, it reveals that similar reasons have been assigned that the petitioner - Santram was not liable to be issued appointment letter by Manager of the institution on 08.03.2010. In this regard, I have perused the contents of the writ petition made in paragraph-11, which recites that the committee of management submitted papers on 18.01.2010. Reply to the same has been given in paragraph-11 of the counter affidavit and in paragraph-10 of the supplementary counter affidavit, which admits that papers were received in the office of DBEO on 18.01.2010 but without any material on record it has been stated that same were returned to the Manager of the institution without disclosing any date.

35. To meet out ends of justice, I have perused the order, which was passed earlier on 24.02.2010, annexed at page-58, wherein it has been admitted that letter dated 18.01.2010 was made available to the office of DBEO on 27.02.2010. It clearly demonstrates that the statement made in paragraph-11 of the counter affidavit and page - 10 of supplementary counter affidavit do not corroborate with the letter dated 24.02.2010 and it appears that only to dislodge the claim of the petitioner of deemed approval, a concocted story has been framed by the DBEO. If this was the position, then clear cut statement of fact would have been made in the statement given along with counter affidavits. Thus, the claim setup by the DBEO in the counter affidavits is not acceptable in law.

36. Accordingly, the impugned order dated 04.03.2013 suffers from apparent illegality and cannot be sustained and is hereby quashed.

37. The writ petition succeeds and is **allowed.**

38. The DBEO, District Unnao is directed to pay the petitioner regular monthly salary month by month forthwith as well as arrears of salary w.e.f. 12.03.2010 till date within a period of three months from the date of production of a certified copy of this order.

(2021)02ILR A761
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 25.02.2021

BEFORE

THE HON'BLE VIVEK CHAUDHARY, J.

Service Single No. 2842 of 2021

Mahendra Kumar Gautam ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sameer Kalia, Abhishek Yadav

Counsel for the Respondents:
C.S.C.

A. Civil Law - U.P. Recruitment of Dependents of Government Servant Dying in Harness Rules, 1974 – Hindu Adoption and Maintenance Act, 1956 – Sections 5 and 16 – Registration Act, 1908 – S. 17(1)(f) – Compassionate appointment – Adoption deed claimed is not registered – Effect – After 01.01.1977 any adoption in theSt. of U.P. can take place by way of a registered deed only and not otherwise – Held, Adoption set up by the petitioner is in violation of Chapter-2 of the Act of 1956 – Heydons' Principle applied. (Para 10, 11 and 13)

B. Civil Law - Dying in Harness Rules, 1974 – Hindu Adoption and Maintenance Act, 1956 – Sections 8 and 12 – Compassionate appointment – Adoption by the widow, not by the deceased employee – Effect – Widow alone has signed the adoption deed accepting the petitioner in adoption – Held, the petitioner would at best become an adopted child of his adoptive mother, not of the deceased employee – Petitioner would not succeed to claim appointment under Rules of 1974. (Para 15)

C. Interpretation of statute – Heydons' Principle – Court is duty-bound to give an interpretation to the provisions which would promote the purpose for which amendments in the Acts were brought and not one that would make the amendments redundant. (Para 11)

Writ Petition dismissed .(E-1)

Cases relied on :-

1. Vijay Shankar Pandey Vs St. of U.P. & ors., 2006 SCC online All 1142

2. Jainendra Pratap Singh Vs St. of UP & ors., 2010 SCC online All 2508

3. Bijender & anr.Vs Ramesh Chand & ors., (2016) 12 SCC 483

4. Laxmibai (Dead) through LRS & anr. Vs Bhagwantbuva (Dead) through Lrs. & ors., (2013) 4 SCC 97

5. Baru (Since deceased) & anr. Vs Tej Pal & ors., 1997 SCC Online All 739

6. Lal Behari (Minor) Vs Gyanchand (Minor) & anr., 2007 SCC Online All 527

7. Rajendra Vs Assistant Director of Consolidation, 2018 SCC Online All 5606

8. Heydons' Case, [(1584) 3 Co Rep 7a : 76 ER 637],

9. R.B.I. Vs Peerless General Finance and Investment Co. Ltd. & ors., (1987) 1 SCC 424.

10. Utkal Contractors and Joinery Pvt. Ltd. & ors. Vs St. of Orissa a& ors., (1987) 3 SCC 279.

11. Novartis Ag. Vs U.O.I. & ors., (2013) 6 SCC 1.

(Delivered by Hon'ble Vivek Chaudhary, J.)

1. Heard Sri Sameer Kalia and Sri Abhishek Yadav, learned counsels for the petitioner and learned Standing Counsel for the State.

2. Petitioner has filed the present writ petition for quashing of the order dated 05.12.2020 passed by the Superintendent of Police, Rai Bareilly, respondent no.3, and for a mandamus commanding the respondents to reconsider the case of the petitioner for grant of a compassionate appointment on the post of Sub Inspector (Civil Police).

3. By the impugned order the respondent no.3 has rejected the application of the petitioner for appointment under Dying in Harness Rules, 1974 (Rules of 1974) on the ground that late Parsuram expired on 15.11.2018, while in service, and Mahendra Kumar Gautam, petitioner, was not a member of his family during his lifetime or at the time of his death. The petitioner was never an adopted son and dependent of late Parsuram. The document of adoption was not executed in the lifetime of late Parsuram and is executed by the

widow of late Parsuram. Therefore, the petitioner is not entitled to an appointment under the Rules of 1974.

4. The facts of the case are that Sri Parsuram was working on the post of Head Constable under respondent no.3 and expired in harness, due to heart failure, on 15.11.2018. Petitioner, on 08.08.2019, applied before respondent no.3 seeking a compassionate appointment on the post of Sub Inspector of police, claiming that he is an adopted son of the deceased employee. The adoption was set up on two different dates. The first adoption set up is on the day of Basant Panchami of the year 2002 in front of the entire village and the second is claimed on 27.04.2011 in presence of the gram pradhan and some other villagers. So far as the first adoption of the year 2002 is concerned, there is no adoption deed of the year 2002. There is an adoption deed concerning the second adoption dated 27.4.2011, but, the same is not a registered document. The only registered document is an adoption deed dated 20.12.2019 presented for registration on 21.12.2019 and registered on 24.12.2019. This registered deed is executed by the natural parents of the petitioner, claiming to have given him in adoption, and by Smt. Prema Devi wife of late Parsuram, claiming to have accepted petitioner in adoption. The said adoption deed states that on Basant Panchami of the year 2002, when petitioner was aged around 5 years, after conducting hawan, puja, etc. in presence of everyone, the adoption took place by both the natural parents and both the adopting parents, i.e., by Smt. Prema Devi as well late Parsuram, who then was alive. The deed further states that the document of adoption could not be registered at that time and, hence, now earlier executed adoption deed with the consent of parties is being presented for registration. The said document at the bottom notes its' date of drafting as 20.12.2019 and not of the year 2002. It does not even contain any signatures of late Parsuram.

5. Learned counsel for the petitioner, based on the aforesaid facts, submits that once there is a duly registered adoption deed, it was incumbent upon the authorities to accept the same. They cannot deny a valid adoption in the existence of a duly registered adoption deed. Reliance is placed upon the U.P. amendment to Section 16 of the Hindu Adoption and Maintenance Act, 1956 (Adoption Act, 1956). Further, reliance is also placed upon the succession certificate dated 12.06.2020 issued by the office of District Magistrate, Sitapur, which notes the two heirs of late Parsuram as Smt. Prema Devi, his widow, and Sri Mahendra Kumar Gautam, his adopted son. Based on these documents, counsel for the petitioner states that the petitioner is a duly adopted son of late Parsuram and, therefore, he is entitled to appointment under Dying in Harness Rules, 1974. Reliance is also placed by the petitioner upon the following judgments:-

(i) Vijay Shankar Pandey vs. State of Uttar Pradesh Through its Secretary, Irrigation Department, Lucknow and others 2006 SCC online All 1142

(ii) Jainendra Pratap Singh vs. State of Up. And ORS 2010 SCC online All 2508

(iii) Bijender and another vs. Ramesh Chand and others (2016) 12 SCC 483

(iv) Laxmibai (Dead) Through LRS and Another vs. Bhagwantbuva (Dead) Through Lrs. And others (2013) 4 SCC 97

(v) Baru (Since deceased) and another vs. Tej Pal and others 1997 SCC Online All 739

(vi) Lal Behari (Minor) vs. Gyanchand (Minor) And another 2007 SCC Online All 527

(vii) Rajendra vs. Assistant Director of Consolidation 2018 SCC Online All 5606

6. On the other hand, learned Standing Counsel submits that the adoption deed dated 20-12-2019 is executed after the death of late Parsuram and, therefore, the same can not confer any right upon the petitioner to claim appointment as the son of late Parsuram. He further states that even at best, the adoption can be said to have taken place in the year 2019, and admittedly at that time petitioner was a major, a fact not disputed by the petitioner, and thus could neither be given nor taken in adoption. He further argues that succession certificate is a collusive act on part of family members of the petitioner and has no binding force upon the respondents who are to act as per Rules of 1974.

7. By U.P. Civil Laws (Reforms and Amendments) Act, 1976 ('Amending Act of 1976'), amendments were brought in several laws in the State of U.P., including in the Registration Act, 1908 and the Adoption Act, 1956. The said amendments were made operative with effect from 01.01.1977. The Statement of Objects and Reasons, for introducing the bill, in paragraph-5 states:-

"5. A deed of adoption of a child, a sale deed of immovable property of the value below Rs. 100 and an agreement to sell immovable property, are not required compulsorily to be registered at present. Playing upon the element of chance involved in oral evidence, fictitious ante-dated deeds of such nature are set up with view to usurp the property of a rightful transferee of legatee, and on the other hand genuine transactions of these categories are challenged. Suitable amendments are proposed in the Transfer of Property Act, 1882, The Registration Act, 1908, and the Hindu Adoption and Maintenance Act 1956 to make compulsory the registration of the adoption deeds, all agreements to sell immovable property and all transfers of immovable property irrespective of the value or consideration."

8. By Section 35 of the Amending Act of 1976, Section 16 of the Act of 1956 was amended and relevant amended Section 16 reads:-

"Uttar Pradesh- Renumber Section 16 as sub-section (1)thereof and after sub-section (1) as so renumbered, insert the following sub-section (2) namely:--

"(2) In case of an adoption made on or after the 1st day of January, 1977 no court in Uttar Pradesh shall accept any evidence in proof of the giving and taking of the child in adoption, except a document recording an adoption, made and signed by the person giving and the person taking the child in adoption, and registered under any law for the time being in force:

Provided that secondary evidence of such document shall be admissible in the circumstances and the manner laid down in the Indian Evidence Act, 1872."

9. Similarly, by Section 32 of the Amending Act of 1976, Section 17 of the Registration Act, 1908 was also amended and the relevant amendment for our case is the addition of sub-clause (f) in Sub-Section 17(1). After amendment Section 17(1)(f) reads:-

"17. Documents of which registration is compulsory.--(l) The following

documents shall be registered, if the property to which they relate is situate in a district in which, and if they have been executed on or after the date on which, Act No. XVI of 1864, or the Indian Registration Act, 1866, or the Indian Registration Act, 1871, or the Indian Registration Act, 1877, or this Act came or comes into force, namely:--,

.....

(f) any other instrument required by any law for the time being in force, to be registered,"

10. A reading of amended Section 16(2) of the Adoption Act, 1956 and Section 17(1)(f) of the Registration Act, 1908 makes it clear that after 01.01.1977 any adoption in the State of U.P. can take place by way of a registered deed only and not otherwise. The period within which a document can be presented for registration is provided under Section 23 of the Registration Act, 1908. The same reads:-

"23 ***Time for presenting documents****.-- Subject to the provisions contained in sections 24, 25 and 26, no document other than a will shall be accepted for registration unless presented for that purpose to the proper officer within four months from the date of its execution:*

Provided that a copy of a decree or order may be presented within four months from the day on which the decree or order was made, or, where it is appealable, within four months from the day on which it becomes final."

11. A perusal of the Statement of Objects and Reasons quoted above shows that the amendments in law were brought so that oral evidence or fictitious anti-dated deed may not be set up to claim any wrongful right or usurp the rights of a rightful person. If a contrary interpretation is accepted and this Court permits registration of an adoption deed beyond the period of four months, as provided under Section 23 of the Registration Act, 1908, the very mischief which is sought to be corrected by the U.P. Act of 1976 would be frustrated and the fraud and fictitious activities would go on unabated. This Court is duty-bound to give an interpretation to the provisions which would promote the purpose for which amendments in the Acts were brought and not one that would make the amendments redundant. This principle of interpreting a statute finds mention for the first time in ***Heydons' Case, [(1584) 3 Co Rep 7a : 76 ER 637],*** (thus also known as Heydon's Principle), which states:-

"that for the sure and true interpretation of all statutes in general (be they penal or beneficial restrictive or enlarging of the common law) four things are to be discerned and considered: (1st) What was the common law before the making of the Act. (2nd) What was the mischief and defect for which the common law did not provide. (3rd) What remedy Parliament has resolved and appointed to cure the disease of the commonwealth. And, (4th) The true reason of the remedy; and then the office of all the Judges is always to make such construction as shall: (a) suppress the mischief, and advance the remedy, (b) suppress subtle inventions and evasions for continuance of the mischief, and pro private commodo, (c) add force and life to the cure and remedy, according to the true intent of the makers of the Act, pro bono publico."

(ii) Maxwell on the Interpretation of Statutes, 12th edition; Chapter-6, page 137, states:-

"I NEVER understand," said Lord Cranworth L.C. (at p.89), "what is meant

by evading an Act of Parliament. Either you are within the Act or you are not; if your are not within it, you are right; if you are within it, the course is clear, and it cannot be said that you are not within it because the very words of the Act may not have been violated." On the other hand, there is no doubt that "the office of the Judge is, to make such constructions as will suppress the mischief, and advance the remedy, and to suppress all evasions for the continuance of the mischief." To carry out effectually the object of a statute, it must be so construed as to defeat all attempts to do, or avoid doing, in an indirect or circuitous manner that which it has prohibited or enjoined: quando aliquid prohibetur, prohibitur et omne per quod denenitur ad illud;

This manner of construction has two aspects. One is that the courts, mindful of the mischief rule, will not be astute to narrow the language of a statute so as to allow persons within its purview to escape its net. The other is that the statute may be applied to the substance rather than the mere form of transactions, thus defeating any shifts and contrivances which parties may have devised in the hope of thereby falling outside the Act. When the courts find an attempt at concealment, they will, in the words of Wilmot C.J., "brush away the cobweb varnish, and shew the transactions in their true light."

(iii) In Halsbury's Laws of England, Vol. 44(1), 4th Reissue, para 1474, pp. 906-07, it is stated:

"Parliament intends that an enactment shall remedy a particular mischief and it is therefore presumed that Parliament intends that the court, when considering, in relation to the facts of the instant case, which of the opposing constructions of the enactment corresponds to its legal meaning, should find a construction which applies the remedy provided by it in such a way as to suppress that mischief. The doctrine originates in Heydon's case [(1584) 3 Co Rep 7a : 76 ER 637] where the Barons of the Exchequer resolved that for the sure and true interpretation of all statutes in general (be they penal or beneficial, restrictive or enlarging of the common law), four things are to be discerned and considered:

(1) what was the common law before the making of the Act;

(2) what was the mischief and defect for which the common law did not provide;

(3) what remedy Parliament has resolved and appointed to cure the disease of the commonwealth; and

(4) the true reason of the remedy;and then the office of all the judges is always to make such construction as shall:

(a) suppress the mischief and advance the remedy; and

(b) suppress subtle inventions and evasions for the continuance of the mischief pro privato commodo (for private benefit); and

(c) add force and life to the cure and remedy according to the true intent of the makers of the Act pro publico (for the public good)."

The Supreme Court has also followed the said principle in a large number of cases, some of which are:-

(i) ***Reserve Bank of India Vs. Peerless General Finance and Investment Co. Ltd. and Others1*** *Paragraph 33 of the said judgment reads:-*

"33. Interpretation must depend on the text and the context. They are the basis of interpretation. One may well say if the text is the texture, context is what gives the colour. Neither can be ignored. Both are important. ***That interpretation is best which makes the textual interpretation***

match the contextual. A statute is best interpreted when we know why it was enacted. *With this knowledge, the statute must be read, first as a whole and then section by section, clause by clause, phrase by phrase and word by word.* ***If a statute is looked at, in the context of its enactment, with the glasses of the statute maker, provided by such context, its scheme, the sections, clauses, phrases and words may take colour and appear different than when the statute is looked at without the glasses provided by the context. With these glasses we must look at the Act as a whole and discover what each section, each clause, each phrase and each word is meant and designed to say as to fit into the scheme of the entire Act.*** *No part of a statute and no word of a statute can be construed in isolation. Statutes have to be construed so that every word has a place and everything is in its place. It is by looking at the definition as a whole in the setting of the entire Act and by reference to what preceded the enactment and the reasons for it that the Court construed the expression 'Prize Chit' in Srinivasa and we find no reason to depart from the Court's construction." (emphasis added)*

(ii) ***Utkal Contractors and Joinery Pvt. Ltd. and Others Vs. State of Orissa and Others****2 In paragraph-9, the Supreme Court held:-*

"9. In considering the rival submissions of the learned counsel and in defining and construing the area and the content of the Act and its provisions, it is necessary to make certain general observations regarding the interpretation of statutes. ***A statute is best understood if we know the reason for it. The reason for a statute is the safest guide to its interpretation. The words of a statute take their colour from the reason for it. How do we discover the reason for a statute? There are external and internal aids. The external aids are Statement of Objects and Reasons when the Bill is presented to Parliament, the reports of Committees which preceded the Bill and the reports of Parliamentary Committees.*** *Occasional excursions into the debates of Parliament are permitted. Internal aids are the preamble, the scheme and the provisions of the Act. Having discovered the reason for the statute and so having set the sail to the wind, the interpreter may proceed ahead. No provision in the statute and no word of the statute may be construed in isolation. Every provision and every word must be looked at generally before any provision or word is attempted to be construed. The setting and the pattern are important. It is again important to remember that Parliament does not waste its breath unnecessarily. Just as Parliament is not expected to use unnecessary expressions, Parliament is also not expected to express itself unnecessarily. Even as Parliament does not use any word without meaning something, Parliament does not legislate where no legislation is called for. Parliament cannot be assumed to legislate for the sake of legislation; nor can it be assumed to make pointless legislation. Parliament does not indulge in legislation merely to state what is unnecessary to state or to do what is already validly done. Parliament may not be assumed to legislate unnecessarily.* ***Again, while the words of an enactment are important, the context is no less important. For instance, "the fact that general words are used in a statute is not in itself a conclusive reason why every case falling literally within them should be governed by that statute, and the context of an Act may well indicate that wide or general words should be given a restrictive meaning"*** *(see Halsbury, 4th edn. Vol. 44 para 874)." (emphasis added)*

(iii) ***Novartis Ag. Vs. Union of India and Others3****. In paragraph 28, the Court held:-*

"28. ***In order to understand what the law really is, it is essential to know the "why" and "how" of the law. Why the law is what it is and how it came to its present form****? The adage is more true in case of the law of patents in India than perhaps any other law. Therefore, in order to correctly understand the present law it would be necessary to briefly delve into the legislative history of the law of patents in the country." (emphasis added)*

12. Thus, from the reading of Section 16 of Adoption Act, 1956 and Section 17(1)(f) read with Section 23 of Registration Act, 1908 and, applying the Heydons' Principle, it is clear that the registered adoption deed set up by the petitioner is not a valid adoption deed. Even its' registration could not have taken place.

13. From the aforesaid discussion, it is clear that the adoption set up by the petitioner is in violation of Chapter-2 of Adoption Act of 1956. Section 5 of the said Act provides that any adoption made in contravention of Chapter-2 shall be void. Since, the adoption set up by the petitioner is in violation of provisions of Chapter-2 of the Adoption Act of 1956 the same is a void document.

14. Now, lets also consider the judgments relied upon by the counsels for the petitioner. In the case of ***Vijay Shankar Pandey (supra)***, the petitioner was granted an appointment under Dying in Harness Rules, 1974 after looking into the correctness and validity of the adoption deed. After his continuing in the job for around a year his appointment was canceled without giving him any opportunity of hearing and on a note of the Chief Minister on a complaint filed by the persons who were involved in the murder of his father, the deceased employee. The Court allowed the said writ petition on the ground that the order cancelling the appointment only refers to there being some doubt created by the High School mark-sheet of the petitioner. There was no conclusive proof that the adoption was invalid. The impugned order was passed without giving any notice or opportunity of hearing to the petitioner and without any finding of fact that adoption was invalid. The Court also noted that there was an earlier satisfaction of a valid adoption recorded at the time of the petitioner's appointment. The argument under consideration in the present writ petition was neither raised in the said writ petition nor decided. In Jainendra Pratap Singh (supra) case, Section 16 of the Adoption Act, 1956 as well as provisions of Registration Act, 1908 were not taken into consideration by the Court and, therefore, the same has no application to the present case. In ***Bijender and another (supra***) case, a registered adoption deed was challenged on the ground that though, seven-eight persons have signed the adoption deed but the natural guardians had not signed the adoption deed at the place provided for natural guardians but they had signed it along with witnesses. The Court refused to go into the hyper-technicalities and believed the adoption deed. Therefore, the same also has no applicability to the facts of the present case. In ***Laxmibai (Dead) Through LRS and Another (supra)*** case, in paragraph-4 it is specifically noted that adoption took place on 11.05.1971 in presence of all, and on the same day the adoption deed was executed and registered. Therefore, the facts of the said case are entirely different and not applicable to the present case. Even the question involved in the present writ petition was not raised in the

said case. In ***Baru (Since deceased) and another (supra)*** case, the grounds raised in the present writ petition were not raised. The two questions considered in the said case by the Court were (i) as to whether the appellant had a right to sue and (ii) whether the requisite ceremony of adoption was performed or not. While considering the second ground, the Court said that the requisite ceremony for adoption was performed. The due execution and registration of adoption deed was proved and evidence given by the defendants has to be presumed to be correct under Section 16 of the Hindu Adoption and Maintenance Act, 1956. Therefore, the law settled in the said case is also not applicable to the facts of the present case as due execution of the adoption deed is not proved in the present case. In ***Lal Behri (Minor) (supra)*** case the factual controversy was considered and the argument raised in the present writ petition or the provisions referred were also not considered and, thus, said judgment does not apply to the present case. In ***Rajendra (supra)*** case also the deed was duly registered on 26.06.1981 and was duly filed before the consolidation authorities. The Court, therefore, relied upon the same under Section 16 of the Hindu Adoption and Maintenance Act, 1956. The question raised in the present writ petition i.e. impact of Section 17(f) read with Section 23 of the Registration Act, 1908 was neither raised nor considered in the said judgment. Therefore, the same is also not applicable to the facts of the present case. Thus, none of the judgments relied upon by the counsel for the petitioner have any bearing on the present case.

15. Though in the year 2019 petitioner was major and could not be adopted but still even accepting for the sake of arguments, the submission made by counsels for the petitioner, that, the adoption deed executed on 20.12.2019 is a valid adoption deed duly registered and thus must be accepted under Section 16 of the Adoption Act, 1956, still, petitioner would not succeed to claim appointment under Rules of 1974. The reason is that Section 8 of the Adoption Act, 1956 describes the capacity of a female to take in adoption. It provides that "***any female Hindu who is of sound mind and is not a minor has the capacity to take a son or daughter in adoption.***" The proviso to the same provided that if she has a husband living then the adoption shall be with the consent of her husband. Section 12 provides the effects of adoption. It says "***An adopted child shall be deemed to be the child of his or her adoptive father or mother for all purposes with effect from the date of the adoption.....".*** In the present case, admittedly in the year 2019 Smt. Prema Devi did not have a husband, but she was competent enough to adopt alone. She alone has signed the adoption deed accepting the petitioner in adoption. Therefore, under Section 8 read with Section 12 of the Adoption Act,1956 the petitioner would at best become an adopted child of his adoptive mother, i.e., Smt. Prema Devi only and not an adoptive child of late Parsuram.

16. So far as the succession certificate dated 12.06.2020 issued by the office of District Magistrate, Sitapur is concerned the same also is a document issued on the basis of stand taken by the family members. The same has no binding effect upon respondents. The respondents department can individually look into the entire matter and take a stand in accordance with law. The said document is not sufficient to accept the claim of the petitioner for appointment under the Rules of 1974.

17. Thus, this Court does not find any force in the present writ petition filed by the petitioner and the same is ***dismissed***.

(2021)02ILR A770
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 25.01.2021

BEFORE

THE HON'BLE CHANDRA DHARI SINGH, J.

Service Single No. 6063 of 2017

Sunder Singh Solanki ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Maneesh Sahdev, Shailendra Singh Rajawat

Counsel for the Respondents:
C.S.C., Abhinav N Trivedi, K. Chandra

A. Constitution of India – Article 21 – Right to life and personal liberty – Right to good health – Right to life enshrined in Article 21 has been held to mean something more than survival or animal existence – This right include right to live with human dignity – It include all those aspects of life, which go to make a man's life meaningful, complete and worth living – Held, right of the petitioner to seek reimbursement of medical expenses incurred by him to ensure his right to health would fall within the ambit of right to life. (Para 12)

B. Civil Law - U.P. Government Servants (Medical Attendance), Rules, 2011 – Accident during discharging of Official duties – Injury sustained –Medical reimbursement – Claim – Genuineness of Medical bill undisputed – Meager amount – Validity – Held, once the accident and the medical bills are undisputed, the medical reimbursement cannot be denied on technical grounds, the respondents have clearly misdirected themselves by disallowing the petitioner's reimbursement of his medical bills under the pretext of Rules. (Para 13)

C. Interpretation of statute – Objective interpretation – Medical Attendance Rules providing for reimbursement of the medical expenses to the Government servant and retired pensioners, is a beneficial and welfare legislation meant for the welfare of the Government servants – A liberal, sympathetic and objective interpretation for the applicability of these Rules, has to be made by the Courts and not a pedantic or narrow approach of the matter would subserve the interest of justice. (Para 17)

Writ Petition allowed. (E-1)

Cases relied on :-

1.St. of Punj. & ors. Vs Ram Labhaya Bagga & ors., (1198) 4 SCC 117

2.St. of Punj. Vs Mohan Lal Jindal, 2001 (9)SCC 217

3.Paschim Banga Khet Mazdoor Samity Vs St. of W.B., (1996) 4 SCC 37

4. Surjit Singh Vs St. of Punj. & ors., (1996) 2 SCC 336

5. Menika Gandhi Vs U.O.I., AIR 1978 Supreme Court 597

(Delivered by Hon'ble Chandra Dhari Singh, J.)

1. In effect, the present petition has been filed with the prayer to quash the order dated 29.09.2016 passed by Senior Superintendent of Police, Lucknow and also to command the respondents to pay the remaining amount of medical reimbursement of Rs.8,84,879.60 against the expenses at Apollo Indraprasth Hospital, New Delhi and Rs.53,027/- against the expenses at KGMU, Lucknow along with 18% interest including the

amount of Rs.3,30,000/- against the expenses of Air Ambulance and also the amount spent against the private rooms of hospital.

2. Brief facts of the case are that the petitioner met with an accident during late hours of night at 1.45 am on 26.07.2010 while he was posted as Station Officer, Police Station Gosainganj and was on patrolling. The petitioner sustained severe injuries and he was brought to Trauma Centre in King George Medical University, Lucknow. At a later point of time, looking to the condition of the petitioner, he was referred to Indraprasth Apollo Hospital New Delhi for further treatment. The petitioner was Airlifted and he was remained in the hospital up to 22.08.2010. On 23.08.2010, the petitioner was sent to Lucknow and he remained under treatment at King George Medical University till 08.04.2011. On 09.04.2011, the petitioner joined his services on the advise of the doctors. The petitioner submitted his all bill vouchers amounting to Rs.98,406/- spent in KGMU and Rs.10,99,219.60 spent in Apollo Hospital, New Delhi to the D.I.G. Police, Lucknow Range who referred the matter to the Director General Medical Health, Lucknow (opposite party no.2). The opposite party no.3 sanctioned only an amount of Rs.1,48,340/- against the expenses at Indraprasth Apollo Hospital New Delhi and Rs.45,479/- against the expenses at K.G.M.U., Lucknow. The amount of Rs.3,30,000/- against the bill of Air Ambulance was not sanctioned.

3. Being dissatisfied with the meager amount, so sanctioned, the petitioner preferred a representation to the Additional Director, Medical and Health, Lucknow (opposite party no.3) on 18.04.2011. Thereafter the petitioner has filed a writ petition No.6092 (SS) of 2012 praying therein to reimburse the amount so incurred on the medical treatment. The said writ petition was disposed of vide order dated 01.08.2016 giving liberty to the petitioner to approach the respondent no.4-Senior Superintendent of Police, Lucknow for ventilation of his grievance by making a representation which shall be considered and decided by the respondent no.4 in accordance with law. It was also observed that the Senior Superintendent of Police, Lucknow while considering the matter under this order shall also give finding as to whether provisions of Uttar Pradesh Government Servant (Medical Attendance) Rules, 2011 are applicable to the case of the petitioner or not. The petitioner preferred a representation in compliance to the order of this Court dated 01.08.2016, which has been rejected by impugned order dated 29.09.2016 on the ground that the claim has been settled before issuance of the U.P. Government Servants (Medical Attendance), Rules, 2011. Hence, this petition.

4. Learned counsel for the petitioner has submitted that respondent no.3 in a very illegal and arbitrary manner without applying his mind sanctioned only an amount of Rs.1,48,340/- against the claim of Rs.10,33,219.60 and Rs.45,479/- against the claim of Rs.98,406/-. Learned counsel submits that the actual claim of the petitioner was verified by the competent authorities of the K.G.M.U, and the Appollo Hospital New Delhi, but the authorities did not sanction the entire amount and no reason has been assigned. It is submitted that the petitioner cannot be denied the payment of entire amount of medical reimbursement as he met with an accident and sustained serious injuries while he was on official duty. Learned

counsel submits that as per the earlier Government Orders and the Uttar Pradesh Government Servants (Medical and Attendance) Rules, 2011 (for short 'Rules 2011'), the petitioner is entitled for the expenses of the private room or special room during the treatment as his basic salary was Rs.22,370/- and 'Rules 2011' also provides for the expenses of Air Ambulance in case of emergency but despite of the admitted fact of emergent situation, the fee of Air Ambulance was not paid to the petitioner. It has also been submitted that the opposite parities have illegally denied the benefit of the 'Rules 2011' to the petitioner. Learned counsel for the petitioner has submitted that the representation of the petitioner has been rejected without application of mind. The denial of medical reimbursement is not only violate the legal right of the petitioner but also violative of fundamental rights of the petitioner. Learned counsel for the petitioner submits that the impugned order is liable to be quashed and the petitioner is entitled for the payment of medical reimbursement.

5. Per contra, learned counsel for the State has vehemently opposed the submissions made by the learned counsel for the petitioner and submitted that in compliance to order dated 01.08.2016 passed in W.P. 6092 (SS) of 2012, the representation of the petitioner has been decided in accordance with law by the impugned order. Learned Standing Counsel has submitted that all admissible amounts have been reimbursed to the petitioner after due consideration and as per the relevant rules and the Government Orders applicable at the relevant time. The incident was taken place on 26.07.2010 and the 'Rules 2011' came into existence w.e.f. 02.09.2011 and therefore the same is not applicable in the case of the petitioner. It is submitted that the department has proceeded with the matter and after following the procedure prescribed in the relevant rules and the Government Orders, amounts have been reimbursed to the petitioner. Learned counsel for the State has submitted that the writ petition has no merit and it is liable to be dismissed.

6. Heard learned counsel for the parties and perused the record. Pleadings have already been exchanged.

7. It is admitted fact that the petitioner met with an accident during discharging of his official duties. He was admitted in the Hospital at King George Medical University and thereafter looking to his condition, he was referred to the Appollo Indraprasth Hospital, New Delhi on the advise of the doctors for the specialized treatment. After the treatment, he has submitted his medical bills duly verified by the doctors and there is no dispute regarding the genuineness of the medical bills, which have been submitted to the department for the reimbursement.

8. In the petition, it is contended that this Court may exercise its jurisdiction under Article 226 of the Constitution of India so that the fundamental rights of the petitioner under Article 14 and 21 of the Constitution are protected and promoted by reimbursing his medical expenditure already incurred by him under genuine emergency.

9. In the case of ***State of Punjab and others vs. Ram Labhaya Bagga and others reported at (1198) 4 SCC 117*** Hon'ble the Apex Court in para 23 and 27 the following has held that :

"23. When we speak about a right, it corelates to a duty upon another,

individual, employer, Government or authority. In other words, the right of one is an obligation of another. Hence the right of a citizen to live under Article 21 casts obligation on the State. This obligation is further reinforced under Article 47, it is for the State to secure health to its citizen as its primary duty. No doubt Government is rendering this obligation by opening Government hospitals and health centers, but in order to make it meaningful, it has to be within the reach of its people, as far as possible, to reduce the queue of waiting lists, and it has to provide all facilities for which an employee looks for at another hospital. Its up-keep; maintenance and cleanliness has to be beyond aspersion. To employ the best of talents and tone up its administration to give effective contribution. Also bring in awareness in welfare of hospital staff for their dedicated service, give them periodical, medico-ethical and service oriented training, not only at the entry point but also during the whole tenure of their service. Since it is one of the most sacrosanct and valuable rights of a citizen and equally sacrosanct sacred obligation of the State, every citizen of this welfare State looks towards the State for it to perform its this obligation with top priority including by way of allocation of sufficient funds. This in turn will not only secure the right of its citizen to the best of their satisfaction but in turn will benefit the State in achieving its social, political and economical goal. For every return there has to be investment. Investment needs resources and finances. So even to protect this sacrosanct right finances are an inherent requirement. Harnessing such resources needs top priority."

However, having regard to the fact that the medical facilities continued to be given and an employee was given free choice to get treatment from any private hospital in India but the amount of payment for reimbursement was regulated, it was opined :-

"27. No State or any country can have unlimited resources to spend on any of its project. That is why it only approves its projects to the extent it is feasible. The same holds good for providing medical facilities to its citizen including its employees. Provision of facilities cannot be unlimited. It has to be to the extent finance permit. If no scale or rate is fixed then in case private clinics or hospitals increase their rate to exorbitant scales, the State would be bound to reimburse the same. Hence we come to the conclusion that principle of fixation of rate and scale under this new policy is justified and cannot be held to be violative of Article 21 or Article 47 of the Constitution of India."

The aforesaid principle was reiterated in the case of State of Punjab vs. Mohan Lal Jindal reported at 2001 (9)SCC 217.

10. In the case of ***Paschim Banga Khet Mazdoor Samity v. State of W.B. reported at (1996) 4 SCC 37*** Hon'ble the Apex Court has held that

"The Constitution envisages the establishment of a welfare State at the federal level as well as at the State level. In a welfare State the primary duty of the Government is to secure the welfare of the people. Providing adequate medical facilities for the people is an essential part of the obligations undertaken by the Government in a welfare State. The Government discharges this obligation by running hospitals and health centres which provide medical care to the person seeking to avail of those facilities. Article 21 imposes an obligation on the State to safeguard the right to life of every person. Preservation of human life is thus of

paramount importance. The government hospitals run by the State and the medical officers employed therein are duty-bound to extend medical assistance for preserving human life. Failure on the part of a government hospital to provide timely medical treatment to a person in need of such treatment results in violation of his right to life guaranteed under Article 21."

11. In the case of ***Surjit Singh vs. State of Punjab and others reported at (1996) 2 SCC 336*** Hon'ble the Apex Court has held as under :

"In a case where the appellant therein while in England fell ill and being a case of emergency case was admitted in Dudley Road Hospital, Birmingham. After proper medical diagnosis he was suggested treatment at a named alternate place. He was admitted and undergone bypass surgery in Humana Hospital, Wellington, London. He claimed reimbursement for the amount spent by him.

In the peculiar facts of that case it was held :-

"11. It is otherwise important to bear in mind that self preservation of one's life is the necessary concomitant of the right to life enshrined in Article 21 of the Constitution of India, fundamental in nature, sacred, precious and inviolable. The importance and validity of the duty and right to self-preservation has a species in the right of self defence in criminal law. Centuries ago thinkers of this Great Land conceived of such right and recognised it. Attention can usefully be drawn to verses 17, 18, 20 and 22 in Chapter 16 of the Garuda Purana (A Dialogue suggested between the Divine and Garuda, the bird) in the words of the Divine :

17. Vinaa dehena kasyaapi canpurushaartho na vidyate Tasmaaddeham dhanam rakshetpunyakarmaani saadhayet Without the body how can one obtain the objects of human life? Therefore protecting the body which is the wealth, one should perform the deeds of merit.

18. Rakshayetsarvadaatmaanamaatmaa sarvasya bhaajanam Rakshane yatnamaatishthejje vanbhaadraani pashyati One should protect his body which is responsible for every thing. He who protects himself by all efforts, will see many auspicious occasions in life.

20. Shararakshanopaayaah kriyante sarvadaa budhaih Necchanti cha punastyaagamapi kushthaadiroginah The wise always undertake the protective measures for the body. Even the persons suffering from leprosy and other diseases do not wish to get rid of the body.

22. Aatmaiva yadi naatmaanamahitebhyo nivaarayet Konsyo hitakarastasmaadaatmaanam taarayishyati If one does not prevent what is unpleasent to himself, who else will do it? Therefore one should do what is good to himself."

We may, however, notice that in that case, before the Court, Rules framed under the proviso to Article 309 of the Constitution of India, were not in force. What were in force were the Policies regarding reimbursement of medical expenses framed by the State of Punjab on 25th January, 1991 and 8th October, 1991."

12. The right to life of a citizen of the country is the obligation on the part of the State to reimburse the Medical Expenses incurred by the employees. Article 21 of the Constitution says that no person shall be deprived of his life or personal liberty except according to procedure established by law. Right to life enshrined in this

Article has been held to mean something more than survival or animal existence. This right would include right to live with human dignity, a right to minimum subsistence allowance during suspension. This right would include all those aspects of life, which go to make a man's life meaningful, complete and worth living. This principle was laid down by Hon'ble the Apex Court in the case of ***Menika Gandhi v. Union of India, AIR 1978 Supreme Court 597***. An aspect which alone can make it possible to live must be declared to be an integral component of right to life. Right to livelihood would also be a facet of right to life. Even right to good health has been held to be inclusive of right to life. That being the wide scope and ambit of this Article, right of the petitioner to seek reimbursement of medical expenses incurred by him to ensure his right to health would fall within the ambit of right to life. The responsibility of the Government towards government employees can not be left at the whims of the officials. The Government can not be permitted to escape from responsibility to reimburse the medical expenses of the employees incurred on the support of some technicalities.

13. In the instant case, the accident taken place during discharge of official duties. The petitioner was admitted in the Government Hospital in emergency condition and thereafter referred for the further treatment which was the requirement and necessity for survival of his life. Once the accident and the medical bills are undisputed, the medical reimbursement cannot be denied on technical grounds. The respondents have clearly misdirected themselves by disallowing the petitioner's reimbursement of his medical bills under the pretext of Rules. The Rules do not disentitle the petitioner from getting reimbursement of his medical bills, if otherwise are found genuine. The State and its officials being public functionary are supposed to discharge their duties for larger benefit of its citizens. It is welfare State. The respondents were expected to perform their duties in a more responsible, reasonable and passionate manner so as to visualize the problem and hardship faced by the government employees.

14. It is settled legal position that the Government employee during his life time or after his retirement is entitled to get the benefit of the medical facilities and no fetters can be placed on his rights. It is acceptable to common sense, that ultimate decision as to how a patient should be treated vests only with the Doctor, who is well versed and expert both on academic qualification and experience gained. A very little scope is left to the patient or his relative to decide as to the manner in which the ailment should be treated. Speciality Hospitals are established for treatment of specified ailments and services of Doctors specialized in a discipline are availed by patients only to ensure proper, required and safe treatment. Can it be said that taking treatment in Speciality Hospital by itself would deprive a person to claim reimbursement solely on the ground that the expenditure incurred was excess to his entitlement. The right to medical claim cannot be denied on technical grounds. Before any medical claim is honoured, the authorities are bound to ensure as to whether the claimant had actually taken treatment and the factum of treatment is supported by records duly certified by Doctors/Hospitals concerned. Once, it is established, the claim cannot be denied on technical grounds.

15. It is admitted fact that the medical bills which have been submitted by the petitioner were duly verified by the concerned hospitals. The petitioner was discharged from the Indraprasth Apollo Hospital on 22.08.2010. Thereafter, he was sent to Lucknow and further he remained under treatment at King George Medical University, Lucknow till 08.04.2011. On the advise of the doctor, he joined his duties on 09.04.2011. The petitioner submitted all medical bills to the D.I.G. Police Lucknow Range for reimbursement, however, only Rs.1,48,340/- was sanctioned against the claim of Rs.10,33,219/- and Rs.45,479/- was sanctioned against the claim of Rs.98,406/-. On 18.04.2011, the petitioner made representation to opposite party no.2 for reconsideration but no order was passed by the competent authority. In the year 2012, the petitioner filed a writ petition No.6092 (SS) of 2012 before this Court which was disposed of vide order dated 01.08.2016 with direction to the S.S.P. Lucknow to reconsider the claim of the petitioner. So, the matter regarding bill of medical reimbursement never finally settled and in the meantime the U.P. Government Servant (Medical Attendance) Rules 2011 came into force and made applicable w.e.f. 02.09.2011.

16. Now the question which is for consideration is whether the duly verified medical bills by the concerned hospitals may be reimbursed to the petitioner as per the Rules 2011 or not ? It is also relevant to take into consideration that if the petitioner was not sent by the Air Ambulance, then he would certainly have died for want of better medical treatment.

17. Apparently and avowedly, the Medical Attendance Rules providing for reimbursement of the medical expenses to the Government servant and retired pensioners, is a beneficial and welfare legislation meant for the welfare of the Government servants and, therefore, a liberal, sympathetic and objective interpretation for the applicability of these Rules, has to be made by the Courts and not a pedantic or narrow approach of the matter would subserve the interest of justice.

18. In the aforesaid facts and circumstances the case in hand, it is admitted fact that the bills which were submitted for reimbursement were duly verified by the concerned hospitals and it is also not disputed by the State - respondents that the condition of the petitioner was critical and he was required specialized treatment under the advise of the doctors of K.G.M.U., so he was shifted to Appollo Hospital New Delhi by Air Ambulance. The only objection on behalf of the State is that Rules 2011 is not applicable in the case of the petitioner as the incident took place prior to the commencement of the Rules 2011 but it is admitted fact that till the commencement of the Rules, 2011, medical bills of the petitioner was not settled by the competent authority and this Court vide order dated 01.08.2016 passed in writ petition No.6092 (SS) of 2012 has directed to consider the claim of the petitioner for the reimbursement of the medical bills.

19. Since the amount of medical bills of the petitioner was not settled and pending for reimbursement before the competent authority after the commencement of the Rules 2011, I am of the view that the claim of the petitioner requires consideration as per the Rules 2011. Thus, the impugned order dated 29.09.2016 passed by Senior

Superintendent of Police, Lucknow is liable to be set aside.

20. Accordingly, the writ petition is **allowed**. Impugned order dated 29.09.2016 is hereby set aside. A writ of mandamus is issued directing the respondents - competent authority to re-consider the claim of the petitioner for the reimbursement of the medical bills in terms of the Uttar Pradesh Government Servants (Medical and Attendance) Rules, 2011. Whatever amount the petitioner is entitled, the same be released. The said exercise shall be completed within two months from the date of receipt of a certified copy of this order.

No costs. Pending applications, if any stands disposed of.

(2021)02ILR A777
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 25.01.2021

BEFORE

THE HON'BLE CHANDRA DHARI SINGH ALI, J.

Service Single No. 12306 of 2016

Mrs. Vinay Kumari ...Petitioner
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Petitioner:
Yadukul Shiromani Srivast

Counsel for the Respondents:
C.S.C.

A. Civil Law - U.P. Recruitment of Dependents of Government Servant Dying in Harness Rules, 1974 – Rule 5 – Compassionate appointment – Object and Purpose – Maintenance of other family members of deceased – Consequence of failure – Object and purpose of compassionate appointment is to provide ameliorative relief to the family of a government servant who has died in harness – Where compassionate appointment is provided under Rule 5, there is an obligation under the rule for the person appointed to maintain the other members of the family of the deceased government servant who were dependent on him/her immediately before the death occurred and who are unable to maintain themselves – When the person appointed neglects or refuses to maintain a person whom he or she is liable to maintain, the services are liable to be terminated under the Conduct, Discipline and Appeal Rules. (Para 10 and 11)

B. Civil Law - U.P. Recruitment of Dependents of Government Servant Dying in Harness Rules, 1974 – Rule 5 – Compassionate appointment – Filing of application – Time limit of five years – Relaxation – Held, rationale for imposing the requirement of the application being made within five years is that the nexus between the grant of employment and the need of the family is preserved. That is because after a lapse of time the sense of need or dependency may cease to exist both financially and otherwise – However, Rule 5 enables the time limit to be dispensed with or relaxed for the purpose of dealing with a case in a just and equitable manner where undue hardship is shown. (Para 11)

C. Constitution of India – Article 14 and 15 – U.P. Recruitment of Dependents of Government Servant Dying in Harness Rules, 1974 – Rule 2(c) – Compassionate appointment – Word 'family' – Scope and Ambit – Use of the word 'unmarried' before daughter – Validity –Married daughter – Entitlement – A daughter after her marriage does not cease to be a daughter of the father or mother – Use of word 'unmarried' in Rule 2 (c) (iii) of Dying-in-Harness Rules held illegal and unconstitutional, being violative of Articles 14 and 15 of the Constitution. (Para 16 and 19)

Writ Petition allowed. (E-1)

Cases relied on :-

1. Writ C No.41279 of 2014, Isha Tyagi Vs St. of U.P. decided on 26.08.2014

2. Vijaya Manohar Arbat Vs Kashirao Rajaram Sawai, AIR 1987 SC 1100

3. Githa Hariharan Vs R.B.I., (1999) 2 SCC 228

4. National Legal Services Authority Vs U.O.I., (2014) 5 SCC 438

5. Writ C No. 60881 of 2015, Smt. Vimla Srivastava Vs St. of U.P. & anr. decided on 04.12.2015

(Delivered by Hon'ble Chandra Dhari Singh, J.)

1. The petition seeks issuance of a writ in the nature of certiorari quashing impugned order dated 11.04.2016 passed by respondent no.2/Executive Engineer, Irrigation Division, Rae Bareli.

2. The petition also seeks issuance of a writ in the nature of mandamus directing respondents to reconsider the case of the petitioner for appointment on compassionate grounds on appropriate post under U.P. Recruitment of Dependents of Government Servant Dying in Harness Rules, 1974.

3. Brief facts of the case are that the petitioner's father Shri Om Prakash was employed in the Irrigation Department in the year 1976 as Roller Operator. After his death on 05.05.1986, her mother Mrs. Chandrawati was appointed as Peon and posted in Sub Division Bachharawan functioning under Executive Engineer, Irrigation Division, Rae Bareli. Marriage of the petitioner was solemanised with Shri Jitendra Kumar, R/o Village Mankhera, Post Kankaha, District Lucknow. The petitioner's mother died on 12.09.2009. The petitioner's husband is also unemployed and he was also dependent on petitioner's mother (now deceased). After death of the petitioner's mother, the petitioner has no source of income. She applied for appointment on compassionate grounds under U.P. Recruitment of Dependents of Government Servant Dying in Harness Rules, 1974 (hereinafter referred as 'dying in harness rules') on 19.11.2009 and when no order was passed, she again applied for the same on 28.09.2012 and 26.10.2012 but again no order was passed on the said applications. The petitioner filed a writ petition bearing No.1328 (SS) of 2015 which was disposed of vide order dated 23.12.2015 with a direction to the competent authority to consider and decide petitioner's application for compassionate appointment keeping in mind the law settled. Vide impugned order dated 11.04.2016 (supra), the Executive Engineer rejected the claim of the petitioner. Hence, the writ petition has been filed.

4. Learned counsel for the petitioner has submitted that the impugned order dated 11.04.2016 (supra) has been passed by respondent no.2 in utter denial of the verdict of Hon'ble Supreme Court as well as this Court passed in several judgments. It is submitted that now the law is settled that under Section 2C of dying in harness rules, the petitioner/married daughter is also included in the 'member of family'. Thus, while passing the impugned order, the concerned authority has not considered the legal position as also not taken into consideration the several judgments passed by Hon'ble Supreme Court as well as this Court from time to time. The impugned order is illegal, arbitrary and contrary to the law settled and deserves to be quashed.

5. *Per Contra*, learned counsel appearing for the State has opposed the petition on merit, however has acceded to

the legal position laid down by Hon'ble Supreme Court as well as this Court.

6. Counter and rejoinder affidavits have been filed by the parties and are available on record.

7. I have heard learned counsel for the parties and perused the record.

8. The Uttar Pradesh Recruitment of Dependents of Government Servants Dying-in-Harness Rules, 1974 have been framed under the proviso to Article 309 of the Constitution and regulate the grant of compassionate appointment to the members of the family of a government servant who dies in harness. The Rules define the expression "family" to include, among others, "unmarried daughters and unmarried adopted daughters". The Rules also bring sons and adopted sons within the ambit of a family. The eligibility of a son or adopted son is not conditioned by marital status. The challenge in these proceedings is to the stipulation that only an unmarried daughter falls within the definition of the expression "family". as a consequence of the condition, a married daughter ceases to fall within the family of a deceased government servant for the purpose of seeking compassionate appointment.

9. Rule 2(c) of the Dying-in-Harness Rules defines the expression "family" in the following terms:

"2(c) *"family"* shall include the following relations of the deceased Government servant:

(i) Wife or husband;

(ii) Sons/adopted sons;

(iii) Unmarried daughters, unmarried adopted daughters, widowed daughters and widowed daughters-in-law;

(iv) Unmarried brothers, unmarried sisters and widowed mother dependent on the deceased Government servant, if the deceased Government servant was unmarried;

(v) aforementioned relations of such missing Government servant who has been declared as "dead" by the competent Court;

Provided that if a person belonging to any of the above mentioned relations of the deceased Government servant is not available or is found to be physically and mentally unfit and thus ineligible for employment in Government service, then only in such situation the word "family" shall also include the grandsons and the unmarried granddaughters of the deceased Government servant dependent on him."

10. In exploring the nature of the constitutional challenge which has been addressed in these proceedings, it would at the outset be necessary to dwell briefly on the nature and purpose of compassionate appointment. The object and purpose of compassionate appointment is to provide ameliorative relief to the family of a government servant who has died in harness. Compassionate appointment is an exception to the principle that there must be an equality of opportunity in matters of public employment under Article 16 of the Constitution. Equality of opportunity postulates a level playing field where all eligible persons are entitled to compete in an effort to secure public employment. The basis of the exception that is carved out by the Dying-in-Harness Rules is that the death of a wage earner while in the service of the State imposes severe financial hardship on the family faced with an untimely death. Compassionate appointment is intended to provide immediate financial support to such a family by stipulating that upon the death of

its wage earner while in harness as a government servant, another member of the family would be granted appointment. Compassionate appointment is not a reservation of a post in public employment but is in the nature of an enabling provision under which a member of the family of a deceased government servant who has died while in harness can seek appointment based on financial dependency and need.

11. Rule 5 of the Dying-in-Harness Rules provides that such an appointment is contemplated to be given to a member of the family of a deceased government servant who has died in harness where the spouse of the government servant is not already employed with the Central or the State Governments or a Corporation owned by them. Moreover, a member of the family who is not already employed with the Central or State Governments or their Corporations can be given suitable employment in government service in relaxation of the normal recruitment rules. Such an appointment can be granted if the person (i) fulfills the educational qualifications prescribed for the post; (ii) is otherwise qualified for government service; and (iii) makes an application for employment within five years from the date of the death of the government servant. The rationale for imposing the requirement of the application being made within five years is that the nexus between the grant of employment and the need of the family is preserved. That is because after a lapse of time the sense of need or dependency may cease to exist both financially and otherwise. However, Rule 5 enables the time limit to be dispensed with or relaxed for the purpose of dealing with a case in a just and equitable manner where undue hardship is shown. Where compassionate appointment is provided under Rule 5, there is an obligation under the rule for the person appointed to maintain the other members of the family of the deceased government servant who were dependent on him/her immediately before the death occurred and who are unable to maintain themselves. When the person appointed neglects or refuses to maintain a person whom he or she is liable to maintain, the services are liable to be terminated under the Conduct, Discipline and Appeal Rules.

12. The basic rationale and the foundation for granting compassionate appointment is thus the financial need of the family of a deceased government servant who has died in harness and it is with a view to alleviate financial distress that compassionate appointment is granted.

13. The issue before the Court is whether marriage is a social circumstance which is relevant in defining the ambit of the expression "family" and whether the fact that a daughter is married can constitutionally be a permissible ground to deny her the benefit of compassionate appointment.

14. In the judgment of this Court in ***Isha Tyagi v. State of U.P. - Writ C No.41279 of 2014,*** a Division Bench considered the legality of a condition which was imposed by the State Government while providing horizontal reservation to descendants of freedom fighters. The condition which was imposed by the State excluded the children of the daughter of a freedom fighter from seeking admission to medical colleges in the State under an affirmative action programme. Holding this to be unconstitutional, the Division Bench held as follows:

"It would be anachronistic to discriminate against married daughters

by confining the benefit of the horizontal reservation in this case only to sons (and their sons) and to unmarried daughters. If the marital status of a son does not make any difference in law to his entitlement or to his eligibility as a descendant, equally in our view, the marital status of a daughter should in terms of constitutional values make no difference. The notion that a married daughter ceases to be a part of the family of her parents upon her marriage must undergo a rethink in contemporary times. The law cannot make an assumption that married sons alone continue to be members of the family of their parents, and that a married daughter ceases to be a member of the family of her parents. Such an assumption is constitutionally impermissible because it is an invidious basis to discriminate against married daughters and their children. A benefit which this social welfare measure grants to a son of a freedom fighter, irrespective of marital status, cannot be denied to a married daughter of a freedom fighter."

15. Dealing with the aspect of marriage, the Division Bench held as follows:

"Marriage does not have and should not have a proximate nexus with identity. The identity of a woman as a woman continues to subsist even after and notwithstanding her marital relationship. The time has, therefore, come for the Court to affirmatively emphasise that it is not open to the State, if it has to act in conformity with the fundamental principle of equality which is embodied in Articles 14 and 15 of the Constitution, to discriminate against married daughters by depriving them of the benefit of a horizontal reservation, which is made available to a son irrespective of his marital status."

16. In ***Vijaya Manohar Arbat v. Kashirao Rajaram SawaI*** - *AIR 1987 SC 1100*, the Supreme Court held in the context of the provisions of Section 125 of the Code of Criminal Procedure 1973 that "a daughter after her marriage does not cease to be a daughter of the father or mother".

17. The same principle was applied in ***Githa Hariharan v. Reserve Bank of India - (1999) 2 SCC 228*** while defining the ambit of the expression "the father, and after him, the mother" in Section 6(a) of the Hindu Succession Act, 1956. The Supreme Court observed that if the word "after' was read to mean that a mother would be disqualified from acting as a guardian of a minor during the lifetime of the father, this would run counter to the constitutional mandate of gender equality and will lead to an impermissible differentiation between males and females. Interpreting the word "after', the Supreme Court held that it does not necessarily mean after the death of the father but would mean in the absence of, whether temporary or otherwise or in a situation of the apathy of the father or his inability to maintain the child.

18. In ***National Legal Services Authority v. Union of India - (2014) 5 SCC 438***, the Supreme Court recognized that gender identity, is an integral part of sex within the meaning of Articles 15 and 16 and no citizen can be discriminated on the ground of gender. The Supreme Court observed as follows:

"We, therefore, conclude that discrimination on the basis of sexual

orientation or gender identity includes any discrimination, exclusion, restriction or preference, which has the effect of nullifying or transposing equality by the law or the equal protection of laws guaranteed under our Constitution, and hence we are inclined to give various directions to safeguard the constitutional rights of the members of the TG community."

19. In ***Smt. Vimla Srivastava v. State of U.P. & Anr. - Writ - C No.60881 of 2015 Dated 04.12.2015***, a Division Bench of this Court has struck down the word 'unmarried' in Rule 2 (c) (iii) of Dying-in-Harness Rules and hold that exclusion of married daughters from the ambit of the expression "family" in Rule 2 (c) of the Dying-in-Harness Rules is illegal and unconstitutional, being violative of Articles 14 and 15 of the Constitution.

20. In view of the above, the instant petition is ***allowed.***

21. Impugned order dated 11.04.2016 passed by respondent no.2/Executive Engineer, Irrigation Division, Rae Bareli is hereby quashed.

22. A mandamus is issued to the Executive Engineer, Irrigation Division, Rae Bareli to consider the petitioner's claim for compassionate appointment, in accordance with law, which shall mean without reference to her marital status, within a period of three months from the date of production of a copy of this order.

23. No order as to costs.

(2021)02ILR A782

ORIGINAL JURISDICTION

CIVIL SIDE

DATED: LUCKNOW 08.01.2021

BEFORE

THE HON'BLE MANISH MATHUR, J.

Service Single No. 16156 of 2020

Rajendra Kumar ...Petitioner

Versus

Director General, Council of Sc. & Tech. & Ors. ...Respondents

Counsel for the Petitioner:
Shivam Sharma

Counsel for the Respondents:
Ajit Kumar

A. Constitution of India – Article 226 – Writ – Maintainability – Alternative remedy of Appeal – Three exceptions, when writ petition is maintainable even despite availability of alternative remedy – Such exceptions are enforcement of fundamental rights, violation of principles of natural justice, where order or proceedings are without jurisdiction and where vires of an Act is challenged – Whirlpool Corporation's case followed – Pleadings regarding lack of jurisdiction and violation of principles of natural justice is there in the writ petition – Held, writ petition is maintainable. (Para 10.3, 10.4 and 10.5)

B. Civil Law - Council of Science & Technology, Uttar Pradesh (Service) Regulations, 1989 – Regulations 68(iv) and 71 – Departmental Enquiry – Punishment – Censure and reduction of pay – No Prima facie satisfaction recorded before full fledged enquiry – Non-compliance of procedure prescribed in Regulation 68(iv) – Effect – Held, Non-compliance of the provision would completely defeat its object, failure to adhere the provision would lead to severe consequences – Provisions of Regulation 68 (iv) of the Regulations of 1989 are mandatory in nature. (Para 11.14 and 11.15)

C. Civil Law - Council of Science & Technology, Uttar Pradesh (Service) Regulations, 1989 – Regulation 68 (v) and

(vi) – Departmental Enquiry – Opportunity of hearing – Delinquent employee failed to submit reply and choose not to participate in enquiry – Effect – Entire purpose of a departmental enquiry is not to hold the employee guilty but to arrive at a conclusion upon consideration of evidence whether the charges leveled against the delinquent employee are proved or not – This procedure is to be followed by enquiry officer in an objective and fair manner – Enquiry officer has a bounden duty to enquire into the charges levelled against the delinquent employee upon consideration of not only oral but documentary evidence as well to be produced by the department even in case the delinquent employee chooses not to participate in the enquiry proceedings. (Para 12.7)

Writ Petition allowed. (E-1)

Cases relied on :-

1. Authorised Officer, St. Bank of Travancore Vs Mathew K.C., (2018) 3 SCC 85

2. Whirlpool Corporation Vs Registrar of Trade Marks, Mumbai & ors., (1998) 8 SCC 1

3.St. of Jharkhand & ors. Vs Ambay Cements & anr. (2005) 1 SCC 368

4. Devinder Singh & ors. Vs St. of Punj. & ors., (2008) 1 SCC 728

5. Sharif-ud-Din Vs Abdul Gani Lone, AIR 1980 SC 303

6. Ram Asrey Baiswar v. Subedar Pandey & ors., AIR 1964 All 169

7. Chamoli District Cooperative Bank Ltd. & anr. Vs Raghunath Singh Rana & ors., AIR 2016 SC 2510

8.St. of U.P. & ors. Vs Saroj Kumar Sinha, (2010) 2 SCC 772

9. Roop Singh Negi Vs P.N.B. & ors., AIR 2008 SC (supp) 921

10. Marathwada University Vs Seshrao Balwantrao Chavan, (1989) 3 SCC 132

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

1. Heard Mr. Shivam Sharma, learned counsel for petitioner and Mr. Ajit Kumar, learned counsel for opposite parties.

2. Under challenge is the punishment order dated 21.07.2020, the enquiry report dated 13.12.2019 and the charge sheet dated 17.06.2019. A further prayer directing opposite parties to grant consequential benefits upon quashing of the aforesaid orders has also been sought.

3. Learned counsel submits that while petitioner was working with opposite parties on the post of Artist-cum- Publicity Assistant, he was issued a show cause notice on 10.04.2019 levelling certain allegations. It is submitted that petitioner submitted his reply on 24.05.2019 whereafter the charge sheet was issued to him and upon submission of enquiry report, the impugned punishment order has been passed whereby punishment of censure and reduction of pay to a lower stage in the time-scale has been awarded.

4. Learned counsel for petitioner has submitted that petitioner is governed by the Council of Science & Technology, Uttar Pradesh (Service) Regulations, 1989 which prescribes the procedure for initiation and conclusion of enquiry. Learned counsel has drawn attention to Regulations 67 onward with Regulation 66 prescribing punishment for misconduct as per Regulation 69. Procedure of enquiry into misconduct is prescribed under Regulation 68 with nature of penalties being indicated in Regulation 70. Provision of appeal has been provided in Regulation 71.

5. Learned counsel for petitioner submits that as per Regulation 68, in case there is any reason to believe that an employee has been guilty of misconduct, it

is incumbent upon the employer-authority to order an enquiry to be instituted into his/her conduct whereupon the employee is to be served with a show-cause notice setting forth the nature of misconduct and calling for an explanation. It is submitted that explanation is to be furnished by the employee to enquiry officer who shall submit a report to the appointing authority indicating whether in his opinion the explanation is satisfactory or not. As per clause (iv) of Regulation 68, in case the explanation is found to be unsatisfactory, the appointing authority has occasion either to administer warning to employee or impose censure or direct charges to be framed against the employee whereafter regular departmental enquiry shall ensue.

6. Learned counsel for petitioner submits that the aforesaid provision is mandatory in nature and opposite parties were bound to comply with the same. However, after the explanation submitted by petitioner, it was the enquiry officer and not the appointing authority who had rejected the explanation submitted by petitioner. It is, thus, submitted that Regulation 68 being mandatory in nature, it was incumbent upon appointing authority to have taken decision on the explanation submitted by petitioner and not the enquiry officer. As such, it is submitted that the very initiation of enquiry proceedings against petitioner by issuance of charge sheet without first deciding the explanation submitted by petitioner is dehors the rules and thereby vitiated.

7. Learned counsel for petitioner has also drawn attention to enquiry report and the punishment order with the submission that the same has been passed without adhering to procedure prescribed as per the service regulations inasmuch as each of the charge has been found proved against petitioner without any application of mind and without considering the evidence merely on the ground that petitioner had not furnished his reply. It is submitted that it is settled law as enunciated by Hon'ble the Supreme Court that even in case the delinquent employee fails to submit his reply, it is incumbent upon the employer to enquire into the charges levelled against the delinquent employee, independently. That having not been done, it is submitted, not only the enquiry report but punishment order as well is vitiated on that score as well.

8. Learned counsel for opposite party has raised a preliminary objection with regard to maintainability of petition in view of the fact that Regulation 71 specifically prescribes an appeal to be filed before the appellate authority, i.e. the Managing Director against any such order of punishment. Learned counsel for opposite parties has strenuously and repeatedly argued that petitioner is liable to be relegated to the forum of appeal without the writ petition being entertained. It has been further submitted that punishment order has been passed by the Secretary, who is the appointing authority of petitioner and therefore petitioner has the provision of filing an appeal. It has also been submitted that petitioner failed to avail himself of the opportunity to submit his reply to charge sheet and deliberately did not participate in the enquiry proceedings, for which he himself is to be blamed and as such he cannot be permitted to take benefit of his own wrongs. Even otherwise, it is submitted, all the grounds as taken in the writ petition can very well be looked into by the appellate authority.

9. Upon consideration of material on record and submissions advanced by learned counsel for the parties, the three

questions requiring adjudications are as follows:-

1.Whether this Court is mandatorily required to refer the dispute to Appeal in view of preliminary objection?

2. Whether the provisions in Regulation 68 of the Service Regulations would be mandatory in nature inasmuch as whether appointing authority is required to first adjudicate upon reply submitted to show cause notice, prior to issuance of charge sheet or not?; and

3. Whether even in absence of reply by petitioner/delinquent employee, the enquiry officer was required to look into veracity of charges levelled against petitioner or whether the enquiry proceedings can be concluded only on the basis that petitioner had failed to submit his reply.

10. Question No.1: **Whether this Court is mandatorily required to refer the dispute to Appeal in view of preliminary objection?**

Learned counsel for opposite parties has strenuously objected to maintainability of writ petition in view of remedy of appeal being available with petitioner. He has also placed reliance on judgment rendered by Hon'ble the Supreme Court in **Authorised Officer, State Bank of Travancore v. Mathew K.C**. reported in (2018) 3 SCC 85.

10.1 Learned counsel for petitioner in response thereto has submitted that it is settled law that availability of alternative remedy does not absolutely bar maintainability of writ petition. He has placed reliance on judgment rendered by Hon'ble the Supreme Court in **Whirlpool Corporation v. Registrar of Trade Marks, Mumbai & others**, reported in(1998) 8 SCC 1.

10.2 Upon consideration of the aforesaid submissions and judgments cited by learned counsel for the parties, it is apparent that in Authorised Officer, State Bank of Travancore(supra), no specific embargo has been enunciated by Hon'ble the Supreme Court regarding non-maintainability of writ petition on account of availability of alternative remedy. Aforesaid judgment is also distinguishable in view of the fact that the said matter pertained to recovery of public money under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, particularly regarding loans, timely repayment is required to ensure liquidity to facilitate loan to another in need by circulation of money which cannot be permitted to be blocked by frivolous litigation. Another aspect of the matter was that the writ petition had been held to be maintainable without assigning special reasons and without granting opportunity to other side to contest maintainability of writ petition.

10.3 In the present case, the matter pertains to service dispute and not the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act. Further more, Hon'ble the Supreme Court in the case of **Whirlpool Corporation (supra)** has clearly indicated the exceptions where writ petition is maintainable even despite availability of alternative remedy. Such exceptions being enforcement of fundamental rights, violation of principles of natural justice, where order or proceedings are without jurisdiction and where vires of an Act is challenged.

10.4 The aforesaid factors are required to be seen considering the pleadings in the writ petition. In the present case, pleadings in the writ petition have clearly been made regarding lack of jurisdiction and violation of principles of natural justice.

10.5 In view of aforesaid, the matter in hand is clearly coming within the scope of

exceptions as enunciated by Hon'ble the Supreme Court in the case of **Whirlpool Corporation (supra).** As such, the writ petition is held to be maintainable.

11. Question No.2 : **Whether the provisions in Regulation 68 of the Service Regulations would be mandatory in nature inasmuch as whether appointing authority is required to first adjudicate upon reply submitted to show cause notice, prior to issuance of charge sheet or not?**

11.1 The second question requiring adjudication is as to whether Regulation 68 of the Service Regulations would be mandatory or merely directory in nature.

11.2 With regard to aforesaid, learned counsel for petitioner has submitted that Regulation 68 of the Service Regulations pertaining to enquiry into misconduct is mandatory in nature inasmuch as upon receipt of explanation from the employee, the enquiry officer is required to submit a report to appointing authority indicating whether in his opinion the explanation is satisfactory or not. Regulation 68 (iv) states that in case the explanation is found to be unsatisfactory, the appointing authority may administer a warning to the employee or censure or direct that charges be framed against the employee.

11.3 In view of aforesaid provisions, learned counsel for petitioner submits that once a penal clause is indicated in Regulation 68(iv), the aforesaid provision would necessarily be mandatory.

11.4 In support of his submissions, learned counsel for petitioner has placed reliance on the following judgments:-

(a) State of Jharkhand and others v. Ambay Cements and another, reported in (2005) 1 SCC 368;

(b) Devinder Singh & others v. State of Punjab and others, reported in (2008) 1 SCC 728;

(c) Sharif-ud-Din v. Abdul Gani Lone, reported in AIR 1980 SC 303; and

(d) Ram Asrey Baiswar v. Subedar Pandey and Ors., reported in AIR 1964 All 169.

11.5 A reading of Regulation 68 indicates that where there is any reason to believe that an employee has been guilty of misconduct, the appointing authority may order an enquiry to be instituted. Upon such an order being issued, the employee is to be served with a show cause notice by enquiry officer setting forth the charges levelled against him to which the employee is required to furnish explanation. Subsequently upon receipt of explanation from employee, the enquiry officer is required to submit a report to appointing authority indicating his opinion whether the explanation is satisfactory or not. In case the competent authority is of the view that the explanation is satisfactory, no further action is required to be taken and the proceedings are required to be dropped.

11.6 However, Regulation 68 (iv) clearly indicates the procedure in case the explanation is found to be unsatisfactory and states that the appointing authority (emphasis supplied) may administer a warning to employee or censure or direct that charges be framed against the employee whereafter a proper departmental enquiry is to ensue.

11.7 The aforesaid provision clearly indicates the facts that once explanation is submitted by the employee, the appointing authority is required to apply his mind to the explanation and thereafter reach a conclusion as to whether the proceedings are required to be dropped or are required to be continued. Even in case the proceedings are not required to be dropped, it is the further bounden duty of the appointing authority to first reach a conclusion as to whether the charges are

not grave enough and the matter can be ended by administering a warning to the employee or censuring him. It is only in case the appointing authority reaches a conclusion that the explanation submitted is not satisfactory and the charges against him are serious enough that direction is to be issued for charges to be framed against the employee for holding a proper departmental enquiry.

11.8 Clearly, the purpose of the aforesaid proceedings is firstly, whether the charges are required to be enquired into at all or are to be dropped when the explanation submitted by the employee is considered satisfactory. Secondly, in case the appointing authority reaches a prima facie satisfaction that the explanation is unsatisfactory but the charges are not serious enough to merit a full departmental enquiry, the matter can be closed by administering a warning or censure to employee concerned. Thirdly, it is only in case where the aforesaid conditions are not met that a full fledged departmental enquiry is required to be resorted to by the appointing authority.

11.9 In the considered opinion of this Court, the very purpose of Regulation 68 (iv) would be rendered nugatory in case the steps as required are not followed by the appointing authority and a full fledged departmental enquiry is required to ensue after submission of explanation by the employee, without any prima facie satisfaction of the appointing authority with regard to explanation so submitted.

11.10 The issue whether a particular statute or rule is mandatory or directory has been dealt with in detail by Hon'ble the Supreme Court in the case of **Sharif-ud-Din (supra)** in the following manner:-

"9. The difference between a mandatory rule and a directory rule is that while the former must be strictly observed, in the case of the latter, substantial compliance may be sufficient to achieve the object regarding which the rule is enacted. Certain broad propositions which can be deduced from several decisions of courts regarding the rules of construction that should be followed in determining whether a provision of law is directory or mandatory may be summarized thus: The fact that the statute uses the word 'shall' while laying down a duty is not conclusive on the question whether it is a mandatory or directory provision. In order to find out the true character of the legislation, the Court has to ascertain the object which the provision of law in question is to sub-serve and its design and the context in which it is enacted. If the object of a law is to be defeated by non-compliance with it, it has to be regarded as mandatory. But when a provision of law relates to the performance of any public duty and the invalidation of any act done in disregard of that provision causes serious prejudice to those for whose benefit it is enacted and at the same time who have no control over the performance of the duty, such provision should be treated as a directory one. Where however, a provision of law prescribes that a certain act has to be done in a particular manner by a person in order to acquire a right and it is coupled with another provision which confers an immunity on another when such act is not done in that manner, the former has to be regarded as a mandatory one. A procedural rule ordinarily should not be construed as mandatory if the defect in the act done in pursuance of it can be cured by permitting appropriate rectification to be carried out at a subsequent stage unless by according such permission to rectify the error later on, another rule would be contravened. Whenever a statute prescribes that a particular act is to be done in a

particular manner and also lays down that failure to comply with the said requirement leads to a specific consequence, it would be difficult to hold that the requirement is not mandatory and the specified consequence should not follow."

11.11 Similarly, with regard to aforesaid factor, Hon'ble the supreme Court in the case of **Ambay Cements(supra)** has held as follows:-

"26. Whenever the statute prescribes that a particular act is to be done in a particular manner and also lays down that failure to comply with the said requirement leads to severe consequences, such requirement would be mandatory. It is the cardinal rule of interpretation that where a statute provides that a particular thing should be done, it should be done in the manner prescribed and not in any other way. It is also settled rule of interpretation that where a statute is penal in character, it must be strictly construed and followed. Since the requirement, in the instant case, of obtaining prior permission is mandatory, therefore, non-compliance with the same must result in cancelling the concession made in favour of the grantee, the respondent herein."

11.12 The issue when the word 'may' can be considered to be mandatory and not directory has been dealt with in detail by a Division Bench of this Court in **Ram Asrey Baiswar(supra)** in the following terms:-

"The use of the word "shall" might prima facie go to indicate that the legislature probably wanted the requirement to be of a mandatory type. In a particular context, however, the word "shall" also might be used in respect of a directory provision of law. similarly although the word "may" is ordinarily used in connection with directory provisions. In the particular circumstances of a case and in the context m which the said word is used, it may have the effect of making the particular provision a mandatory one. Reference in this connection might be made to the cases of Bhikraj Jaipuria v. union of India AIR 1952 S. C. 113 and Collector of Monghyr v. Keshav Prasad Goenka AIR 1962 S. C. 1694."

11.13 Even in case a rule is held to be directory and not mandatory, Hon'ble the Supreme Court in Devinder Singh (supra) has held that the same should be substantially complied with and cannot be ignored in its entirety only because the provision is held to be directory and not an imperative one.

11.14 Regulation 68(iv) also indicates that prior to issuance of a charge-sheet for holding a full fledged enquiry, it is incumbent upon the appointing authority to record a prima facie satisfaction that the explanation submitted by the employee is unsatisfactory and thereafter proceed to either administer a warning to the employee or visit him with censure. The appointing authority is further required to record his prima facie satisfaction that not only is the explanation submitted by the employee unsatisfactory but the charges are serious enough to hold a full fledged departmental enquiry, the said factor is also to be recorded in the order required to be passed in terms of the said provision. The expression of prima facie opinion by the appointing authority is 'must' and has to be based on the material on record. With regard to expression of such opinion by the appointing authority and the procedure of its effecting, Hon'ble the Supreme Court in **Devinder Singh (supra)** has held as follows:-

"33. When an order is passed without jurisdiction, it amounts to colourable exercise of power. Formation of opinion must precede application of mind. Such application of mind must be on the materials brought on record. The materials should be such which are required to be collected by the authorities entitled therefor. The authorities must act within the four corners of the statute. An opinion formed even on the basis of an advice by an authority which is not contemplated under the statute renders the decision bad in law. A statutory authority is bound by the procedure laid down in the statute and must act within the four corners thereof."

11.15 The purpose of Regulation 68(iv) has already been indicated herein above and in the considered opinion of this Court, non-compliance of the said provision would completely defeat the object of the said provision. Further more, non-compliance of the aforesaid provision would also cause serious prejudice to the employee concerned. Once the said provision has prescribed a particular act to be done in a particular manner, the failure to adhere to such a provision would lead to severe consequences and therefore it is held that the provisions of Regulation 68 (iv) of the Council of Science & Technology Uttar Pradesh (Service) Regulations, 1989 are mandatory in nature.

12. Question No. 3: **Whether even in absence of reply by petitioner/delinquent employee, the enquiry officer was required to look into veracity of charges levelled against petitioner or whether the enquiry proceedings can be concluded only on the basis that petitioner had failed to submit his reply:**

12.1 The issue whether even in the absence of reply by the delinquent employee the procedure required to be followed is also to be seen from the service regulations and the law on that subject.

12.2 Regulation 68(v) and (vi) provides that once the appointing authority has directed that charges be framed against the employee, the enquiry officer shall frame the charges against the employee concerned and communicate the same in writing to the employee who will be required to reply in writing to those charges. Thereafter the enquiry officer is required to conduct the enquiry to ascertain the truth of the charges after affording adequate opportunity to the charged employee of being heard and shall record his findings in respect each charge, whereupon the competent authority shall impose any one or some of the penalties specified in Regulation 70 upon the charged employee being found guilty in the enquiry proceedings.

12.3 Although the aforesaid provisions do not indicate any specific procedure to be followed with regard to departmental enquiry but at the same time clearly indicate that adequate opportunity of hearing is required to be afforded to the charged employee by the enquiry officer.

12.4 Recently, Hon'ble the Supreme Court in **Chamoli District Co-operative Bank Ltd. and another v. Raghunath Singh Rana and others** reported in AIR 2016 SC 2510 has held as follows:-

"19. The compliance of natural justice in domestic/disciplinary inquiry is necessary has long been established. This Court has held that even there are no specific statutory Rule requiring observance of natural justice, the compliance of natural justice is necessary. Certain ingredients have been held to be constituting integral part of holding of an inquiry. The Apex Court in Sur Enamel and

Stamping Works Pvt. Ltd. v. Their Workmen reported in (1964) 3 SCR 616 : AIR 1963 SC 1914 has laid down following:

... An enquiry cannot be said to have been properly held unless, (i) the employee proceeded against has been informed clearly of the charges levelled against him, (ii) the witnesses are examined - ordinarily in the presence of the employee - in respect of the charges, (iii) the employee is given a fair opportunity to cross-examine witnesses, (iv) he is given a fair opportunity to examine witnesses including himself in his defence if he so wishes on any relevant matter, and (v) the inquiry officer records his findings with reasons for the same in his report."

12.5 Hon'ble the Supreme Court in **State of Uttar Pradesh and others v. Saroj Kumar Sinha reported in (2010) 2 SCC 772** has held as under:-

"28.An inquiry officer acting in a quasi-judicial authority is in the position of an independent adjudicator. He is not supposed to be a representative of the department/disciplinary authority/Government. His function is to examine the evidence presented by the Department, even in the absence of the delinquent official to see as to whether the unrebutted evidence is sufficient to hold that the charges are proved. In the present case the aforesaid procedure has not been observed. Since no oral evidence has been examined the documents have not been proved, and could not have been taken into consideration to conclude that the charges have been proved against the respondents."

12.6 Further Hon'ble the Supreme Court in **Roop Singh Negi v. Punjab National Bank and others reported in AIR 2008 SC (supp) 921** has specifically held that the authority conducting an enquiry against a delinquent employee clearly discharges a quasi-judicial function and is, therefore, required to act in a fair and impartial manner. It is obligatory upon the said authority not only to deal with the reply submitted by the delinquent employee but also a duty is cast upon him to find out the truth of the allegations leveled against the delinquent employee. The purpose of an enquiry is not to establish a delinquent employee guilty of the charges levelled against him. The relevant portion reads as follows:-

"Indisputably, a departmental proceeding is a quasi judicial proceeding. The Enquiry Officer performs a quasi judicial function. The charges leveled against the delinquent officer must be found to have been proved. The enquiry officer has a duty to arrive at a finding upon taking into consideration the materials brought on record by the parties. The purported evidence collected during investigation by the Investigating Officer against all the accused by itself could not be treated to be evidence in the disciplinary proceeding. No witness was examined to prove the said documents. The management witnesses merely tendered the documents and did not prove the contents thereof. Reliance, inter alia, was placed by the Enquiry Officer on the FIR which could not have been treated as evidence."

12.7 Upon a consideration of the aforesaid enunciation of law by Hon'ble the Supreme Court, it is clear that the enquiry officer is required to act fairly and as a quasi judicial authority in order to ascertain the truth behind the charges levelled against the charged employee. The entire purpose of a departmental enquiry is not to

hold the employee guilty but to arrive at a conclusion upon consideration of evidence whether the charges levelled against the delinquent employee are proved or not. The said procedure is to be followed by enquiry officer in an objective and fair manner. It is also clear from the aforesaid case laws that even if an employee prefers not to participate in the enquiry proceedings, it is the department that has to establish the charges against the said employee by adducing not only oral but documentary evidence as well to substantiate and corroborate the charges levelled against the delinquent employee. In view of said matter, it is held that the enquiry officer has a bounden duty to enquire into the charges levelled against the delinquent employee upon consideration of not only oral but documentary evidence as well to be produced by the department even in case the delinquent employee chooses not to participate in the enquiry proceedings. Any other meaning given to departmental proceedings would render the very purpose of holding departmental enquiry nugatory.

Conclusion:

13. Upon applicability of aforesaid factors in the present case, it is clear that there is no recording of any subjective satisfaction by the appointing authority in terms of Regulation 68(iv) inasmuch as there is no document on record to indicate that the appointing authority applied its mind to explanation submitted by the petitioner as required. It is only the enquiry officer who has in the charge sheet indicated that the explanation submitted by petitioner did not merit any consideration. No reasons for recording such a finding have been indicated in the charge sheet either. Even otherwise, in view of the specific provision of Regulation 68 (iv), it is only the appointing authority who is required to record his prima facie subjective satisfaction regarding the explanation submitted by the delinquent employee being unsatisfactory.

14. Hon'ble the Supreme Court **in Marathwada University v. Seshrao Balwantrao Chavan** reported in (1989) 3 SCC 132 while referring to Halsbury's Laws of England (Vol. I, 4th End., para 32) has held as follows:-

"20. Counsel for the appellant argued that the express power of the Vice-Chancellor to regulate the work and conduct of officers of the University implies as well, the power to take disciplinary action against officers. We are unable to agree with this contention. Firstly, the power to regulate the work and conduct of officers cannot include the power to take disciplinary action for their removal. Secondly, the Act confers power to appoint officers on the Executive Council and it generally includes the power to remove. This power is located under Section 24(1)(xxix) of the Act. It is, therefore, futile to contend that the Vice-Chancellor can exercise that power which is conferred on the Executive Council. It is a settled principle that when the Act prescribes a particular body to exercise a power, it must be exercised only by that body. It cannot be exercised by others unless it is delegated. The law must also provide for such delegation. Halsbury's Laws of England (Vol. I, 4th End., para 32) summarises these principles as follows:

"32. Sub-delegation of powers.? In accordance with the maxim delegatus non potest delegare, a statutory power must be exercised only by the body or officer in whom it has been confided, unless sub-delegation of the power is authorised by

express words or necessary implication. There is a strong presumption against construing a grant of legislative, judicial or disciplinary power as impliedly authorising sub-delegation; and the same may be said of any power to the exercise of which the designated body should address its own mind."

15. In terms of aforesaid, it is clear that the provisions of Regulation 68(iv) of the Service Regulations of 1989 have been completely ignored with regard to petitioner and as such the entire proceedings are clearly vitiated on that account.

16. Even otherwise, it is clear from a perusal of impugned orders that the entire enquiry proceedings have been concluded treating the charges levelled against the delinquent employee to be true only on account of the fact that no reply was submitted by him within the time stipulated. Such a procedure is totally contrary to the law enunciated by Hon'ble the Supreme Court as referred to herein above and clearly are against the principles of natural justice as were required to be followed by the enquiry officer in terms of Regulation 68.

17. Considering the aforesaid aspects, it is clear that the entire proceedings against the petitioner were clearly vitiated for non-compliance of provisions of Regulation 68 of the Service Regulations of 1989.

18. Consequently, a writ in the nature of Certiorari is issued quashing the punishment order dated 21.07.2020, the enquiry report dated 13.12.2019 and the charge sheet dated 17.06.2019.

19. Since it is admitted between the parties and as specifically pleaded in the counter affidavit that the Secretary of the Council is the appointing authority of the petitioner, the matter is remitted to the said authority with a further writ in the nature of Mandamus to first pass appropriate orders in consonance with Regulation 68(iv) and to take consequential action in pursuance thereof within a period of six weeks from the date a copy of this order is served upon the said authority. In case the said authority reaches a prima facie satisfaction that a full fledged departmental enquiry is required to be held the said enquiry proceedings shall be completed within a period of six months form the date the petitioner is required as a last date to submit his reply.

20. Consequently, the writ petition stands **allowed** in terms of aforesaid.

(2021)02ILR A792
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 28.01.2021

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER , J.
THE HON'BLE GAUTAM CHOWDHARY, J.

Criminal Appeal No. 204 of 2021
(Defective Appeal No. 386 of 2005)

Vishnu ....Appellants(In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellants:
Shweta Singh Rana (appointed by State Service Legal Authority), Kamini Pandey, Sri Anand Pandey

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

A. Criminal Law - Code of Criminal Procedure, 1973-Section 374(2) - Indian Penal Code, 1860-Sections 376,506 & Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act,1989-Sections 3(1)(xii) & 3(2)(v)-rape is committed alleged by the prosecutrix – inordinate delay in FIR-no injury found – no corroboration in the prosecution version and medical evidence-doctor opined that no signs of forcible intercourse-several contradictions were found in examination-in-chief as well as cross examination of all three witnesses-motive on the part of the complainant that there was land dispute between the parties-for maintaining the conviction u/s 376 IPC, medical evidence has to be in conformity with the oral testimony-prosecutrix belonged to the SC/ST community and accused falling in upper caste-Learned Trial Judge has not given any finding as to how commission of offence u/s 376 IPC made out-Accused acquitted.(Para 1 to 43)

B. The accused remained in jail for 20 years. Appeal was preferred through jail. Even after 14 years of incarceration, the State did not think of exercising its power for commutation of sentence of life imprisonment. Power of Governor under Article 161 of the constitution are not exercised while Section 433 and 434 of the Cr.P.C. enjoins a duty upon the State Government as well as Central Government to commute the sentence as mentioned in the said section. (Para 46 to 50)

The appeal is allowed. (E-5)

List of Cases cited:-

1. Sadashiv Ramrao Hadbe Vs St. of Mah., (2006) 10 SCC 92

2. Manne Siddaiah @ Siddiramulu Vs St. of A.P. (2000) 2 Alld (Cri.)

3. Hitesh Verma Vs St. of U.K. & anr. (2020) 10 SCC 710

4. Rafiq Vs St. of U.P.,(1981) AIR SC Page 559

5. Nawab Khan Vs St. (1990) Cri.L.J Pg. 1179

6. Bharvada Bhogin Bhai Hirji Bhai Vs St. of Guj.,(1983) AIR SC pg.753

7. Ganesan Vs St. Reprted by its Insptr. of Police Crl.Appl. No. 680 of 2020 (Arising from S.L.P. (Crl.) No . 4976 of 2020)

8. Bhaiyamiyan @ Jardar Khan & anr. Vs St. of M. P.(2011) SCW 3104 Pudav Bhai Anjana Patel Vs St. of Guj. Crl. Appl. No. 74 of 2006

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

1. Since the date of occurrence of the incident, i.e. 16.9.2000, the accused is in jail i.e. since 20 years. Most unfortunate, aspect of this litigation is that the appeal was preferred through jail. The matter remained as a defective matter for a period of 16 years and, therefore, we normally do not mention defective appeal number but we have mentioned the same. This defective conviction appeal was taken up as listing application was filed by the learned counsel appointed by Legal Services Authority on 6.12.2012 with a special mention that accused is in jail since 20 years.

2. By way of this appeal, the appellant has challenged the Judgment and order 24.2.2003 passed by court of Sessions Judge, Lalitpur in Special Case No.43 of 2000, State Vs. Vishnu arising out of Special Case No. 43 of 2000, under Sections 376, 506 of IPC and 3(1)(xii) read with Section 3(2)(v) of Scheduled Casts and Scheduled Tribes (Prevention of Atrocities) Act, 1989, Police Station

Mehroni, District Lalitpur whereby the accused-appellant was convicted under Section 376 IPC and sentenced to imprisonment for a period of ten years with fine of Rs.2,000/-, and in case of default of payment of fine, to undergo further rigorous imprisonment for six months; he was further convicted under Section 3(2)(v) read with Section 3(1)(xii) of Scheduled Casts and Scheduled Tribes (Prevention of Atrocities) Act, 1989 (hereinafter referred to as 'S.C./S.T. Act, 1989') and sentenced to imprisonment for life with fine of Rs.2,000/- and in case of default of payment of fine, to undergo further rigorous imprisonment for six months; and he was further convicted under Section 506 IPC and sentenced to undergo rigorous imprisonment under Section 506 IPC. All the sentences were to run concurrently as per direction of the Trial Court.

3. The brief facts as per prosecution case are that on 16.9.2000 at about 2:00 p.m., the prosecutrix was going from her house in village Silawan, P.S. Mehroni to Haar (fields), when she reached near mango tree named 'black mango tree' situted on the road leading to Zaraia accused-Vishnu son of Rameshwar Tiwari who had hidden behind the bushes, caught hold of her with bad intention and behind the bushes, he committed rape with her by pressing her mouth and went away extending threat that if any report is lodged at the police station or this fact is divulged to anyone, he will kill her. She went back to the house and disclosed the whole incident to her family members who did not go to the police station due to threat and went to Lalitpur, and on 19.9.2000 she along with her father-in-law Gulkhai and husband Bragbhan hiding themselves went to the police station for reporting the said incident.

4. C.O. Narahat, Akhilesh Narain Singh tookup the investigation visited the spot, prepared site plan, recorded statements of the prosecutrix and witnesses and after completing investigation submitted charge sheet against the accused.

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6. The prosecution so as to bring home the charges examined six witnesses, who are as under:-

1.	Prosecutrix	P.W. 1
2.	Gulkhai (Father-in-law)	P.W. 2
3.	Brijbhan(Husband)	P.W. 3
4.	Dr. Sarojini Joshi	P.W. 4
5.	Dr. S.N.H. Rizvi	P.W. 5
6.	Akhilesh Narayan Singh	P.W. 6

7. In support of the ocular version of the witnesses, following documents were produced and contents were proved by leading evidence:

1.	F.I.R.	Ext. Ka-7
2.	Written report	Ext. Ka-1
3.	M.L.P.C.	Ext. Ka-4
4.	Injury Report	Ext. Ka-2
5.	Supplementary report	Ext. Ka-3

6.	Charge Sheet (Mool)	Ext. Ka-6
7.	Site Plan with Index	Ext. Ka-5

8. Heard learned Amicus Curiae Miss Shweta Singh Rana for the appellant, Sri Rupak Chaubey, learned AGA for the State and also perused the record.

9. It is submitted by the counsel for the appellant that as far as commission of offence under Section 3(1)(xii) and 3(2)(v) of S.C./S.T. Act, 1989 is concerned, the learned Sessions Judge convicted the accused due to the fact that the victim was a person belonging to Scheduled Caste Community, though there were no allegations as regard the offence being committed due to the caste of the prosecutrix and there were no allegations of commission of offence which would attract the provision of Section 3(2)(v) read with Section 3(1)(xii) of SC/ST Act.

10. Learned counsel for appellant has relied on the following decisions of the Apex Court rendered in the case of **Sadashiv Ramrao Hadbe Vs. State of Maharashtra, 2006(10)SCC 92** and the judgment of High Court of Andhra Pradesh in the case of **Manne Siddaiah @ Siddiramulu Vs. State of Andhra Pradesh, 2000(2) Alld(Cri)** so as to contend and submit that in fact no case is made out so as to convict the accused under Section 376 IPC leave apart the offence under Sections 506 IPC and Section 3(1)(xii) and read with Section 3(2)(v) of S.C./S.T. Act, 1989 and the prosecutrix has roped in the accused with ulterior motive i.e. land dispute between her family members and the accused.

11. It is submitted by learned counsel for the State that prosecutrix belongs to Scheduled Caste community and the judgment of learned Trial Judge cannot be found fault with just because there is silence on the part of the prosecutrix. It is submitted that the incident occurred because of the caste of the prosecutrix. It is further submitted that any incident on person belonging to a particular caste would be an offence. It is further submitted by learned counsel for the State that the accused ravished the prosecutrix as she was belonging to lower strata of life.

12. Learned counsel for the appellant has relied on the judgment of **Sadashiv Ramrao Hadbe Vs. State of Maharashtra (supra)** and has submitted that she presses for clean acquittal of the accused and not for a fixed term incarceration though the appellant has been in jail for more than 20 years. In support of her submission, she presses into service the judgment in the case of Manne Siddaiah @ Siddiramulu (supra) rendered by Andhra Pradesh High Court, though it is a judgment of Single Bench, i.e. by Justice B. Sudershan Reddy (as he then was). Learned counsel has relied on findings returned in paragraphs 14, 15 and 16 of the said judgment, which lay down as follows :-

"14. In nutshell the version given by P.W.5 is not supported by even P.Ws. 1 and 2. P.W.1 in his evidence in categorical terms states that he caught hold of the appellant herein as his wife informed him that the appellant has raped her. P.W.5 in her evidence does not state that she has informed P.W.1 about the rape at any time. These major inconsistencies and contradictions in the evidence of material witnesses - P.Ws. 1, 2 and 5 create a lot of suspicion and doubt about the prosecution case. Added to that, P.W.10 - the Civil Assistant Surgeon who examined P.W.5, in

her evidence clearly states that she did not find any external injuries on the body of P.W.5. She has also not noticed any semen and spermatozoa in the vaginal slides.

15. In the aforesaid circumstances, it would not be safe to convict the appellant herein on mere suspicion. The inconsistencies and contradictions noticed above are fatal to the case of the prosecution and create any amount of doubt. Obviously, it is the appellant who is entitled for the benefit of doubt.

16. In the aforesaid circumstances, I find it difficult to sustain the conviction of the appellant herein for the offence Under Section 3(1) (xii) and Section 3(2) (v) of the Act read with Section 376 of the Code. The conviction as well as the sentence of the appellant herein is set aside."

13. Learned counsel for appellant presses into service the judgment in the case of **Sadashiv Ramrao Hadbe Vs. State of Maharashtra** (supra) more particularly observations in paras 9, 10, 11 of the said judgment, which are verbatim reproduced as follows
:-

"9. It is true that in a rape case the accused could be convicted on the sole testimony of the prosecutrix, if it is capable of inspiring of confidence in the mind of the court. If the version given by the prosecutrix is unsupported by any medical evidence or the whole surrounding circumstances are highly improbable and belie the case set up by the prosecutrix, the court shall not act on the solitary evidence of the prosecutrix. The courts shall be extremely careful in accepting the sole testimony of the prosecutrix when the entire case is improbable and unlikely to happen.

10. In the present case there were so many persons in the clinic and it is highly improbable the appellant would have made a sexual assault on the patient who came for examination when large number of persons were present in the near vicinity. It is also highly improbable that the prosecutrix could not make any noise or get out of the room without being assaulted by the doctor as she was an able bodied person of 20 years of age with ordinary physique. The absence of injuries on the body improbablise the prosecution version.

11. The counsel who appeared for the State submitted that the presence of semen stains on the undergarments of the appellant and also semen stains found on her petticot and her sari would probablise the prosecution version and could have been a sexual intercourse of the prosecutrix.

12. It is true that the petticot and the underwear allegedly worn by the appellant had some semen but that by itself is not sufficient to treat that the appellant had sexual intercourse with the prosecutrix. That would only cause some suspicion on the conduct of the appellant but not sufficient to prove that the case, as alleged by the prosecution."

14. Learned counsel for the appellant has also relied on the latest decision of Apex Court in the case of **Hitesh Verma Vs. State of Uttarakhand & another, 2020(10)SCC 710,** pertaining to Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 and has contended that the incidence reported is prior to 2016, amendment more particularly relates to the year 2000, where no offence of S.C./S.T. Act, 1989 has been committed on the lady on the basis of her caste belonging to a particular caste. The learned Trial Judge

has misread the provisions of law, just because the prosecutrix is belonging to scheduled caste community, the offence would not be made out.

15. We are unable to convince ourselves with the submission made by learned AGA for State that she has been a victim of atrocity as well rape and, therefore, the accused should not be leniently dealt with.

16. We have been taken through the evidence and the deposition mainly of prosecution witnesses and judgment of Trial Court. We have read the same and are discussing the same.

17. PW-1, in her ocular version, has conveyed that she dictated the FIR while she did not go inside the police station but she was sitting out side the Police Station whereas, in her cross examination she accepted that it was her father-in-law who dictated the report to the police station officer she deposed that prosecutrix belongs to the community known as Dhobi community which is enumerated as scheduled castes the matter of fact which was known to the accused. The prosecutrix in her oral testimony has narrated the version of forcible sex on her and that the accused had gauged her for a period of ten minutes, she did not convey this to anybody because of threats given by the accused. In her cross examination, she conveyed that her father-in-law had dictated the report. If the police did not mention in the FIR that the accused had done the illegal act she could not possibly know why the same is not reflected in the report. The report was given by her father-in-law. She had one daughter who was two years of age, according to her, her marriage had taken place when she was 13 years of age and she was running 17 years of age at the time of deposition. She denied the fact that fields of accused was in the way to her fields and they used to visit the place of each other but accepted that she knew the accused by name.

18. According to the prosecutrix, it was rainy season when incident occurred, she was thrashed in the bushes and according to her the accused had committed bad act with her for ten minutes. She did not convey the incident to her husband immediately who was in the fields but on next day, she conveyed the same to her father-in-law.

19. PW-2 is the father-in-law of the prosecutrix. It was he who was the person whom the prosecutrix had conveyed about the incident. In his cross examination, he stated that marriage of the prosecutrix with his son had taken place for about 10-12 years ago. According to him his field was very far from that of the accused and there was no property dispute between PW-2 and the father of the accused. He has admitted that he has received a sum of Rs.25000/- from Government.

20. PW-3 is the husband who has deposed on oath that his wife was going to the field to give lunch to his father and when she reached at the place of incident, accused was present there and he thrashed her in the bushes and did all bad work.

21. PW-4 and 5 are the medical Officer. PW-6 who is the Officer who had conducted the investigation.

22. We now decide to sift the evidence threadbare of the prosecution story, the evidence laid and discussed before the trial court and appreciated as by the learned Trial Judge.

23. Provision of Section **3(1)(xii)** of the Scheduled Castes and Scheduled Tribes Act, 1989 read as follows : -

"(xii) being in a position to dominate the will of a woman belonging to a Scheduled Caste or a Scheduled Tribe and uses that position to exploit her sexually to which she would not have otherwise agreed;"

24. Provision of Section **3(2)(v)** of the Scheduled Castes and Scheduled Tribes Act, 1989 read as follows : -

(v) commits any offence under the Indian Penal Code (45 of 1860) punishable with imprisonment for a term of ten years or more against a person or property on the ground that such person is a member of a Scheduled Caste or a Scheduled Tribe or such property belongs to such member, shall be punishable with imprisonment for life and with fine;

25. Provision of Section 376 I.P.C. read as follows :

"376. Punishment for rape.--

(1) Whoever, except in the cases provided for by sub-section (2), commits rape shall be punished with imprisonment of either description for a term which shall not be less than seven years but which may be for life or for a term which may extend to ten years and shall also be liable to fine unless the women raped is his own wife and is not under twelve years of age, in which cases, he shall be punished with imprisonment of either description for a term which may extend to two years or with fine or with both: Provided that the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than seven years.

(2) Whoever,--

(a) being a police officer commits rape--

(i) within the limits of the police station to which he is appointed; or

(ii) in the premises of any station house whether or not situated in the police station to which he is appointed; or

(iii) on a woman in his custody or in the custody of a police officer subordinate to him; or

(b) being a public servant, takes advantage of his official position and commits rape on a woman in his custody as such public servant or in the custody of a public servant subordinate to him; or

(c) being on the management or on the staff of a jail, remand home or other place of custody established by or under any law for the time being in force or of a woman's or children's institution takes advantage of his official position and commits rape on any inmate of such jail, remand home, place or institution; or

(d) being on the management or on the staff of a hospital, takes advantage of his official position and commits rape on a woman in that hospital; or

(e) commits rape on a woman knowing her to be pregnant; or

(f) commits rape on a woman when she is under twelve years of age; or

(g) commits gang rape, shall be punished with rigorous imprisonment for a term which shall not be less than ten years but which may be for life and shall also be liable to fine: Provided that the Court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment of either description for a term of less than ten years. Explanation 1.--Where a woman is raped by one or more in a group of persons acting in furtherance of their common intention, each of the persons shall be deemed to have committed gang rape within the meaning of this sub-section. Explanation 2.--"Women's or children's institution" means an institution, whether called an orphanage or a home for neglected woman or children or a widows' home or by any other name, which is established and maintained for the reception and care of woman or children. Explanation 3.--"Hospital" means the precincts of the hospital and includes the precincts of any institution for the reception and treatment of persons during convalescence or of persons requiring medical attention or rehabilitation."

26. In respect of the victim, the doctor in medical report has opined as under :-

"In the x-Ray of both wrist A.P., all eight carpal bones were found present. The lower epiphyses of both wrist joints have not fused. In the x-Ray of both elbow joints, all the bony epiphyses around both elbow joints had fused

In her supplementary report, lady doctor opined that no spermatozoa was seen by her. According to physical appearance, age of the prosecutrix was 15 to 16 years. No definite opinion about rape was given"

27. The evidence as discussed by learned Judge shows that the mere fact that no external marks of injury was found by itself would not throw the testimony of the prosecutrix over board as it has been found that the prosecutrix had washed out all the tainted cloths worn at the time of occurrence as she was an illiterate lady. The learned Judge brushed aside the fact that **report was lodged three days later**. We also do not give any credence to that fact and would like to go through the merits of the matter.

28. As far as the commission of offence under Section 376 IPC is concerned, the learned Judge has relied on the judgments of (1) Rafiq Versus State of U.P., AIR 1981 SC page 559, (2) Nawab Khan Versus State, 1990 **Cri.L.J. Page 1179 and the judgment in (3) Bharvada Bhogin Bhai Hirji Bhai Versus State of Gujarat, AIR 1983 SC page 753.** The accused has not sought benefit of Section 155(4) of Evidence Act.

29. We venture to discuss the evidence of the prosecutrix on which total reliance is placed and whether it inspires confidence or not so as to sustain the conviction of accused. There were concrete positive signs from the oral testimony of the prosecutrix as regards the commission of forcible sexual intercourse. In case of **Ganesan Versus State Represented by its Inspector of Police, Criminal Appeal No. 680 of 2020 (Arising from S.L.P. (Criminal) No.4976 of 2020)** decided on 14.10.2020 wherein the principles of accepting the evidence of the minor prosecutrix or the prosecutrix are enshrined the words may be that her testimony must be trustworthy and reliable then a conviction based on sole testimony of the victim can be based. In our case when we rely on the said decision, it is borne out that the testimony of the prosecutrix cannot be said to be that of a sterling witness and the

medical evidence on evaluation belies the fact that any case is made out against the accused.

30. The evidence of Dr. Smt. Sarojini Joshi, Medical Officer, PW-4 C.H.C., Mehroni who medically examined the prosecutrix on 19.9.2000 at 8:45 p.m., found no external or internal injury on the person of the victim. On preabclomen examination, uterus size was 20 weeks and ballonement of uterus who was present. On internal examination, vagina of the victim was permitting insertion of two fingers. Internal uterine ballonement was present. The victim complained of pain during internal examination but no fresh injury was seen inside or outside the private part. Her vaginal smear was taken on the slide, sealed and sent for pathological investigation for examination. The doctor opined both in occular as well as her written report that the prosecutrix was having five months pregnancy **and no definite opinion about rape could be given.**

31. In the x-ray examination, both wrist A.P., all eight carpal bones were found present. Lower epiphyses of both writst joints were not fused. All the bony epiphyses around both elbow joints were fused. In the supplementary report, the docotr opined that **no spermatozoa was seen** by her and according to the physical appearance, age of the victim was appearing to be 15 to 16 years and no definite opinion about rape could be given.

32. We find one more fact that despite allegation that rape is committed as alleged by the prosecutrix, there are no injuries on the private part of the lady, who is a fully grown up lady and who was pregnant and is said to have been threshed. Further, there was a motive on the part of complainant that there was land dispute between the parties. In statement of prosecutrix in her cross examination on 23.5.2002, she stated that it was her husband and father-in-law, who had lodged the compliant. Thereafter, learned Judge closed the cross examination of PW-1 and recorded it further on 24.5.2002. The First Information Report is also belatedly lodged by three days is the submission of the counsel Amicus Curiae appointed by High Court.

33. As far as the medical evidence is concerned, there are three emerging facts. Firstly, no injury was found on the person of the victim. We are not mentioning that there must be any corroboration in the prosecution version and medical evidence. The judgment of the Apex Court rendered in the case of **Bharvada Bhogin Bhai Hirji Bhai Versus State of Gujarat, AIR 1983 SCC page 753,** which is a classical case reported way back in the year 1983, on which reliance is placed by the learned Session Judge would not be helpful to the prosecution. The medical evidence should show some semblance of forcible intercourse, even if we go as per the version of the prosecutrix that the accused had gagged her mouth for ten minutes and had thrashed her on ground, there would have been some injuries to the fully grown lady on the basis of the body.

34. In our finding, the medical evidence goes to show that doctor did not find any sperm. The doctor categorically opined that no signs of forcible sexual intercourse were found. This was also based on the finding that there were no internal injuries on the lady who was grown up lady.

35. The factual data also goes to show that there are several contradictions in the

examination-in-chief as well as cross examination of all three witnesses. In her examination-in-chief, she states that incident occurred at about 2:00 p.m. but nowhere in her ocular version or the FIR, she has mentioned that she was going to the fields with lunch for her father-in-law. This statement was made for the first time in the ocular version of the husband of the prosecutrix i.e. PW-3 and that it was father-in-law who narrated incident to the police authority. The father-in-law as PW-2 in his testimony states that he was told about the incident by her daughter-in-law (Bahu) on which he complained some villagers about the accused who denied about the incident, therefore, they decided to go to the police station on the next day but the police refused to lodge the report on the ground that no one was present in the police station, therefore, they went on third day of the incident to lodge the FIR. After this, again he contradicts his story in his own statement recorded on cross-examination on the next date stating that the incident was told by his daughter-in-law to his wife who told him about the same. There is further contradiction in the statements of this witness. In examination-in-chief he states that the parties called for Panchayat but there is nothing on record that who were the persons called for Panchayat. If the pregnant lady carries fifth month pregnancy is thrashed forcefully on the ground then there would have been some injury on her person but such injuries on her person are totally absent.

36. For maintaining the conviction under Section 376 Cr.P.C., medical evidence has to be in conformity with the oral testimony. We may rely on the judgment rendered in the case of **Bhaiyamiyan @ Jardar Khan and another Versus State of Madhya Pradesh, 2011 SCW3104.** The chain of incident goes to show that the prosecutrix was not raped as would be clear from the provision of section 375 read with Section 376 of IPC.

37. The judgment relied on by the learned Amicus Curiae for the appellant will also not permit us to concur with the judgment impugned of the learned Trial Judge where perversity has crept in. Learned Trial Judge has not given any finding as to fact as to how commission of offence under Section 376 IPC was made out in the present case.

38. Section 3(2)(v) of Scheduled Casts and Scheduled Tribes (Prevention of Atrocities) Act, 1989 is concerned, the FIR and the evidence though suggests that any one or any act was done by the accused on the basis that the prosecutrix was a member of Scheduled Castes and Scheduled Tribes then the accused can be convicted for commission of offence under the said provision. The learned Trial Judge has materially erred as he has not discuss what is the evidence that the act was committed because of the caste of the prosecutrix. The sister-in-law of the prosecutrix had filed such cases, her husband and father-in-law had also filed complaints. We are unable to accept the submission of learned AGA that the accused knowing fully well that the prosecutrix belongd to lower strata of life and therefore had caused her such mental agony which would attract the provision of Section 3(2)(v) of the Atrocities Act. The reasoning of the learned Judge are against the record and are perverse as the learned Judge without any evidence on record on his own has felt that the heinous crime was committed because the accused had captured the will of the prosecutrix and because the police officer had investigated the matter as a attrocities case

which would not be undertaken within the purview of Section 3(2)(v) of Atrocities Act and has recorded conviction under Section 3(2)(v) of Act which cannot be sustained. We are supported in our view by the judgment of Gujarat High Court in **Criminal Appeal No.74 of 2006 in the case of Pudav Bhai Anjana Patel Versus State of Gujarat decided on 8.9.2015 by Justice M.R. Shah and Justice Kaushal Jayendra Thaker (as he then was).**

39. Learned Judge comes to the conclusion that as the prosecutrix belonged to community falling in the scheduled caste and the appellant falling in upper caste the provision of SC/ST Act are attracted in the present case.

40. While perusing the entire evidence beginning from FIR to the statements of PWs-1, 2 and 3 we do not find that commission of offence was there because of the fact that the prosecutrix belonged to a certain community.

41. Site Plan with Index The learned Judge further has not put any question in the statement recorded under Section 313 of the accused relating to rape or statement which is against him.

42. In view of the facts and evidence on record, we are convinced that the accused has been wrongly convicted, hence, the judgment and order impugned is reversed and the accused is acquitted. The accused appellant, if not warranted in any other case, be set free forthwith.

43. Appeal is allowed accordingly.

44. We are thankful to learned Amicus Curiae appointed by Legal Services Authority who shall be paid all her dues as are admissible. We are even thankful to learned AGA for the State who has ably assisted the Court.

45. We find that in the State of U.P. even after 14 years of incarceration does not even send the matter to the Magistrate for reevaluation the cases for remission as per mandate of Sections 432 and 433 of Cr.P.C. and as held by Apex Court in catena of decisions even if appeals are pending in the High Court. The accused in present case is in jail since 2000.

46. Sections 433 and 434 of the Cr.P.C. read as follows:-

"Section 433. Power to commute sentence. The appropriate Government may, without the consent of the person sentenced, commute-

(a) a sentence of death, for any other punishment provided by the Indian Penal Code;

(b) a sentence of imprisonment for life, for imprisonment for a term not exceeding fourteen years or for fine;

(c) a sentence of rigorous imprisonment, for simple imprisonment for any term to which that person might have been sentenced, or for fine;

(d) a sentence of simple imprisonment, for fine."

"Section 434. Concurrent power of Central Government in case of death sentences. The powers conferred by sections 432 and 433 upon the State Government may, in the case of sentences of death, also be exercised by the Central Government."

47. Section 433 and 434 of the Cr.P.C. enjoins a duty upon the State Government as well as Central Government to commute the sentences as mentioned in the said section. We are pained to mention that even after 14 years of incarceration, the State did not think of exercising its power for commutation of sentence of life imprisonment of the present accused and it appears that power of Governor provided under Article 161 of the Constitution of India are also not exercised though there are restriction to such power to commute sentence. The object of Sections 432 read with Section 433 of the Cr.P.C. is to remit the sentence awarded to the accused if it appears that the offence committed by him is not so grave. In our case, we do not see that why the accused is not entitled to remission. His case should have been considered but has not been considered. Remission/ commutation of sentence under Sections 433 and 434 of the Cr.P.C. is in the realm of power vested in the Government. The factual scenario in the present case would show that had the Government thought of taking up the case of the accused as per jail manual, it would have been found that the case of the appellant was not so grave that it could not have been considered for remission / commutation.

48. Most unfortunate, aspect of this litigation is that the appeal was preferred through jail. The matter remained as a defective matter for a period of 16 years and, therefore, we normally do not mention defective appeal number but we have mentioned the same. This defective conviction appeal was taken up as listing application was filed by the learned counsel appointed by Legal Services Authority on 6.12.2012 with a special mention that accused is in jail since 20 years.

49. Seeing this sorry State of Affairs, we request the Registrar (Listing) through the Registrar General to place the matter before Hon'ble the Chief Justice that periodical listing of matters be taken up in the High Court so that those who are in jail for more than 10 or 14 years, where the appeals are pending, may at least get their appeal heard which are mainly jail appeals.

50. Section 433 and 434 of the Cr.P.C. enjoins a duty upon the State Government as well as Central Government to commute the sentences as mentioned in the said section. We are pained to mention that even after 14 years of incarceration, the State did not think of exercising its power for commutation of sentence of life imprisonment of the present accused and it appears that power of Governor provided under Article 161 of the Constitution of India are also not exercised though there are restriction to such power to commute sentence. The object of Sections 432 read with Section 433 of the Cr.P.C. is to remit the sentence awarded to the accused if it appears that the offence committed by him is not so grave. In our case, we do not see that why the accused is not entitled to remission. His case should have been considered but has not been considered. Remission/ commutation of sentence under Sections 433 and 434 of the Cr.P.C. is in the realm of power vested in the Government. The factual scenario in the present case would show that had the Government thought of taking up the case of the accused as per jail manual, it would have been found that the case of the appellant was not so grave that it could not have been considered for remission / commutation.

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52. Site Plan with Index A copy of this judgment be sent to the Law Secretary, State of U.P. who shall impress upon the District Magistrates of all the districts in the State of U.P. to reevaluate the cases for remission after 14 years of incarceration as per mandate of Sections 432 and 433 of Cr.P.C. even if appeals are pending in the High Court.

(2021)02ILR A804
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 08.02.2021

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER , J.
THE HON'BLE GAUTAM CHOWDHARY, J.

Criminal Appeal No. 1850 of 2014

Akeela @ Sanno Anneta & Anr.
....Appellants(In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellants:
Sri Deepak K. Jaiswal, Mary Puncha (Sheeb Jose), Sri Mohd. Kalim

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

A. Criminal Law - Code of Criminal Procedure, 1973- Section 374(2) - Indian Penal Code, 1860-Section 364-A-modification of sentence-factum of asking ransom from a particular phone number has not been proved-no cogent evidence on the fact that the accused under the guise of taking the child around had kidnapped her and had demanded ransom-matter would fall within section 365 and not within 364-A of IPC-as the accused are in jail for more than ten years-the accused is entitled to be released.(Para 1 to 22)

The appeal is partly allowed. (E-5)

List of Cases cited:-

1. Guddo @ Nitin Singh Vs St. of U.P.,(2020) Cri.L.J. 3792

2. Kallu @ Gurdayal Vs St. of U.P.,(2020) CRI. L.J. 1547

(Delivered by Hon'ble Dr. Kaushal Jayendra Thaker, J. &
Hon'ble Gautam Chowdhary, J.)

1. Present appeal has been preferred against the Judgment and order dated 4.4.2014 passed by learned Additional Sessions Judge, Room No. 16, Kanpur Nagar in S.T. No. 177 of 2010, State Vs. Akeela @ Sanno @ Aneeta & another, arising out of Case Crime No. 212 of 2009 under Section 364A I.P.C. Police Station Bekanganj, District Kanpur Nagar.

2. The facts as culled out from the prosecution story are that on 20.10.2009, the first informant Misbahul Islam gave a written report at Police Station Bekanganj, District Kanpur Nagar alleging that on 19.10.2009 at about 6 p.m., his housemaid, namely, Sanno @ Akeela took his niece Shifa aged about one and half year around the house and did not return. It is further alleged that she could not traced out even after lot of efforts.

3. On the basis of written report, a case was registered as Case Crime No. 212

of 2009 under Section 364 I.P.C. against the accused-appellant Akeela @ Sanno on the very same day at 10.00 p.m. S.I. Ram Charan Gihar took up the investigation of the matter. The Investigating Officer prepared nakal chik, nakal rapat and also recorded the statement of scribe of the First Information Report. On the pointing out of first informant, he also prepared the site plan of the place of occurrence and started tracing out the kidnapped girl.

4. On 22.10.2013, wife of the first informant Smt. Tahsin Fatima presented a written report with an intent that on 20.10.2009 on her mobile phone no.9450436353, a call was made from mobile phone no.9753775687 and the person who rang her told that kidnapped girl was in his custody and for giving her back alive, ransom amounting to Rs.5 lakhs was asked for. The said application was entered in the G.D. and Section 364 was converted into Section 364-A I.P.C. and investigation was taken up by S.O. S.K. Singh.

5. On receiving information from some informant on 22.10.2013, when Investigating Officer along with police party proceeded on foot towards Yatimkhana crossroads and were 50 paces away from the crossroads, the informant pointing out towards a person standing near the crossroads told that he was the person who was husband of Akeela @ Sanno. The police, at the spur of moment, nabbed that person on the Yatimkhana crossroads itself, who told that his name was Vijay Sharma (accused-appellant no.2) and admitted that on his instigation, his wife Sanno had kidnapped the girl for ransom of Rs. 5 lakhs and his wife was sitting in China Park behind Community Centre hiding herself. The Investigating Officer nabbed her from the said place from whose custody the kidnapped girl was recovered. He prepared the recovery fard of the girl on the said place and took signatures of public witnesses as well as the police personnel present thereon. He also took signatures of the accused person on the copy of the fard. After investigation, charge-sheet was submitted before the court.

6. The Chief Metropolitan Magistrate, Kanpur Nagar taking cognizance of the offence, committed the matter to Sessions Court for trial. The Trial Court charged the accused-appellants under Section 364A I.P.C. who denied the charges and claimed trial.

7. To bring home the charges, the prosecution examined as many as eight witnesses, namely, P.W.1 Misbahul Islam (first informant and uncle of the kidnapped girl); P.W.2 Mohd. Sibtain (father of the informant); P.W.3 Sharbat Mufiz (independent witness of recovery of kidnapped girl); P.W. 4 Tahseen Fatima (wife of the informant); P.W. 5 Head Constable Devendra Kumar ; P.W. 6 SI Sunil Kumar Singh ; P.W. 7 S.I. Ramcharan Gihar; and P.W. 8 Rajendra Singh Nagar (witness of recovery of kidnapped girl).

8. P.W. 1 Misbahul Islam in his examination-in-chief stated that Sanno @ Akeela and her husband Vijay were known to him. Sanno used to do maid work at his home. It was on 19.10.2009 at about 6 p.m. when Sanno @ Akeela took out his niece Shifa aged about one and half year out of the house on the pretext of walking around. When she did not returne for a long time, he and his family members started tracing her out. They searched for them in the night. On not finding them, he had moved an application on 20.10.2009 at about 10

a.m. at Police Station Bekan Ganj. He along with others was searching Shifa and Akeela on the very day. At about 12.30 at day hours, on mobile no.9450436353 of his wife Tahsin Fatma, a call was made from mobile no. 9753775687 and it was told that his child is safe and if she wanted her back, she had to extend ransom of Rs.5 lakhs and if it was disclosed to anybody, her child will be no more. This witness further stated that on account of threat, he did not told this to the police and was waiting for his call as it was said that he will make another call as to where the money had to be given. On not being made call for two days, his wife gave a written information in this regard at the police station. On 20.10.2009 at about 10.10.30 at night, the police nabbed Sanno @ Akeela and Vijay near Yatimkhana crossroads and recovered his niece Shifa from their custody. At that time, police had called up his father and brother. On the very same day, the police had handed over Shifa to his father and brother. Accused Sanno @ Akeela and her husband had kidnapped his niece Shifa aged about one and half years for getting ransom.

9. P.W.1 in his cross-examination stated that he had written the written report. May be that in haste, he could not put date on the written report. Mobile No. 9415051970 was his number. Mobile No.941512805 belongs to his father Mohd. Sibtain. Mobile No. 9935959933 belongs to his younger brother Mistahul Islam who is the father of the girl. Mobile No. 2542042 belongs to doctor, which was closed at that time and out of order on that day. He had written the written report standing on the road outside the police station. It was written on 20th at about 10 a.m. in the morning. Akeela @ Sanno had come for work in his house about two months ago. She had come two months ago from the date of incident. Akeela did not live in his house. He did not know where Akeela used to live. Mother of Sanno used to visit his house earlier to the incident. Her visit was upto three years ago. Mother of Akeela used to visit his house upto three years ago from the date of incident. Mother of Sanno lived at Colonelganj. He had never visited her house. Mother of Sanno used to come to work at the time of marriage etc. Sanno used to take around the girl outside and then he stated that she had took her around for about two to four times. There was a boy child except that girl, who was aged about four years old and boy child was seven years old. She had taken him around about one time. He did not remember specifically as to what remuneration he used to give her but he used to give less than thousand rupees. Neither he had given any application on 19.10.2009 nor he remembered about that. That girl could not be found. He had seen the girl at home. He had given statements to the Inspector. He had got recorded his statements between dates 20th-22nd. He further stated that it was false statement that he had lodged false case due to not giving of salary. Call was made on the cell phone of his wife. What was told, should be asked from his wife. Mobile number of his wife was 9450436353 and which number was used at that time, he did not remember. He had checked the number but he did not remember the number at that time. He had not got made audio CD. Nothing occurred in his presence. In his presence, police visited his home, they did paper work but what they did, he did not know. The girl was healthy when she was at home. Girl was weeping.

10. P.W. 2 Mohd. Sibtain stated in his examination-in-chief that he knew Akeela @ Sanno. She was housemaid in his house.

On 19.10.09 in the evening hours, Akeela took his granddaughter Shikha aged about one and half years out of the house on the pretext of play. On not being returned, he along with others started search for them. On not being traced out, his son Misbahul Islam got registered a case of kidnapping against her at Police Station Bekanganj. On 20.10.2009, his daughter-in-law (bahu) was asked for ransom of Rs.5 lakhs on making call on her cell phone. Thereafter, they were waiting for another call and making arrangement for demanded ransom. When no call was made again, his daughter-in-law Tahsin Fatima having apprehension of any untoward incident gave a written report at police station Bekanganj about the call for demand of ransom. On 22.10.2009 at night, one police personnel came to call up him and told that a lady had been nabbed with one and half year girl to whom he should recognize. Thereafter, he went to China Park and saw that his girl was in the lap of lady police and Akeela was nabbed by police. He recognized his girl there and the lady caught hold was Akeela @ Sanno. This witness proved handing over document Ext. Ka-2 and recovery fard Ext. Ka-3.

11. P.W. 2 in his cross-examination stated that he knew Akeela from 10-15 days ago of the incident. He did not know another accused who is known by Vijay Sharma. Where Akeela lived, he did not know. Akeela was engaged for work at 800 rupees per month. He did not go to the police station for lodging case. Report was lodged on 20.10.2009. His son had lodged the report against Akeela for kidnapping. He had not seen her taking the girl around. Mother and grandmother of the girl had seen her taking girl around. Voice asking for Rs.5 lakhs was of a man. The number from which call was made on the mobile of his daughter-in-law was given at the police station. He came to know about finding out of the girl on 22.10.2009. One policeman came and gave the information. The girl was found at Tikonia Park in Heeramanpurwa. When he reached there, Parvez, Arlad, Sharbar and policemen were there. Except the lady and girl, there was none other else. Husband of that lady was also there. He did not know the actual time. Darkness had grown in the revving. This witness further stated that police had not recorded his statement. Tahsin Fatma was his daughter-in-law. His statement was not recorded thereafter. The girl was one and half years old and was not able to tell anything. It was wrong to state that his girl was not kidnapped and case was wrongly registered. This was also wrong to state that he had given false statement. He further stated that it is wrong to state that he lodged case against her as her money was outstanding with them. He further stated that it is wrong to state that he registered false case on account of some personal acrimony.

12. P.W. 3 Sharbat Mufiz is the independent witness of the recovery of the girl. This witness proved Exts. Ka-3 and Ka-2. He stated in the cross-examination that he knew first informant, who was his brother-in-law (sala). From his home, Talaq Mahal was about 10 kms away. Yatimkhana was nearby Talaq Mahal. Yatimkhana is at walking distance of 2-3 minutes from Talaq Mahal. In his knowledge, the incident relates to 19.10.2009. He did not know when the case was registered. His wife came to know about the incident and thereafter he came to know about the incident from her. He did not know accused earlier. On 21-22.10.2009 no phone came to him about ransom. He was his son-in-law. Call was made to elder sister-in-law

(badi bahu). Neither any call was made to him nor any ransom was asked from him. He had reached Yatimkhana crossroads at 10.10.30. For what he was going there, he did not know. He was not going to his in-laws home. This witness further stated that he was made to stop at the crossroads and then stated he stopped seeing crowd. He went to China Park with the police. Eight-ten policemen were catching hold of one man. From police, he came to know that it was a matter of kidnapping. Thereafter, he went along with the nabbed man and police to the China Park. This witness stated that there was darkness under the tree in China Park. In torch light, he saw that a lady with girl was sitting there. Policemen got that lady caught hold by lady home guard. He did not know that lady. Along with him, there was 8-10 policemen and Parvez. This witness stated that it was wrong to state that as he was son-in-law (damad) of the informant's family, therefore, he was making false statement.

13. P.W. 4 Smt. Tahsin Fatma in her examination-in-chief stated the fact of taking around the girl by her housemaid Sanno @ Akeela on 19.10.2019 and not coming back thereafter. On not being traced out, her husband Misbahul had lodged a report at police station Bekanganj. On 20.10.2009 at 12.30 p.m., a call was made on her mobile number 9450436353 by mobile no. 9753775687 and ransom of Rs.5 lakhs was demanded. When the call was not made again, she moved an application in regard to demand of ransom, which she proved as Ext. Ka-4. She further stated that on 22.10.2009 at night hours, police had nabbed Akeela and recovered Shifa. Her father-in-law had brought girl from the police station. In cross-examination, this witness stated that on 22nd her father-in-law had brought the girl at 12.00 a.m. From where he had brought she did not know. She did not ask her father-in-law as to wherefrom, he had brought the girl. Call was made by husband of Sanno on 20th at 12.30 noon. She did not remember the number from which call was made. In examination-in-chief, which number she had got written, was brought by her in writing and from that number call was made. She did not know from where her niece was recovered and from whom she was recovered. She did not remember whether she had told the Inspector the number from which call was made. She stated that the girl was neither kidnapped or recovered before her. She further stated it was wrong to say that false case was registered because of money being outstanding.

14. The prosecution proved written report F.I.R. as Ext. Ka-1; fard handing over of kidnapped girl as Ext. Ka-2; fard recovery of kidnapped girl as Ext. Ka-3; written report of Tahsin Fatima as Ext. Ka-4; Chik F.I.R. as Ext. Ka-5, Copy of G.D. Entry as Ext. Ka-6; Copy of G.D. Entry regarding registration of case as Ext. Ka-7; Charge-sheet as Ext. Ka-8; and site plan of the place of occurrence as Ext. Ka-9.

15. Learned Trial Judge after hearing the prosecution as well as defence counsel and appreciating the evidence, held both the accused-appellant guilty under Section 364 A I.P.C. and sentenced them to undergo life imprisonment with fine of Rs.2500/- each and in default of payment of fine, sentenced each of them to undergo two months additional imprisonment.

16. Heard Ms. Mary Puncha (Sheeb Jose), learned counsel for the appellants and Sri Roopak Chaubey, learned counsel for the State.

17. Learned counsel for the appellant contended that in fact the evidence is so scanty that there was no proof that minor child was kidnapped. She further stated that leave apart kidnapping, there is no evidence that the kidnapping was for ransom. Conviction of the accused cannot be based on the sole testimony of the accused himself who had guided the police to the place where child was kept. It is further submitted that husband is a blind person. The husband and wife were working with the first informant. It is further submitted that from the record, it is not found that the accused had demanded what can be said to be ransom. The telephone number from which call was made is also not proved. The kidnapper were nabbed from China Park. The learned Trial Judge, according to the learned counsel, has based the Judgment on the fact that Sanno @ Akeela @ Aneeta at the instance of Vijay Sharma under the guise of taking the child around had kidnapped her and had demanded ransom. It is submitted that this fact is not proved by cogent evidence. Hence, placing reliance on Judgments of this Court in **Guddo @ Nitin Singh Vs. State of U.P., 2020 CRI.L.J. 3792, and Kallu @ Gurdayal Vs. State of U.P., 2020 CRI. L. J. 1547**, learned counsel for the appellants submitted that conviction and sentence of the accused appellants may be modified from Section 364 A to one Section 365 I.P.C..

18. Per contra, learned counsel for the State submitted that the accused were in fiduciary capacity and were servants with the first informant. Ransom has been demanded, which has been proved and this Court may not easily interfere with the Jugement impugned herein as there was arrest even at the behest of the accused Vijay Sharma. They were knowing the first informant and the child. It was submitted that P.W. 3 has given exact version of entire fact which is corroborated by statements of P.W. 7 S.I. Ram Charan.

19. Considering the evidence on record, we are convinced that the matter would fall within Section 365 and not within 364 A of the Indian Penal Code. The decision of the Division Bench of this Court in Guddo @ Nitin Singh **(supra)** relied on by Mary Puncha (Sheeb Jose), learned counsel for the appellants would apply to the facts of the case. Factum of asking ransom from a particular phone number has not been proved. Even if we go by the admission of the accused, which is a weak piece of evidence that there was kidnapping because of the threat given , it would be offence under Section 365 and not 364A of the Indian Penal Code. Sections 365 and 364 A read as under:-

***"365. Kidnapping or abducting with intent secretly and wrongfully to confine person.**--Whoever kidnaps or abducts any person with intent to cause that person to be secretly and wrongfully confined, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine."*

***"364A. Kidnapping for ransom, etc.**--Whoever kidnaps or abducts any person or keeps a person in detention after such kidnapping or abduction and threatens to cause death or hurt to such person, or by his conduct gives rise to a reasonable apprehension that such person may be put to death or hurt, or causes hurt or death to such person in order to compel the Government or 2[any foreign State or international inter-governmental organisation or any other person] to do or*

abstain from doing any act or to pay a ransom, shall be punishable with death, or imprisonment for life, and shall also be liable to fine."

20. In view of the aforesaid, we modify the conviction of the appellants under Section 364-A I.P.C. to one for offence punishable under Sections 365 I.P.C. Maximum punishment for such offence is seven years only. Hence, we modify the sentence from life imprisonment to seven years (already in jail). Fine is reduced to Rs.1,000/- and default sentence is reduced to six months which would start after completion of seven years. The accused shall be entitled to remission as per law.

21. As the accused are in jail for more than ten years, we direct them to be released forthwith in case they are not required in any other case.

22. Appeal stands partly allowed.

23. Lower court record be sent to the court below forthwith.

24. Let a copy of this Judgment be sent to the Jail Authorities concerned and District Magistrate for compliance.

(2021)02ILR A810
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 12.02.2021

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER , J.
THE HON'BLE GAUTAM CHOWDHARY, J.

Criminal Appeal No. 3969 of 2013

Mohd. Imran ...Appellant(In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellants:
Sri Lav Srivastava, Sri Imtiyaz Ali, Sri Santosh Kumar Tiwari, Sri Shujauddin, Sri V.P. Srivastava

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

A. Criminal Law-Code of Criminal Procedure,1973-Section 374(2) & Indian Penal Code, 1860-Sections 302-challenge to-conviction-deceased was killed by her brother over the honor issue-she was requested not to meet the person Hanif coming to the home-brother did not like his sister who have a love affair with that person-incident took place in grave and sudden provocation-Though, the brother can never had intention to murdering his sister- all the witnesses have turned hostile-The brother of the deceased has been sentenced for 302 IPC giving it a picture of honor killing- it is homicidal death but not murder. Accused held guilty for Section 304(1) IPC- Since, accused is in jail for a period of more than 10 years, he is set free, as he was sentenced for nine years of R.I. in jail. (Para 1 to 27)

The Appeal is allowed. (E-5)

List of Cases cited: -

1. Suresh @ Kala Vs St. NCT of Delhi, CRLA No.1284 of 2019

2. Nandlal Vs St. of Mah. (2019) 5 SCC 224

3. Surain Singh Vs St. of Punj. (2017) 5 SCC 796

4. Deepak Vs St. of U.P. (2018) 8 SCC 228

5. Budhi Singh Vs St. of H.P. (2012) 13 SCC 663

6. Atul Thakur Vs St. of H.P. & ors. (2018) 2 SCC 496

7. Muthu Vs St. of Inspr. of Police, T.N. CRLA NO. 1511 of 2007

8. Stalin Vs St. CRLA No. 577 of 2020

9. St. of Guj. Vs B.L. Dave CRLA No. 99 of 2021

10. Bhagwan Das Vs St. of New Delhi (2011) Crl. LJ 2903

(Delivered by Hon'ble Dr. Kaushal Jayendra Thaker, J. &
Hon'ble Gautam Chowdhary, J.)

1. Heard Sri Santosh Kumar Tiwari, learned counsel for appellant and Sri N.K. Srivastava, learned A.G.A. for the State.

2. This appeal has arisen from the judgement and order dated 08.08.2013 passed by learned Additional Sessions Judge, Saharanpur in S.T. No. 507 of 2011, State of U.P. v. Imran (Crime No.28/11) under Section 302 I.P.C., Police Station Thakurdwara,, District Moradabad for life imprisonment and fine of Rs. 20,000, in default of payment of fine one year further R.I. We place reliance in the case decided by us titled **Sharaft Vs. State of U.P. being Criminal Appeal No. 1237 of 2013 decided on 20.01.2021.** The facts are practically identical with the facts due to quarrel the brother stifling his sister and she met with her death. Can judgement be based on personal thought of a Judge and can conviction be based on what is known as moral conviction. Despite the fact that all the witnesses have turned hostile. The brother of the deceased has been sentenced for 302 IPC giving it a picture of honour killing.

3. The factual scenario as it unfurls from the record and the F.I.R are that the accused caused death of the deceased on 09.02.2011 at 9.30 p.m. when Usman Ali (who is father of the accused and also of deceased) had lodged the F.I.R. conveying to the Police that her daughter Shahista Parween was done to death by her brother Imran by stifling her neck by knife in glave and sudden provocation.

4. It is submitted by Shri Santosh Kumar Tiwari that the prosecution started against the accused who is brother of the deceased for commission of offence under Section 304 of Indian Penal Code and the charge sheet was laid against him for commission of offence under Section 302 I.P.C. The accused was committed to the court of session as the case was triable exclusively by the court of sessions.

5. It is admitted position of fact that the accused is in jail since 10.02.2011 and might have been in jail even during the period of investigation before he was enlarged on bail.

6. The prosecution examined several witnesses so as to bring home the charge framed against the accused as enumerated:

1.	Deposition of Usman, informant	09.08.2011	PW1
2.	Deposition of Mohd. Rizwan	09.08.2011	PW2
3.	Deposition of Mohd. Umar	30.09.2011	PW3
4.	Deposition of Dr. Abdul Qadir Ansari	01.11.2011	PW4
5.	Deposition of Mohd.	22.11.2011	PW5

	Hanif		
6.	Deposition of Shamsad Ali	16.05.2012	PW6
7.	Deposition of Genda Lal	19.11.2012	PW7
8.	Deposition of Rajiv Kumar Gautam	11.01.2013	PW8
9.	Deposition of Vinod Kumar Singh	14.02.2013	PW9
10.	Deposition of Rohtash Singh	09.04.2013	PW10

7. In support of ocular version following documents were filed:

1.	First Information Report	09.02. 2011	Ex.Ka.3
2.	Written Report	09.02. 2011	Ex.Ka.1
3.	Recovery Memo of of Pant & Jacket	10.02. 11	Ex. Ka.13
4.	Recovery memo of Blood Stained & Plain Earth and Blood Stained Knife	12.01. 2012	Ex. Ka.6
5.	P.M. Report	09.02. 2011	Ex.Ka.6
6.	Report of Vidhi Vigyan Prayogshala	12.01. 2011	Ex. Ka. 16
7.	Panchayatnama	09.02. 2011	Ex. Ka. 7
8.	Charge-Sheet (Mool)	29.02. 2011	Ex. Ka. 15

8. The following judgments of the Supreme Court are cited by the learned counsel for the appellant so as to contend that offence under Section 302 I.P.C. is not made out against the accused. (**i) Suresh @ Kala v. State NCT of Delhi, Criminal Appeal No.1284 of 2019; decided on 27.8.2019 (ii) Nandlal v. State of Maharashtra, (2019) 5 SCC 224 (iii) Surain Singh v. State of Punjab, (2017) 5 SCC 796 (iv) Deepak v. State of Uttar Pradesh, (2018) 8 SCC 228 (v) Budhi Singh v. State of Himachal Pradesh, (2012) 13 SCC 663 (vi) Atul Thakur v. State of Himachal Pradesh and others, (2018) 2 SCC 496.**

9. The learned Advocate Sri Santosh Kumar Tiwari counsel for the appellant has taken us through the record and has contended that this is a case of clean acquittal. The father of the deceased who is father of the accused also has lodged the F.I.R. Despite the fact that no witnesses have supported the case of prosecution. The learned Judge has recorded the finding of section 302 I.P.C. and has convicted the accused for life. It is further submitted that the brother can never had intention to murdering his sister honour issues that she was requested not to meet the person namely Hanif coming to the home. He has relied on the decisions in **Budhi Singh Vs. State of H.P. Crl. Appeal No. 1801 of 2009 decided on 13.12.2012, Muthu Vs. State of Inspector of Police, Tamilnadu, Crl. Appeal NO. 1511 of 2007 decided on 2.11.2007 and Stalin Vs. State, Crl.**

Appeal No. 577 of 2020 and has requested that if this court is not convinced and it is a case of acquittal, this court may follow the judgement which is a mirror judgement of this Bench dated 20.01.2021 in case of Sharafat (Supra) where also two brothers were held to have injured their sister who died. In our case also it is submitted that the conviction be altered.

10. Learned counsel for the appellant has contended that if this Court come to the conclusion that the case is made out against the accused and they are not to be accorded benefit of doubt, he presses into service the provisions of Section 304 of I.P.C. According to learned counsel, the learned Judge could not have framed fresh charge after some of the witnesses had turned hostile.

11. As against this Sri N.K. Srivastava, learned A.G.A. appearing for the State has has vehemently objected and has contended that it is a case of honour killing where the brother did not like his sister who have a love affair with Hanif and has submitted that the conviction can not be modified as all the prosecution witnesses who have turned hostile have in the beginning supported the prosecution. It was accused and accused alone who had committed the offence.

12. We are convinced that it is a case of moral conviction.The accused is in jail since 10.02.2011 which is exactly ten years without remission. The witnesses have not supported the case of prosecution. Same and except the Doctor and the police officials. P.W. 1, P.W. 2, P.W. 3, P.W. 5 and P.W. 6 Shamshad Ali, who had taken the body. P.W. 7 is Genda Lal who is clerk, P.W. 8 is Rajiv Kumar Gautam who is Ist I.O, P.W. 9 Vinod Kumar Singh, who is IInd I.O. and P.W. 10 is Rohtash Singh, who is constable.

13. Learned counsel for the State has also taken us through the record and has contended that the vital part of the body was attacked by the appellant No.1 may be the deceased was sister but he was having knowledge and his intention was also there, otherwise he would not have inflicted blow on the vital part of the body by the instrument which was recovered as his behest.

14. As such we are convinced that the evidence was very scanty and oral testimony on the record of the trial Judge was not so on which conviction could be returned leave apart under Section 302 I.P.C., but it appears that the learned Judge has convicted the accused on the basis of his own ideology and on the basis of the hostile witnesses

15. Recently the Apex Court **State of Gujarat Vs. B.L. Dave in Criminal Appeal No. 99 of 2021 dated 02.02.2021** has held that if the court wants to acquit and wants to take different view then taken by the learned trial Judge the court must discuss the evidence of each and every witness. In our case witnesses of facts have turned hostile. The learned Judge has convicted the accused on the evidence of the police authority which could not have been done in the submission of learned counsel for the appellant. [As ten years have already elapsed]. Death has occurred which is homicidal death. The pathology lab and the evidence of P.W. 8,9 and 10 and that of the medical evidence would permit us to hold that it was a homicidal death. The learned Judge goes to rely on the judgement in the case of honour killing and this is not a case of honour killing. In our

case can it be said that there was a honour killings. The answer is a sympatrically no. The FIR goes to show that it was given in haste as the father felt bad. The deceased was 19 years of age was learning computer. The accusing according to father testimony before he turn hostile was not liked by the appellant herein and even if go by the cross examination he has not supported his version in F.I.R. P.W. 2 also has turned hostile but he had not seen who had inflicted knife injuries on his sister. P.W. 3 who is independent witness has also not supported the case of the prosecution, as we have also discuss the evidence of P.W. 4 that the death was homicidal death. We do not go further on the said aspect. There were four injuries which may be inflicted by a knife. P.W. 5 has also not supported the prosecution witness who has on the contrary stated that he does not know who has committed the act of causing injuries to Shahista Parveen. We have already said that it was a homicidal death. Witnesses 7,8 and 9 are of police personnel. The evidence of the police witnesses have been made a basis of convicting the accused. The learned Judge has mis-led himself to convict under section 302 IPC. The factual data show that there was quarrel between brother and sister and the brother had done her to death. The FIR was lodged by the father which has been proved by learned Judge according to the police officials.

16. We have not discussed the evidence of each witness in detail as most of them have turned hostile being family members. It was a moral conviction by the learned Session Judge, the informant Usman, who is the father of the deceased Shahista Parveen. The incident occurred about seven months from the date of his deposition before Court on 9.8.2011 his turning hostile.

17. The post mortem report has been proved by the evidence of the Doctor Abdul Qadir Ansari, P.W. 4 goes to show that there were anti mortem injuries which was a incised wound 15.08 X 7.0 C.M. deep to conical bone wise cut neck muscles with cut trachea is to death was because of sudden cardiac arrest die to shock and hymrage haemorrhage. This fact itself proves that the death was homicidal and not of suicidal death.

18. It is submitted by counsel for the appellant that this is a case of no evidence, however, the accused is in jail since more than ten years. The learned Judge had relied on which could not have been made the basis for conviction in fact the conviction of the accused should not have been recorded, but as the learned counsel contended that it is not a case for conviction under Section 302 Indian Penal Code but case for lesser sentence.

19. This takes us to the issue of whether the offence would be punishable under Section 299 300 Indian Penal Code or Section 304 I.P.C.

20. Considering the evidence of these witnesses and also considering the medical evidence including post mortem report, there is no doubt left in our mind about the guilt of the present appellant and admission on part of accused. However, the question which falls for our consideration is whether, on reappraisal of the peculiar facts and circumstances of the case, the conviction of the appellant under Section 302 I.P.C. of the Indian Penal Code should be upheld or the conviction deserves to be converted under Section 304 Part-I or Part-II of the Indian Penal Code. It would be relevant to refer Section 299 of the Indian Penal Code, which read as under:

"299. Culpable homicide: *Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide.*

21. The academic distinction between "murder' and "culpable homicide not amounting to murder' has always vexed the Courts. The confusion is caused, if Courts losing sight of the true scope and meaning of the terms used by the legislature in these sections, allow themselves to be drawn into minute abstractions. The safest way of approach to the interpretation and application of these provisions seems to be to keep in focus the keywords used in the various clauses of Section 299 and 300. The following comparative table will be helpful in appreciating the points of distinction between the two offences.

Section 299	**Section 300**
A person commits culpable homicide if the act by which the death is caused is done-	Subject to certain exceptions culpable homicide is murder is the act by which the death is caused is done.
INTENTION	
(a) with the intention of causing death; or	(1) with the intention of causing death; or
(b) with the intention of causing such bodily injury as is likely to cause death; or	(2) with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused;
KNOWLEDGE	**KNOWLEDGE**
(c) with the knowledge that the act is likely to cause death.	(4) with the knowledge that the act is so immediately dangerous that it must in all probability cause death or such bodily injury as is likely to cause death, and without any excuse for incurring the risk of causing death or such injury as is mentioned above.

22. It is very clear from the F.I.R. though unsupported by the prosecution and other witnesses of facts that there was a heated discussion and during the quarrel one of the accused had tried to see that the deceased remained in the four corners of the home.

23. The accused is the brother of deceased, he is in jail **for a period of more than 10 years**. It is a matter of fact as it is transpires from the F.I.R. and as we have held that it is homicidal death but not murder. We hold the accused guilty for Section 304(1) Indian Penal Code.

24. While going through the record, we are convinced that the accused brother had no intention of doing away of his sister but in hit of the moment the incident has occurred. Learned Judge instead of writing philosophy, if he did not think it was a case

of acquittal but could have punished under Section 304 part I or II of I.P.C. which was attracted in the facts of this case.

25. The concept of honour killing is invoked by learned Judge in the facts of the case and it would be not possible to concur as us a case of no evidence. Despite that the accused is in jail for more than 10 years without remission. The factual scenario even if it is believed could not have permitted the Judge to convict the accused for 302 IPC where no evidence was there on record. Most of the family members have turn hostile but the learned Judge has convict the accused on the basis that he had done with her death which was opinion as based on ideology of the learned Judge. It is not a case on record that the appellant did not want the deceased to fall love in a lower caste. Even if we read operative portion it is very clear that there a quarrel between brother and the sister. According to the learned trial Judge the brother acted in gruesome manner and that is why punished him with life imprisonment with a fine of Rs. 20,000/-. The learned Judge has heavenly relied upon **Bhagwan Das Vs. State of New Delhi 2011 Crl.LJ 2903** just because the accused did not examine any witness. The learned Judge has relied reliance and has convicted on the statement under section 161 Cr.P.C. of the witnesses. With this preclude we decide the appeal. Similar is case before us and reliance can be placed on the case of Sharafat (Supra).

26. The accused is in jail for more than 10 years. He is sentenced to undergo nine years R.I. with fine of Rs. 500/- and, in case of default in payment of fine, further to undergo three months imprisonment. He is ordered to be set free if not required in any other case.

27 . Accordingly, the appeal is allowed.

28. Record and proceedings be sent back to the trial court.

29. This court is thankful to Shri Santosh Kumar Tripathi, learned counsel for the appellant and learned AGA Sri N.K. Srivastava for ably assisting this Court in getting this old matter disposed off.

(2021)02ILR A816
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 10.02.2021

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER , J.
THE HON'BLE GAUTAM CHOWDHARY, J.

Criminal Appeal No. 4437 of 2014

Deepak Kalra ....Appellant (In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellants:
Sri Santosh Tiwari, Sri Dhiraj Kumar Pandey, Sri Sunil Kumar Mishra

Counsel for the Opposite Party:
A.G.A., Sri Rahul Kumar Tripathi

A. Criminal matter-Code of Criminal Procedure,1973-Section 374(2) & Indian Penal Code, 1860-Section 302-challenge to-conviction- the appellant had inimical relation with his wife- He had started to consume liquor-He used to regularly beat her- Before two days only, his father had brought the deceased to the matrimonial home-The capacity of the deceased to make a dying declaration with 90% burns is of her own-There is no tutoring by any interested person-The evidence on record gets corroboration of PW-2 who is the son

of appellant and deceased, who has testified that it was his father who had poured kerosene on his mother-due to being addicted to liquor and being in depression due to loss of business, there was a quarrel between him and his wife-He and his wife had a heated discussion-Statement recorded under Section 313 Cr.P.C. shows that he had felt really sorry about the incident- He has children (second daughter) whom he will have to maintain and he has been in jail for a period of over 10 years-accused sentenced reduced to ten years from life imprisonment-he is set free.(Para 1 to21)

B. Dying declaration can be acted upon as per the contours laid down by the authoritative pronouncements, we would like to go by the the juristic theory regarding acceptability of a dying declaration is that such declaration is made in extremity, when the party is at the point of death and when every hope of this world is gone, when every motive to falsehood is silenced, and the man is induced by the most powerful consideration to speak only the truth. Notwithstanding the same, great caution must be exercised in considering the weight to be given to this species of evidence on account of the existence of many circumstances which may affect their truth. The situation in which a man is on death bed is so solemn and serene, is the reason in law to accept the veracity of his statement. It is for this reason the requirements of oath and cross-examination are dispensed with. Since the accused has no power of cross-examination, the court insist that the dying declaration should be of such a nature as to inspire full confidence of the court in its truthfulness and correctness. (Para 10)

The Appeal is allowed.(E-5)

List of Cases cited:-

1. Khushal Rao Vs St. of Bom. (1958) AIR S.C. 22

2. St. of M.P. Vs Ramesh Kumar (2018) LawSuit (MP)358

3. Pramod Kumar Vs St. of U.P. CRLA No.318 of 2015

4. Tukaram & ors. Vs St. of Mah. (2011) 4 SCC 250

5. B.N. Kavatakar & anr. Vs St. of Karnataka (1994) SUPP 1 SCC 304

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

1. By way of this appeal, the appellant has challenged the Judgment and order dated 26.9.2014 passed by court of Ist Additional Session Judge, Court No.1, Saharanpur in Sessions Trial No.81 of 2009, State Vs. Deepak Kalra arising out of Case Crime No.615 of 2008 under Sections 302 I.P.C., Police Station Sadar Bazar, District Saharanpur whereby the accused-appellant was convicted under Section 302 of IPC and sentenced to imprisonment for life with fine of Rs.5,000/- and in case of default of payment of fine, to undergo further rigorous imprisonment for two years.

2. The factual data which is culled out from the record is that the accused on 20.9.2008, deceased Pooja was married to Deepak Kumar namely accused-appellant. Deepak had lost lot of money in the business, and, therefore had taken to liquor and used to demand money from his in-law. The accused tired to set his wife ablaze on the date of incident. The deceased had come back to the matrimonial home with her father-in-law who had assured his parents that she would be kept well, but she was set ablaze within two days of returnings by the accused is her dying declaration. They had altercation and quarrel on the said date also is what is

stated in her dying declarations, she conveyed in her dying declaration that her mother-in-law, brother-in-law and father-in-law were not responsible for the incident. The brother-in-law had brought her to the hospital. The investigation was conducted and the accused was charge sheeted.

3. The accused was committed to the Court of sessions as it was sessions triable case. Accused being brought before session judge, the learned sessions judge framed charges on 19.3.2009 under Section 302 of IPC.

4 . The prosecution so as to bring home the charges examined eleven witnesses, who are as under:-

1.	Deposition of Sushma Bajaj	P.W.1
2.	Deposition of Deepansh	P.W.2
3.	Deposition of Ashok Kumar	P.W.3
4.	Deposition of Dr. Naresh Chandra	P.W.4
5.	Deposition of Narendra Pal Singh	P.W.5
6.	Deposition of Bulaki Ram Verma	P.W.6
7.	Deposition of J.K. Tomar	P.W.7
8.	Deposition of Desh Deepak Singh	P.W.8
9.	Deposition of Balbir Singh	P.W.9
10.	Deposition of I.B.P. Mishra	D.W.1
11.	Deposition of Sanjay Kalra	D.W.2

5. In support of the ocular version of the witnesses, following documents were produced and contents were proved by leading evidence:

1.	F.I.R.	Ext. Ka-2
2.	Written report	Ext. Ka-1
3.	Dying declaration	Ext.Ka-8/22/9
4.	Recovery of memo of match box, bottle & cap of cold drink	Ext. Ka-20
5.	Recovery memo of half shirt	Ext. Ka-21
6.	Injury report	Ext. Ka-6
7.	Bed head ticket	Ext. Ka-7
8.	P.M. Report	Ext. Ka-10
9.	Panchayatnama	Ext. Ka-11
10.	Charge-sheet (Mool)	Ext. Ka-16
11.	Site Plan with Index	Site Plan with Index

6. The minor child Deepansh-PW-2 who is son of accused as well as son of the deceased has deposed that since six months, they were staying with their aunt. The deceased was taken to the matrimonial home , by the grand father according to the child. The minor child has accepted in his testimony that he had conveyed to the maternal aunt that his father and grand father had set his mother ablaze and father

had taken her to the hospital. He has withstood the cross examination also.

7. Learned counsel appearing on behalf of accused-appellant has relied on the decisions in Khushal Rao Vs. State of Bombay, AIR 1958 S.C. 22, State of Madhya Pradesh Vs. Ramesh Kumar, 2018 LawSuit(MP)358 and a Division Bench Judgment of this Court in Criminal Appeal No.318 of 2015 (Pramod Kumar Vs. State of U.P.) Decided on 28.2.2019.

8. Learned A.G.A. appearing on behalf of State has contended that this is a case of dowry death. The accused has caused the death of his wife with brutality. It is further submitted that the dying declaration has been rightly believed by the learned Trial Judge. It is further submitted that just because the witnesses have been family members, they have not supported the prosecution in totality and that the dying delcaration goes to show that there is corroboration. The FIR goes to show that the deceased Pooja was staying with her brother. The evidence of the minor has also been properly scrutinized by the learned Judge. Though later on he has not supported the prosecution but in his chief, he has stated that he had conveyed to his aunt-Sushma Bajaj that was his father, who had set her ablaze but father had taken her to the hospital. He has further relied on evidence of the doctor and the police authorities so as to contend that the judgment does not require any interference and has contended that the post mortem report and the examination by doctor shows that the body was having burn injuries except the feet.

9. It is further submitted by learned AGA that the accused should not be dealt with lightly. It is further submitted that incident occurred on 21.9.2008 at 10:30 p.m. The deceased was set ablaze and has submitted that the learned Judge has minutely discussed oral testimony, decision and has convicted the accused.

10. Before we decide to evaluate whether the dying declaration can be acted upon as per the contours laid down by the authoratative pronouncements, we would like to go by the the juristic theory regarding acceptability of a dying declaration is that such declaration is made in extremity, when the party is at the point of death and when every hope of this world is gone, when every motive to falsehood is silenced, and the man is induced by the most powerful consideration to speak only the truth. Notwithstanding the same, great caution must be exercised in considering the weight to be given to this species of evidence on account of the existence of many circumstances which may affect their truth. The situation in which a man is on death bed is so solemn and serene, is the reason in law to accept the veracity of his statement. It is for this reason the requirements of oath and cross-examination are dispensed with. Since the accused has no power of cross-examination, the court insist that the dying declaration should be of such a nature as to inspire full confidence of the court in its truthfulness and correctness. The court, however has to always be on guard to see that the statement of the deceased was not as a result of either tutoring or prompting or a product of imagination. The court also must further decide that the deceased was in a fit state of mind and had the opportunity to observe and identify the assailant. Normally, therefore, the court in order to satisfy whether the deceased was in a fit mental condition to make the dying declaration look up to the medical opinion.

But where the eyewitnesses state that the deceased was in a fit and conscious state to make the declaration, the medical opinion will not prevail, nor can it be said that since there is no certification of the doctor as to the fitness of the mind of the declarant, the dying declaration is not acceptable. A dying declaration can be oral or in writing and in any adequate method of communication whether by words or by signs or otherwise will suffice provided the indication is positive and definite. In most cases, however, such statements are made orally before death ensues and is reduced to writing by someone like a magistrate or a doctor or a police officer. When it is recorded, no oath is necessary nor is the presence of a magistrate is absolutely necessary, although to assure authenticity it is usual to call a magistrate, if available for recording the statement of a man about to die. There is no requirement of law that a dying declaration must necessarily be made to a magistrate and when such statement is recorded by a magistrate there is no specified statutory form for such recording. Consequently, what evidential value or weight has to be attached to such statement necessarily depends on the facts and circumstances of each particular case. What is essentially required is that the person who records a dying declaration must be satisfied that the deceased was in a fit state of mind. Where it is proved by the testimony of the magistrate that the declarant was fit to make the statement even without examination by the doctor the declaration can be acted upon provided the court ultimately holds the same to be voluntary and truthful. A certification by the doctor is essentially a rule of caution and therefore the voluntary and truthful nature of the declaration can be established otherwise.

11. Before we decide to threadbare go through the evidence, we make it clear that we have appreciated the entire evidence on record. We have been taken through the entire evidence most of witnesses who have turned hostile but to certain extent, they have corroborated the dying declaration.

12. The appellant can be said to have caused the homicidal death. The reason being he was the one who has been named in the dying declaration by the deceased and his son has also conveyed to his maternal aunt who has narrated the fact in the FIR. The dying declaration can be said to be trustworthy and it has to be held that dying declaration though is a weak piece of evidence stands on the same footing as any other piece of evidence. The surrounding circumstances go to show that the appellant had inimical relation with his wife. He had started to consume liquor. He used to regularly beat her. Before two days only, his father had brought the deceased to the matrimonial home. The capacity of the deceased to make a dying declaration with 90% burns is of her own. There is no tutoring by any interested person. The evidence on record gets corobotation of PW-2 who is the son of appellant and deceased, who has testified that it was his father who had pourd kerosene on his mother.

13. Learned counsel for the appellant submitted that the accused had not been instrumental in cuasing the death of the deceased. The dying declaration according to the learned counsel, is not fulfilling the contours set by the Supreme Court and the High Court. It is submitted that except PW-1, most of the witnesses have not supported the case of the prosecution. We hold that the accused was the one who had set his wife ablaze. We hold that the contours for accepting or rejecting the dying declaration are met with in the facts of our case and we

are convinced that the dying declaration has been properly recorded and is admissible in evidence as it is corroborated by the evidence of the child witness also.

14. However, the question which falls for our consideration is whether, on reappraisal of the peculiar facts and circumstances of the case, the conviction of the appellant under Section 302 of I.P.C. of the Indian Penal Code should be upheld or the conviction deserves to be converted under Section 304 Part-I or Part-II of the Indian Penal Code. It would be relevant to refer Section 299 of the Indian Penal Code, which read as under:

"299. Culpable homicide: *Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide."*

15. The academic distinction between "murder' and "culpable homicide not amounting to murder' has always vexed the Courts. The confusion is caused, if Courts losing sight of the true scope and meaning of the terms used by the legislature in these sections, allow themselves to be drawn into minute abstractions. The safest way of approach to the interpretation and application of these provisions seems to be to keep in focus the keywords used in the various clauses of Section 299 and 300 of I.P.Code. The following comparative table will be helpful in appreciating the points of distinction between the two offences.

Section 299	**Section 300**
A person commits culpable homicide if the act by which the death is caused is done-	Subject to certain exceptions culpable homicide is murder is the act by which the death is caused is done.
	INTENTION
(a) with the intention of causing death; or	(1) with the intention of causing death; or
(b) with the intention of causing such bodily injury as is likely to cause death; or	(2) with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused;
KNOWLEDGE	**KNOWLEDGE**
(c) with the knowledge that the act is likely to cause death.	(4) with the knowledge that the act is so immediately dangerous that it must in all probability cause death or such bodily injury as is likely to cause death, and without any excuse for incurring the risk of causing death or such injury as is mentioned above.

16. On overall scrutiny of the facts and circumstances of the present case coupled with the opinion of the Medical Officer and considering the principle laid down by the Apex Court in the Case of **Tukaram and Ors Vs. State of Maharashtra**, reported in (2011) 4 SCC

250 and in the case of **B.N. Kavatakar and Another Vs. State of Karnataka,** reported in **1994 SUPP (1) SCC 304,** we are of the considered opinion that the offence would be one punishable under Section 304 part-I of the IPC.

17. If we summarize the evidence of all the witnesses, they have withstood the cross examination and the factum of trustworthy dying declaration corroborated by the testimony of PW-2 son himself against father will also not permit us to brush aside the evidence.

18. The submission of learned counsel for the appellant relying on the decisions in **Khushal Rao (supra)** would, on the contrary, go against the appellant and the decision in **State of Madhya Pradesh (supra)** is also against appellant.

19. In our case, the decision of **State of Madhya Pradesh (supra)** will not aid the appellant, reason being here this is a case of conviction wherein State of Madhya Pradesh it was appeal against acquital. The judgment of this High Court in Pramod Kumar Vs. State of U.P. also will not help the appellant. The conviction has been based on circumstances which are attendant to the dying declaration. The said decision in Pramod Kumar Vs. State of U.P. also laid down that the dying declaration was truthful. Similar is the case here. Reliance can be placed on the recent decision of this Bench in the case of Criminal Appeal No.- 4702 of 2012 (Ashiq Ali and Another Versus State of U.P.) decided on 10.2.2021 and this vexatious question as to whether the offence with such gravity would fall within the provisions of Section 300 or 304 I.P.Code. The decision in Pramod Kumar (supra) and the decision in the case of Ashiq Ali and another (supra) will permit us to hold that accused be punished for Section 304 Part -I of IPC as it appers that due to being addicted to liquor and being in depression due to loss of business, there was a quarrel between him and his wife. He and his wife had a heated discussion. The judgment of this Court is pressed into service by the learned counsel which is applicable to the facts of this case. Statement recorded under Section 313 Cr.P.C. shows that he had felt really sorry about the incident. He has children (second daughter) whom he will have to maintain and he has been in jail for a period of over 10 years.

20. We substitute the life imprisonment to 10 years rigorous imprisonment. Fine is reduced to Rs.1,000/- and the sentence is reduced to three months.

21. Appeal is partly allowed. If the accused is not wanted in any other case, he be set free.

22. Record and proceedings be sent back to the Court below forthwith.

(2021)02ILR A822
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 22.01.2021

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER , J.
THE HON'BLE GAUTAM CHOWDHARY, J.

Criminal Appeal No. 4598 of 2014

Talewar ...Appellants(In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellants:

Sri Krishna Gopal, Sri Brij Raj Singh

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

A. Criminal Law-Code of Criminal Procedure,1973-Section 374(2) & Indian Penal Code, 1860-Sections 498A, 304-B & Dowry Prohibition Act,1961-Section 3/4 - challenge to-conviction-deceased died in her matrimonial home within 2 years of her marriage- PW-5 (doctor) opined that the death of the deceased to be unnatural and have occurred due to strangulation- Complainant alleged that her daughter was done to death by strangulation on account of non-fulfilment of demand of dowry- Most of the witnesses have not supported case of the prosecution is a fact which emerges on the record and the learned Judge had convicted the accused on the basis of the autopsy report that he had done her to death by strangulation and he has brought certain facts on record that incident occurred on the spur of the moment, which was not intentional- accused is set free if ten years of sentence is over.(Para 1 to 24)

The Appeal is partly allowed. (E-5)

List of Cases cited:-

1. Hem Chand Vs St. of Haryana (1994) 6 SCC 727

2. Hari Om Vs St. of Haryana & Anr.(2014) 10 SCC 577

3. Sunil Dutt Sharma Vs St. (Govt. of NCT of Delhi) (2014) 4 SCC 375

4. Kashmira Devi Vs St. of U.K. & Ors (2020) 11 SCC 343

5. Dev Narain Mandal Vs St. of U.P., Surjit Vs. Nahar rai, State Vs Vinod Kumar & Heeralal (2012) 6 SCC 770

(Delivered by Hon'ble Dr. Kaushal Jayendra Thaker, J. &
Hon'ble Gautam Chowdhary, J.)

1. This appeal has been preferred against the Judgment and order dated 30.10.2014 passed by the Additional Sessions Judge, Room No.09, Budaun in Sessions Trial No. 146 of 2011 arising out of Case Crime No. 1649 of 2010 under Sections 498A, 304-B I.P.C. and 4 of Dowry Prohibition Act, Police Station Ujhani, District Budaun.

2. Facts emerging from the prosecution story are that complainant Smt. Bhagwan Devi wife of Gendan Lal, resident of Village Khaspur Gautiya, Police Station Kunwargaon, District Budaun moved an application under Section 156 (3) Cr.P.C. before the Chief Judicial Magistrate, Budaun with the allegations that complainant's daughter Reshamwati aged 19 years was married to accused-appellant Talewar on 7.5.2009. She, according to her status, had given cycle, T.V. all other necessary articles and Rs.50,000/- in cash. Her daughter used to go and come to her matrimonial home. Her daughter told her that her in-laws pester her and demanded dowry, motorcycle and a buffalo and if she would not bring they would done her to death. The complainant along with others went to make settlement with in-laws of her daughter but they were adamant to demand said dowry. Complainant told that she had given enough dowry according to her status and she had no capacity to give more dowry. Complainant's son-in-law carried his wife Reshamwati on 30.5.2010 last time. Their son Bablu aged about 10 years also accompanied with them. On 11.6.2010 at about 5 p.m. one Aram Singh son of Nanhe resident of Junaiya told her that her daughter was done to death by her in-laws at about 12 noon and also locked her in a

room. When complainant along with her husband, Munshilal of her in-laws and Har Nam Singh reached in-laws home of her daughter at about 6 p.m., husband of complainant found his daughter dead in the room and none of in-laws was found there. Her son Bablu were found on the spot and many persons gathered. Her son Bablu told that brother-in-law Talewar, Jaisingh (jeth) and Sukhi (jethani) being unanimous strangulated her; when he went to see in the room they made him to run away by beating him; and when he asked them later on, they told that his sister was sleeping in the room. Complainant alleged that her daughter was done to death by strangulation on account of non-fulfillment of demand of dowry. The Chief Judicial Magistrate allowed the said application and directed the Station House Officer, Ujhani to investigate the matter lodging the First Information Report on the basis of which on 19.8.2010 at about 18.30 pm. chik First Informantion Report as Case Crime No.1649 of 2010 under Sections 304B, 498A I.P.C. and under Section ¾ Dowry Prohibition Act was lodged.

3. After investigation, the police submitted charge sheet in the court. The Magistrate took cognizance, summoned the accused and finding the case to triable by sessions court committed it to the court of Sessions on 5.2.2011. The Sessions Court framed charges against accused Talewar and Jai Singh under Sections 498A, 304 B and in alternative under Sections 302/34 I.P.C. and Section ¾ Dowry Prohibition Act, which were read over to the accused, who denied the charges and claimed trial.

4. Prosecution examined as many as seven prosecution witnesses, i.e., P.W.1 Smt. Bhagwan Devi (complainant), P.W. Gendanlal (husband of complainant), P.W.3 Bablu (son of complainant), P.W.4 Heeralal (independent witness), P.W. 5 Dr. R.K. Verma (who conducted post mortem report), P.W. 6 Munshilal (independent witness) and P.W. 7 Head Moharrir Akhlak Ali (Investigating Officer).

5. P.W. 1 Bhagwan Devi (mother of the deceased) stated that her daughter died two years ago. She was married to Talewar one year before her death. Her death occurred due to strangulation. She proved application under Section 156 (3) Cr.P.C. (Ext. Ka-1). She stated that she received information on the very same day when death of her daughter occurred due to strangulation. She had gone to the house of Talewar on the very same day and saw that corpse of her daughter was lying. Corpse was carried to Budaun, postmortem was conducted whereafter Talewar and others carried the corpse with them and performed last rites of the corpse, her husband and her other family members were present there, Talewar had performed last rites of the corpse. This witness further stated that she had got case lodged on saying of persons. She had spent one -half lakh rupees in the marriage. Clothes, jewellary, bed, cushion, watch, cycle etc were given in dowry. Her daughter lived one year in the house of Talewar. She had come to her home three times. She had come on teez, festivals and marriage occasions. She never spoke to her that Talewar had ever committed mar-peet with her. She did not know that she may be punished for telling a lie but she was aware that telling a lie is sin. When she lodged the report, the inspector came, investigated and asked when girl was married and how she died. The inspector had no diary.

6. P.W. 2, who was father of the deceased, namely, Gendanlal stated that name of his daughter was Reshamwati. Her

marriage was performed with Talewar one and half year before the incidence. He performed marriage as per Hindu rites. He stated that he had given dowry in the marriage of the Reshamwati as per his status. He had given Rs.50,000/- in cash, cycle, T.V. and necessary domestic articles. Accused Talewar, Jai Singh (jeth of Reshamwati) and other in-laws were happy and satisfied with the dowry. This witness further stated that his daughter used to come and go to his house and was happy. After marriage, neither Reshamwati had not complained to him or none of his family about demand of motor cycle and buffalo as additional dowry by husband and in-laws nor any of the in-laws put any type demand nor his daughter was tortured physically or mentally by her husband or in-laws for dowry. No issue of one and half year was born to Reshamwati for which she was annoyed. Accused had never demanded additional dowry from him. Talewar was only dependent on fields besides which he had no other source of income for which Talewar and Reshamwati used to remain disturbed. His daughter Reshamwati died two and half years ago. How she died, he did not know. On death of Reshamwati, on information being furnished by Talewar and his family members, he and others went to in-laws house of the deceased, where Talewaar and his family members were mourning over the corpse of Reshamwati and all were present near the corpse. After death of Reshamwati, police came into the village. Thereafter, proceedings of panchayatnama was conducted in which he was made a witness. This witness further stated that death of his daughter Reshamwati was not committed by her husband Talewar and jeth Jai Singh conspiring with their family members.

7. P.W. 3 Bablu aged about 13 years stated that Reshamwati was his sister. Her marriage was performed with Talewar. He further stated that his parents had given articles loading in tractor trolley. Clothes, utensils, bed, almirah, T.V. and jewellary were given. Money were given at the time vidai *(see off)*. Cycle was also given. Talewar never used to beat his sister. He used to visit her sister's house. When his sister died, he was at his house. She died after one-two year of the marriage. She was suffering from fever and she died. Case was registered by his father. He did not know whether postmortem was conducted or not. He had not gone at the time of postmortem. He had not visited the house of his sister, therefore, he was unable to tell whether the police had reached or not and police came to his parent is not known to him.

8. P.W.4 Heeralal stated that name of Talewar's wife was Reshamwati who was aged about 22-23 years. She was married one-two years ago when she died. He also stated that when Reshamwati died, he had gone to see her. Her corpse was lying on the ground. He had not seen any injury on her ded body. He had not seen any ligature mark on the neck. Inspector had visited the place of occurrence who interrogated all the persons. He was also interrogated by the Inspector and what he stated was reduced in writing.

9. P.W. 5 Dr. R.K. Verma conducted the postmortem of the deceased who stated in his statement that eyes of the corpse were closed and congested; face was also congensted; nose was bleeding; there were ligature marks on both sides of the neck, which was 4cm below the ears; same was appearing very near to left ear and below the thyroid gland. Thus, the doctor opined that the death of the deceased to be unnatural and have occurred due to strangulation.

10. P.W.6 Munshi Lal is a formal witness, who stated that when he reached the place of occurrence, police was already present there which did proceedings of panchayatnama, he was made a witness to the panchayatnama on which he put his signature.

11. P.W. 7 Head Constable Akhalak Ali is also a formal witness, who proved the relevant documents such as prepared by him.

12. Statements of accused were recorded under Section 313 Cr.P.C. in which they denied the facts of incidence and alleged that statements of witnesses are wrong and on account of acrimony, the case is being conducted. At last, they stated that they are not guilty. They examined D.W.1 Jalim Singh and D.W.2 Raja Ram in defence and no other oral or documentary evidence was produced by them.

13. After hearing the prosecution and defence counsel, the learned Sessions Judge, vide Judgment and order dated 30.10.2014, exonerated accused Jai Singh of the charges under Sections 498A, 304B I.P.C. and ¾ of Dowry Prohibition Act. Further the learned Sessions Judge convicted the accused appellant Talewar under Section 304-B I.P.C. and sentenced him to undergo life imprisonment; he further convicted him under Section 498A I.P.C. and sentenced to undergo three years' rigorous imprisonment with fine of Rs.3,000/- and in case of default of payment of fine, to undergo further three months' simple imprisonment; and he further convicted the accused-appellant under Section 4 of Dowry Prohibition Act and sentenced to undergo one year rigorous imprisonment with fine of Rs.1,000/- and in case of default of payment of fine, to undergo further one month simple imprisonment.

14. Being dissatisfied with the conviction and sentence, the accused-appellant Talewar is being this Court by way of present appeal.

15. Heard learned counsel for the appellant and learned A.G.A. for the State.

16. Learned counsel for the appellant Talewar states that death was not so gruesome that leniency may not be shown to the accused. It is submitted that all the witnesses have practically turned hostile and it is a moral conviction. The accused is in jail for ten years. Learned counsel, therefore, prays for mercy, sympathy and lessor punishment for which he has relied on the following decisions:-

1. ***Hem Chand Vs. State of Haryana, (1994) 6 SCC 727***

2. Hari Om Vs. State of Haryana and another, (2014) 10 SCC 577

3. Sunil Dutt Sharma Vs. State (Government of NCT of Delhi), (2014) 4 SCC 375

4. Kashmira Devi Vs. State of Uttarakhand and others, (2020) 11 SCC 343

17. Learned A.G.A. vehemently opposed the reduction and sentence awarded to the accused-appellant and submitted that in this case, there is brutality in causing death and it is dowry death. Death was committed immediately within two years of the marriage which shows premeditation.

18. Most of the witnesses have not supported case of the prosecution is a fact which emerges on the record and the

learned Judge had convicted the accused on the basis of the autopsy report that he had done her to death by strangulation and he has brought certain facts on record that incident occurred on the spur of the moment, which was not intentional.

19. Learned Trial Judge has relied on the decision of the Apex court in the case of **Dev Narain Mandal Vs. State of U.P., Surjit vs. Nahar rai, State Vs. Vinod Kumar and Heeralal, 2012 (6) SCC 770** and punished him for life imprisonment under Section 304-B. But, totality of the circumstances would not permit us to inflict or concur so as to hold the accused guilty of such gravity that he requires to be punished with the maximum of sentence awardable to him, i.e., life imprisonment. We would substitute it to ten years' incarceration under Section 304-B I.P.C.

20. We may deem it fit to rely on the decisions and award sentence of ten years' rigorous imprisonment with remissions as awarded in the case of **Hem Chand Vs. State of Haryana** and other Judgments referred hereinabove as far as Section 498A I.P.C. is concerned. The accused has already been in jail. If he has not deposited fine, the default sentence would begin after he has completed three years of incarceration.

21. As far as conviction under Section 4 of Dowry Prohibition Act is concerned, punishment was for one year which he has already undergone. He is now not required to undergo imprisonment further as we have substituted the sentences awarded under Sections 304-B and 498A I.P.C. We hold that sentences shall not be one after the other but would be simultaneous.

22. Period of punishment under Section 4 of Dowry Prohibition act is already over. If period of ten years' incarceration is over and accused-appellant is not required in any other case, he be released from jail forthwith.

23. Lower court record be sent to the court below forthwith.

24. Appeal is partly allowed in the light of the observations made hereinabove.

25. Let a copy of this Judgment be sent to the Jail Authorities concerned and District Magistrate for compliance.

(2021)02ILR A827
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 10.02.2021

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER , J.
THE HON'BLE GAUTAM CHOWDHARY, J.

Criminal Appeal No. 5453 of 2008

Bali Mohammad @ Munna Kasai ...Appellant(In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellants:
Sri Atul Kumar Tiwari, Sri Ambrish Kumar Kashyap, Sri Narendra Kumar Singh, Sri R.K. Singh, Sri Rajendra Kumar Dubey, Sri Santosh Kumar Pandey

Counsel for the Opposite Party:
A.G.A., Sri Pravin Kumar

A. Criminal Law-Code of Criminal Procedure, 1973-Section 374(2) & Indian Penal Code,1860-Section 376 & Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act,1989-Section 3 (2) (xii)-modification of

quantum of punishment-testimony of P.W. 3 (doctor) shows that hymen was recently badly raptured and on touching bleeding was there while a single finger was entering as the prosecutrix was medically examined by the doctor on the very same day-prosecutrix aged about 12 years - there were six injuries on the body of prosecutrix and these were only two days back injuries- injuries No. 3 and 4 can be there in case of dragging on floor after considering the testimony of Dr. PW5 it is clear that before rape she was assaulted and pressure was applied on her- testimony given by both the doctors has supported the version of the prosecutrix- no infirmity in the order of trial court, however quantum of punishment may be reduced to 16 years from life imprisonment.(Para 1 to 26)

The Appeal is partly allowed. (E-5)

List of Cases cited:-

1. Arvind Kumar Vs St. of U.P. CRLA No.1880 of 2013

2. Ram Naresh @ Bhondu Vs St. of U.P. CRLA No. 2599 of 2007

3. Jai Prakash @ Guddue Vs St. of U.P. CRLA No. 582 of 2002

4. Bhagelu Harijan Vs St. of U.P. CRLA No. 1213 of 2002

5. Mataruwa @ Amar Vs St. of U.P. CRLA No. 4909 of 2009

6. G.V. Siddharamesh Vs St. of Karnataka (2020) 3 SCC 152

7. Maaru Ram Vs UOI (1980) AIR SC 14

8. Vikash Yadav Vs St. of U.P. (2016) 9 541

(Delivered by Hon'ble Gautam Chowdhary, J.)

1. Heard Sri Ambrish Kumar Kashyap, learned counsel for the appellant and Sri Roopak Chaubey, learned A.G.A. for the State.

2. This criminal appeal has been filed against the order and judgement dated 6.12.2004 passed by (Additional Sessions Judge, Special Court) (S.C./S.T. Act), Farrukhabad in S.C./S.T. No. 30 of 2003 (State of U.P. Vs. Bali Mohammad) convicting and sentencing the appellant to undergo under section 376 Indian Penal Code (hereinafter referred as (IPC) life imprisonment and Rs. 10,000/- fine, in default of payment of fine he shall further incarcerations for six month rigorous imprisonment. Appellant was punished and sentenced undergo under section 3(1)(XII) Scheduled caste and Scheduled Tribes Act, 1989 (hereinafter referred as SC/ST Act) for the five years R.I. and Rs. 1,000/- fine in default of payment of fine he shall further undergo for six month extra R.I. All the sentences will run concurrently.

3. The brief facts of this case are that F.I.R. has been lodged on 29.08.2020 at 18.45 by Dashrath Lal, resident of Shekhpur Rustampur, police station Kamalganj, District Farrukhabad stating therein that he is Jatav belonging to scheduled caste community. One resident of same village namely Munna son of Lal Mohammad of muslim and not of scheduled caste community has sent the prosecutrix aged about 11 years to carry out his bag from the school. On denial she was threatened by Munna. Under the fear and pressure when she went to the school, Munna came from behind and raped her. The F.I.R. culminated into recordings of statements by police and medical examination of prosecutrix.

4. The trial was to be conducted by the court of Sessions as it was Sessions triable case, hence the case was committed to the court of sessions.

5. The court of sessions framed charges against the sole appellant/ accused

who pleaded not guilty. The prosecution examined the following witnesses :-

1.	Prosecutrix	P.W.1
2.	Dasrath Lal (Father)	P.W.2
3.	Dr. Neelam Rani (Dr.)	P.W.3
4.	Dr. Satendra Kumar (Dr.)	P.W.4
5.	Dr. U.C. Sachan (Dr.)	P.W.5
6.	Krishna Kumar Singh	P.W.6
7.	R.B. Suman	P.W.7

6. In order to substantiate the oral testimony of the witnesses and their medical evidence, documentary evidence were also produced which are as follows :-

1.	Written report	Ext. Ka-1
2.	Recovery of cloth	Ext. Ka-2
3.	Injury report	Ext. Ka-3
4.	Supplementary report	Ext. Ka-4
5.	X-ray report of prosecutrix	Ext. Ka-5
6.	Injury report of prosecutrix	Ext. Ka-6
7.	F.I.R.	Ext. Ka-7

7. The accused was examined under section 313 Cr.P.C. also for evidences against him led over.

8. The submissions of the counsels were heard.

9. The arguments advanced by learned counsel for the appellant before us in nut shell are as follows:

(I) That the F.I.R. is delayed and anti timed.

(II) That the accused has been falsely implicated. The reason being father of the prosecutrix is an advocate and due to non payment of fees and other issues, he falsely implicated the accused.

(III) That the peon of the school where incident is said to have occurred has not been examined as and when the incident occurred in the school.

(IV) That the injuries of the prosecutrix occurred on account of her falling on the cut plants of maize field and not because of any overt act on part of occurrance.

(V) That the story narrated by the prosecutrix does not corroborate with the medical evidence.

(VI) No case under SC/ST act is made out.

10. The counsel for the appellant relied on the judgements of in (A) A**rvind Kumar Vs. State of U.P. in Criminal Appeal No. 1880 of 2013; (B) Ram Naresh @ Bhondu Vs. State of U.P. in Criminal Appeal No. 2599 of 2007 ; (C) Criminal Appeal No. 582 of 2002 Jai Prakash @ Guddue Vs. State of U.P. (d) in Criminal Appeal No. 1213 of 2002 Bhagelu Harijan Vs. State of U.P. In the case of Arvind Kumar (Supra)** , there was no external injury at all whereas in the present case external injuries are found and

the opinion of Dr. U.C. Sachan is also corroborating this fact.

11. Learned A.G.A. for the State Sri Roopak Chaubey has submitted that the life punishment awarded to accused under the facts and circumstances of the case was the only punishment which can be awarded to accused as it is very heinous crime against the society. He was well aware that the girl is of 12 years age has been raped by the accused and has also drawn our attention upon the testimony of doctors and he argued that the testimony of two doctors is highly reliable and there is no inconformity the trial court's judgement. The decision of the cases which are heavenly relied by learned counsel for the appellant in the case of **Mataruwa @ Amar Vs. State of U.P. decided on 15.12.2015 in Criminal Appeal No. 4909 of 2009** will not add him as in the same matter the evidence was shaken. The matter was proceeded on the basis that the prosecutrix was a consenting party, after her mother saw the incident and she never said that he not the accused. In the case of Arvind Kumar (Supra) , there was no external injury at all whereas in the present case external injuries are found and the opinion of Dr. U.C. Sachan is also corroborating this fact. In that view of the said decision I cannot apply here. The decision relied by learned counsel for the appellant titled **Arvind Kumar Vs. State of U.P. decided on 26.7.2019 passed in Criminal Appeal No. 1880 of 2013 and Ram Naresh @ Bhondu Vs. State of U.P. decided on 20.07.2015 passed in Criminal Appeal No. 2599 of 2007** cannot aid the accused as facts are quite different.

12. We would discuss the argument advanced by learned counsel for the appellant but before that we would like to discuss the evidence both ocular as well as medical and the trial courts decision.

13. (I)That while considering the first point, it is relevant to mention here that the FIR was lodged on 29.08.2002 at 18.45. The incident took place on the same day i.e. 29.08.2002 approximately at about 4 P.M. There is only a gap of two hours and forty five minutes, hence, it can not be said that there was any delay of lodging the F.I.R. rather it was well within the time and prompt F.I.R. was lodged by father of the prosecutrix, so the argument advanced by learned counsel for the appellant is not sustainable. Hence, the answer is in negative.

14. (II)With regard to second point is concerned, it is well established in the evidence that the father of the prosecutrix was not the counsel of the accused at all, the father of the prosecutrix was junior to the counsel of accused. Moreover, the argument advanced by counsel of the accused that he has been falsely implicated with the malafide intention with regard to non payment of fee, this argument is not acceptable at all and it has been well considered by the trial court and in the circumstance, if argument is accepted why a father of a minor girl will implicate the accused on account of such a heinous matter of his young daughter. The findings given by the trial court in this regard is affirmed as the story of accused has not been supported by any evidence.

15. (III)So far as the third argument advanced by learned counsel for the appellant is concerned, has been well considered by the trial court and from a perusal of the trial court's judgment it comes out that in the said school the peon was not residing at the school. Therefore, In the case of **Arvind Kumar (Supra)** , there was no external injury at all whereas in the present case external injuries are

found and the opinion of Dr. U.C. Sachan is also corroborating this fact.the argument advanced by the counsel for the appellant is not sustainable.

16. (IV)The argument advanced by learned counsel for the appellant in respect of point no. 4 is concerned, is also not sustainable and it has been well discussed by the court below that when the evidence took place the crop of the maize was standing, hence there is no reason at all to believe this argument.

17. (V)Now the last and most important argument advanced by learned counsel for the appellant that the statement of the girl/ prosecutrix is not corroborated while considering this point, the lower court highly relied upon the testimony of P.W. 3 Dr. Neelam Rani who clearly stated that while examining the internal injuries she found that hymen was recently badly raptured and on touching bleeding was there while a single finger was entering as the prosecutrix was medically examined by the doctor on the very same day. Further, she was of the opinion and has clearly stated that the prosecutrix is aged about 12 years and she also specifically stated that on 29.08.2002 at about 4.00 P.M. the rape is possible. The testimony given by the Dr. Neelam Rani is well proved and there is no reason to dis-believe the testimony of P.W. 3, she clearly corroborates with the statement of the girl.

18. Dr. Neelam Rani, P.W. 3 has very vehemently stated that the age of the prosecutrix is 12 years and in her statement Doctor has clearly narrated that the rape was committed with prosecutrix at about 4 P.M. In her testimony Dr. Neelam Rani has well proved, she had opined that there is clear cut possibility of rape. After discussing and perusing the evidence on record given by the Doctor it can not be dis-believed rather there is no reason to dis-believe the testimony of Dr. Neelam Rani which is also supported by the Dr. U.C. Sachan who also supported the version of Dr. Neelam Rani. Dr. Sachan has very confidently stated that the injuries of the prosecutrix shows that she was assaulted before rape and also she was dragged on the ground.

19. Further more, the P.W. 5 Dr. U.C. Sachan who was then the Medical Officer at Dr. Ram Manohar Lohiya Hospital, Farrukhabad clearly stated that there were six injuries on the body of prosecutrix and these were only two days back injuries. He further stated that injuries No. 3 and 4 can be there in case of dragging on floor and in testimony Dr. U.C. Sachan has totally given the opinion that the injuries can be occurred in maize field, whereas he has specifically stated that it can be caused by danda and fists. So after considering the testimony of Dr. Sachan it is clear that before rape she was assaulted and pressure was applied on her. There is no reason to dis-believe the testimony of P.W. 3 and 5 respectively who are Dr. Neelam Rani and Dr. U.C. Sachan. Whereas testimony given by both the doctors has supported the version of the prosecutrix and there is no reason to dis-believe the testimony of the said two doctors. From the ocular evidence it can be said that the minor daughter of the complainant was ravished. The prosecutrix narrated the entire incident without any blemish which is corroborated by the medical evidence. The learned Judge has satisfied himself that the deponent namely P.W. 1 was a minor and understood what she was deposing and where she was deposing. He has categorically mentioned that after the incident she became

unconscious and she has shouted. She was ravished in the school after the school time when nobody was present. The school is about 50-60 feet from her home. There are people staying near the school is not in dispute. She was returning back from school and she was playing near her door of the home. He has categorically denied that the accused stayed at Aliganj. She has stated that the accused belongs to her own village. She has been shaken in her testimony only regarding the accused given her Rs. 500/-. Accused having dispute regarding fees with her father. P.W. 2 also took his daughter to the hospital for medical check up. He is an advocate by profession and on 29.08.2020 at about 4.00 P.M. incident had occurred, he has narrated the antecedents of the accused and he was senior of the advocate who was the advocate for the accused. We thereafter turn to the evidence of Dr. Neelam Rani which is very important for our purpose, who has categorically mentioned that there was hymen was raped which started bleeding on touching. On seeing the documentary evidence she had opinion on oath that at about 4.00 P.M. in the evening there was all chances that the prosecutrix could have been ravished. Dr. Satyendra Kumar has done the ossification test which shows that the girl was a minor. P.W. 5 has found all kind of injuries on the body of the prosecutrix.

20. All these will not permit us to upturn the judgment of the trial court as far as the offence under section 376 Indian Penal Code is concerned.

21. As far as (point no. VI), the offence under section 3(i) (Xii) of Scheduled Caste/Scheduled Tribes is concerned the same cannot be sustained for the following reasons, as recently decided in **Criminal Appeal No. 240 of 2011** we have held that unless the prosecution proves that the incident of a person belonging to the scheduled caste/ scheduled tribes was perpetuated with an intention to insult, then the conviction would not sustainable. In our case there is no such allegation in the F.I.R. nor on the version of P.W. 1 and 2, hence conviction under section 3(1)(XII) of Scheduled Caste/ Scheduled Tribes Act, 1989 hereinafter referred as SC/ST Act is not sustainable and is quashed.

Quantum of Punishment

22. The learned counsel for the appellant contends that the punishment of life till the last breath in the factual date is too harsh punishment and the same may be re-considered. We are convinced that the accused is a sole author and offence is not so gruesome that life till the last breath would be the only punishment which can be accorded and after considering the argument and perusing the record, it is very clear that there is no infirmity in the order passed by the trial court and the act of appellant is confirmed as of rape. Further the counsel for the appellant argued that appellant is in jail for the last 17 years and prayed for quantum of punishment may be reduced and he relied upon the judgement of **G.V. Siddharamesh Vs. State of Karnataka (2020)3 SCC 152 and Maaru Ram Vs. Union of India AIR 1980 SC (14) and Vikash Yadav Vs. State of U.P. 2016 (9) 541.**

23. The impugned judgement and order dated 6.12.2004 passed by Additional Sessions Judge, (Special Court), (SC/ST Act), Farrukhabad in Session Trial No. 30 of 2003 State of U.P. Vs. Bali Mohammad is affirmed. As far as quantum of

punishment is concerned, we are of the view that the present case is not a case where the maximum punishment of life imprisonment ought to have been awarded to the accused i.e. 16 years of R.I. as the appellant is already in jail for the last 17 years, further the appellant shall deposit the fine of Rs. 15,000/ under section 376 IPC as per decision of trial court.

24. Let a copy of this judgment along with the trial court record be sent to the Court concerned and Jail Authorities concerned and District Magistrate for compliance.

25. We are thankful to the Advocates of both the sides namely Ambrish Kumar Kashyap, learned counsel for the appellant and Sri Roopak Choubey for the State for assisting the Court.

26. Accordingly, the appeal is partly allowed.

27. Record and proceeding be sent back to trial court.

(2021)02ILR A833
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 10.02.2021

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER , J.
THE HON'BLE GAUTAM CHOWDHARY, J.

Criminal Appeal No. 6511 of 2011

Jaipal Batham. ...Appellant(In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellants:
Sri Shailendra Singh Rathore, Sri Ambrish Kumar Kashyap, Sri Janmed Kumar, Sri S.K. Tripathi

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

A. Criminal Law-Code of Criminal Procedure,1973-Section 374(2) & Indian Penal Code,1860-Sections 363, 366, 376 & Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act,1989-Section 3 (2) (v)-challenge to-conviction-the medical evidence shows that doctor did not find any sperm-no signs of forcible sexual intercourse were found-no internal injuries on the prosecutrix-statements of PWs-1, 2 and 3, no commission of offence was there-testimony of the prosecutrix cannot be said to be that of a sterling witness-statement u/s164 Cr.P.C. shows that she has taken U-turn in her oral testimony-For maintaining the conviction under Section 376 Cr.P.C., medical evidence has to be in conformity with the oral testimony- In this case. the girl was kidnapped-the medical evidence does not prove that the girl was below the age of 18 years-no certificate showing the age of the girl was ever produced before the Investigating Authority- finding of the learned Judge is not in consonance with the medical evidence produced-The panchayat certificate showed her age to be 21 years, therefore, there is a doubt between this fact and the oral testimony-The oral testimony cannot be said to be so sterling that conviction could be based on the same.(Para 1 to 38)

The Appeal is allowed. (E-5)

List of Cases cited: -

1. Mataruwa @ Amar Vs St. of U.P. CRLA No.4909 of 2009
2. Arvind Kumar Vs St. of U.P. CRLA No.1880 of 2013

3. Raj Kumar Kahar Vs St. of U.P. CRLA No.4200 of 2013

4. Sadashiv Ramrao Hadbe Vs St. of Mah.(2006) 10 SCC 92

5. Manne Siddaiah @ Siddiramulu Vs St. of A.P.(2000) 2 All(Cri)

6. Jaysukh @ Karo Ramji Dharaviya-Satvara Vs St. of Guj. CRLA No.145 of 2010

7. Somabhai Bhedarbhai Bhagora & 2 Vs St. of Guj. CRLA No.151 of 2006

8. Tulsibhai Somabhai Parmar Vs St. of Guj. CRLA No.160 of 1997

9. St. of Guj. Vs Rafiq Dhanvarbhai Memon CRLA No.238 of 1992

10. Maheshwar Tigga Vs St. of Jharkhand CRLA No.635 of 2020

11. Hitesh Verma Vs St. of U.K. & Anr.(2020) 10 SCC 710

12. Pudav Bhai Anjana Patel Vs St. of Guj. CRLA No.74 of 2006

13. Justice Kaushal Jayendra Tha Vishnu Vs St. of U.P. CRLA No.204 of 2021 (Defective Appeal No.386 of 2005)

14. Alamelu Vs St. (2011) 2 SCC 385

15. Mohd. Imran Khan Vs St. (Govt. of NCT of Delhi) (2011) 10 SCC 192

16. S. Varadarajan Vs St. of Madras (1965) AIR SC 942

17. Shyam and Another Vs St. of Mah. (1995) AIR SC 2169

18. Bhartiben w/o Sureshbhai Bhikhabhai Chauhan Vs Sushilaben Kanubhai Tevar & anr. (2009) 3 GLH 664

19. Mussauddin Ahmedabad Vs St. of Assam (2009) 14 SCC 541

20. Bhupatbhai Somabhai Sardiya Vs St. of Guj. (2012) 31 GHJ 140

21. Vinod Kumar Vs St. of Ker. (2014) 5 SCC 678

22. K.P. Thimmappa Gowda Vs St. of Karnataka (2011) AIR SCW 2281

23. Satish Kumar Jayanti Lal Dabgar Vs St. of Guj. CRLA NO.230 of 2013

24. Ganesan Vs St. Reptd by Inspr of Police, CRLA No. 680 of 2020 (Arising from S.L.P. (Criminal) No.4976 of 2020)

25. Bhaiyamiyan @ Jardar Khan & anr. Vs St. of M.P. (2011) SCW 3104

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

1. By way of this appeal, the appellant has challenged the Judgment and order dated 19.10.2011 passed by Special Judge (SC/ST Act), Kannauj in Special Sessions Trial No.48 of 2006 titled (State vs. Ram Rataan Batham and another) arising out of Case Crime No.1133 of 2005 for commission of offences under Sections 363, 366, 376 Indian Penal Code & 3 (2) (v) of Scheduled Castes and Scheduled Tribes (Prevention of Attrocities) Act, 1989, (herein after to be referred as 'SC/ST Act') Police Station-Kannauj, District-Kannauj, whereby the accused-appellant was convicted and sentenced for three years rigorous imprisonment for the offence committed under Section 363 IPC read with Section 3(2) (v); for five years rigorous imprisonment and fine of Rs.1,000/- for the offence under Section 366 IPC read with Section 3 (2) (v) in default of payment of fine, one month additional rigorous imprisonment; for life imprisonment and fine of Rs.5,000/- for the offence under Section 376 IPC read with Section 3 (2) (v) of SC/ST Act and in default of payment of fine, one year additional rigorous imprisonment. Except the sentence of defaulted fine, all the sentences were to run concurrently as per direction of the Trial Court.

2. The brief facts as per prosecution case are that on the evening of 23rd October, 2005, prosecutrix aged about 13 years of age and Neetu (her sister) aged about 9-10 years went for the natural call and at that time, Ram Ratan s/o Guljari, Brijesh s/o Ramswaroop, Jaipal s/o Chunnulal and one unknown person, namely four persons in number, having countrymade pistol reached the daughters of the complainant and gauged both the girls and kidnapped them. Ram Kishore saw the two girls going with the four persons named in the FIR and at about 8-9 p.m., Neetu was sent back. The prosecutrix was taken to an unknown place, the accused had threatened the girl with dire consequences. When they started searching, they found the daughter-Neetu, Ram Ratan on seeing Neetu recognized her to be along with four persons of the village. The complainant went to the police station on the same night at Kannauj but the police did not ascribe his report and, therefore, he sent what can be said to be registered post AD as the accused were head strong people. This report was given on 31.10.2005, which is at Ex.ka-6 and has been described as FIR. The Written Report (Ex.ka-2) dated 24.10.2005 is also on similar terms. The prosecutrix was found after a period about two months. The evidence of the witnesses would have to be considered. On 1.12.2005, her statement before the Chief Judicial Magistrate, Kannauj, was recorded. The prosecutrix was medically examined and, thereafter, as she gave version against the accused, he was arrested.

3. C.O. City, Kannauj, R.D. Yadav, tookup the investigation visited the spot, prepared site plan, recorded statements of the prosecutrix and witnesses and after completing investigation submitted charge sheet against the accused.

4. As the case was triable by court of session, the Magistrate committed the case to court of session.

5. The prosecution so as to bring home the charges examined ten witnesses as under:-

1.	Prosecutrix	P.W.1
2.	Nitu	P.W.2
3.	Diwari Lal	P.W.3
4.	Ram Kishore	P.W.4
5.	Vishram Singh Katheriya	P.W.5
6.	Dr.Manjula Sharma	P.W.6
7.	R.D.Yadav	P.W.7
8.	Raj Kumar Srivastava	P.W.8
9.	Dr.Jyotsna Kumari	P.W.9
10.	Dr. Krishna Gopal	P.W.10

6. In support of the ocular version of the witnesses, following documents were produced and contents were proved by leading evidence:

1.	Statement of Prosecutrix	Ex.ka-1
2.	Written Report	Ex.ka-2
3.	Recovery Memo of Kidnapped Girl & Supurdginama	Ex.ka-3
4.	Injury Report	Ex.ka-4
5.	Supplementary Report	Ex.ka-5
6.	F.I.R.	Ex.ka-6

7.	Injury Report	Ex.ka-7
8.	Supplementary Report	Ex.ka-8
9.	Site Plan with Index	Ex.ka-9

7. On 15.02.2006, the learned Sessions Judge framed the charge for the commission of offence under Sections, 363, 366, 376 Indian Penal Code (herein after referred to as 'IPC') read with Section 3 (2) (5) of the Scheduled Castes and Scheduled Tribes (Prevention of Attrocities) Act, 1989 (herein after referred to as SC/ST Act).

8. Heard Shri Ambrish Kumar Kashyap, learned counsel for the appellant, Shri N.K.Srivastava, learned AGA appearing for the State and also perused the record.

9. It is submitted by the counsel for the appellant that as far as commission of offence under Section 3(2)(v) of S.C./S.T. Act, 1989 is concerned, the learned Sessions Judge convicted the accused because of the fact that the victim was a person belonging to Scheduled Caste Community, though there were no allegations as regard the offence being committed due to the caste of the prosecutrix and there were no allegations of commission of offence which would attract the provision of Section 3(2)(v) of SC/ST Act.

10. Learned counsel for appellant has relied on the following decisions of this Court in the case of (a) **Mataruwa @ Amar vs. State of UP,** in Cr.Appeal No.4909 of 2009 dated 15.12.2015, (b) **Arvind Kumar vs. State of UP** in Criminal Appeal No.1880 of 2013 dated 26.07.2019 and (c) **Raj Kumar Kahar vs. State of UP,** in Crl. Appeal No.4200 of 2013 dated 10.04.2018. He also also relied on the following decisions of the Apex Court rendered in the case of **Sadashiv Ramrao Hadbe Vs. State of Maharashtra, 2006(10)SCC 92** and the judgment of High Court of Andhra Pradesh in the case of **Manne Siddaiah @ Siddiramulu Vs. State of Andhra Pradesh, 2000(2) Alld(Cri)** so as to contend and submit that in fact no case is made out so as to convict the accused under Section 376 IPC leave apart the offence under Sections 363 & 366 of IPC and Section 3(1)(xii) and read with Section 3(2)(v) of S.C./S.T. Act, 1989 and the prosecutrix has roped in the accused with ulterior motive.

11. Reliance has also been placed upon the various judgments of Gujarat High Court by us, which are as under:

(i) **Jaysukh @ Karo Ramji Dharaviya-Satvara vs. State of Gujarat** dated 10.03.2015, passed in Crl.Appeal No.145 of 2010

(ii) **Somabhai Bhedarbhai Bhagora & 2 vs. The State of Gujarat** dated 10.10.2013, passed in Crl.Appeal No.151 of 2006

(iii) **Tulsibhai Somabhai Parmar vs. State of Gujarat d**ated 08.01.2015, passed in Crl.Appeal No.160 of 1997; and

(iv) **State of Gujarat vs. Rafiq Dhanvarbhai Memon,** passed in Crl. Appeal No.238 of 1992, and

(v) **Maheshwar Tigga vs. The State of Jharkhand** dated 28th September, 2020, passed in Crl.Appeal No.635 of 2020.

12. It is submitted by learned counsel for the State that prosecutrix belonged to

Scheduled Caste community and the judgment of learned Trial Judge cannot be found fault with just because there is silence on the part of the prosecutrix. It is submitted that the incident occurred because of the caste of the prosecutrix. It is further submitted that any incident on person belonging to a particular caste would be an offence. It is further submitted by learned counsel for the State that the accused ravished the prosecutrix as she was belonging to lower strata of life.

13. Learned counsel for the appellant has relied on the judgment of S**adashiv Ramrao Hadbe Vs. State of Maharashtra (supra)** and has submitted for acquittal of the accused. The judgment in the case of **Manne Siddaiah @ Siddiramulu (supra)** rendered by Andhra Pradesh High Court, though it is a judgment of Single Bench, i.e. by Justice B. Sudershan Reddy (as he then was). Learned counsel has relied on findings returned in paragraphs 14, 15 and 16 of the said judgment, which lay down as follows :-

"14. In nutshell the version given by P.W.5 is not supported by even P.Ws. 1 and 2. P.W.1 in his evidence in categorical terms states that he caught hold of the appellant herein as his wife informed him that the appellant has raped her. P.W.5 in her evidence does not state that she has informed P.W.1 about the rape at any time. These major inconsistencies and contradictions in the evidence of material witnesses - P.Ws. 1, 2 and 5 create a lot of suspicion and doubt about the prosecution case. Added to that, P.W.10 - the Civil Assistant Surgeon who examined P.W.5, in her evidence clearly states that she did not find any external injuries on the body of P.W.5. She has also not noticed any semen and spermatozoa in the vaginal slides.

15. In the aforesaid circumstances, it would not be safe to convict the appellant herein on mere suspicion. The inconsistencies and contradictions noticed above are fatal to the case of the prosecution and create any amount of doubt. Obviously, it is the appellant who is entitled for the benefit of doubt.

16. In the aforesaid circumstances, I find it difficult to sustain the conviction of the appellant herein for the offence Under Section 3(1) (xii) and Section 3(2) (v) of the Act read with Section 376 of the Code. The conviction as well as the sentence of the appellant herein is set aside."

14. Learned counsel for appellant presses into service the judgment in the case of **Sadashiv Ramrao Hadbe Vs. State of Maharashtra (supra)** more particularly observations in paras 9, 10, 11 of the said judgment, which are verbatim reproduced as follows :-

"9. It is true that in a rape case the accused could be convicted on the sole testimony of the prosecutrix, if it is capable of inspiring of confidence in the mind of the court. If the version given by the prosecutrix is unsupported by any medical evidence or the whole surrounding circumstances are highly improbable and belie the case set up by the prosecutrix, the court shall not act on the solitary evidence of the prosecutrix. The courts shall be extremely careful in accepting the sole testimony of the prosecutrix when the entire case is improbable and unlikely to happen.

10. In the present case there were so many persons in the clinic and it is highly improbable the appellant would have made a sexual assault on the patient

who came for examination when large number of persons were present in the near vicinity. It is also highly improbable that the prosecutrix could not make any noise or get out of the room without being assaulted by the doctor as she was an able bodied person of 20 years of age with ordinary physique. The absence of injuries on the body improbablise the prosecution version.

11. The counsel who appeared for the State submitted that the presence of semen stains on the undergarments of the appellant and also semen stains found on her petticot and her sari would probablise the prosecution version and could have been a sexual intercourse of the prosecutrix.

12. It is true that the petticot and the underwear allegedly worn by the appellant had some semen but that by itself is not sufficient to treat that the appellant had sexual intercourse with the prosecutrix. That would only cause some suspicion on the conduct of the appellant but not sufficient to prove that the case, as alleged by the prosecution."

15. Learned counsel for the appellant has also relied on the latest decision of Apex Court in the case of **Hitesh Verma Vs. State of Uttarakhand & another, 2020(10)SCC 710,** pertaining to Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 and has contended that the incidence reported is prior to 2016, amendment, more particularly relates to the year 2006, where no offence of S.C./S.T. Act, 1989 has been committed on the lady on the basis of her caste belonging to a particular caste. The learned Trial Judge has misread the provisions of law, just because the prosecutrix is belonging to scheduled caste community, the offence would not be made out.

16. We now decide to sift the evidence threadbare of the prosecution story, the evidence led and discussed before the trial court and as appreciated by the learned Trial Judge.

17. Provision of Section 3(2)(v) of the Scheduled Castes and Scheduled Tribes Act, 1989 read as follows : -

(v) commits any offence under the Indian Penal Code (45 of 1860) punishable with imprisonment for a term of ten years or more against a person or property on the ground that such person is a member of a Scheduled Caste or a Scheduled Tribe or such property belongs to such member, shall be punishable with imprisonment for life and with fine;

18. Section 3(2)(v) of Scheduled Casts and Scheduled Tribes (Prevention of Atrocities) Act, 1989 is concerned, the FIR nor the evidence nowhere suggests that any one or any act was done by the accused on the basis that the prosecutrix was a member of Scheduled Castes and Scheduled Tribes then the accused can be convicted for commission of offence under the said provision. The learned Trial Judge has materially erred as he has not discussed what is the evidence that the act was committed because of the caste of the prosecutrix. We are unable to accept the submission of learned AGA that the accused knowing fully well that the prosecutrix belongd to lower strata of life and therefore had caused her such mental agony which would attract the provision of Section 3(2)(v) of the Atrocities Act. The reasoning of the learned Judge are against the record and are perverse as the learned Judge without any evidence on record on his own has felt that the crime was committed because the accused had captured the will of the prosecutrix and because the police officer had investigated the matter as a attrocity case which would

not be undertaken within the purview of Section 3(2)(v) of SC/ST Act and has recorded conviction under Section 3(2)(v) of Act which cannot be sustained. We are supported in our view by the judgment of Gujarat High Court in ***Criminal Appeal No.74 of 2006 in the case of Pudav Bhai Anjana Patel Versus State of Gujarat decided on 8.9.2015 by Justice M.R. Shah (as he then was) and Justice Kaushal Jayendra Thaker.***

19. Learned Judge comes to the conclusion that as the prosecutrix belonged to community falling in the scheduled caste and the appellant falling in upper caste the provision of SC/ST Act are attracted in the present case.

20. While considering the judgment, we have considered the judgment of the Apex Court and the recent judgment rendered by this Bench in the case of **Vishnu vs. State of UP** passed in Criminal Appeal No.204 of 2021 (Defective Appeal No.386 of 2005), dated 28.01.2021, wherein we have held that unless it is made out that the accused had perpetrated any offence, which could be said to be intentional. The reliance placed by learned counsel for the appellant on the judgment relied by us, which is also referred by us in the case of Vishnu (supra), the accused-appellant cannot be held guilty.

21. We would like to refer to the following decisions for deciding whether Sections 363 or 366 and 376 IP Code are attracted:-

a) **Alamelu vs. State** reported in (2011) 2 SCC 385,

b) **Mohd. Imran Khan vs. State (Governemnt of NCT of Delhi)** reported in (2011) 10 SCC 192,

c) **S. Varadarajan vs. State of Madras** reported in AIR 1965 SC 942,

d) **Shyam and Another vs. State of Maharashtra** reported in AIR 1995 SC 2169,

e) **Bhartiben w/o Sureshbhai Bhikhabhai Chauhan vs. Sushilaben Kanubhai Tevar and Anr.** reported in 2009 (3) GLH 664,

f) **Mussauddin Ahmedabad vs. State of Assam** reported in (2009) 14 SCC 541,

e) **Bhupatbhai Somabhai Sardiya vs. State of Gujarat** reported in (2012) 31 GHJ 140,

f) **Vinod Kumar vs. State of Kerala** reported in (2014 5 SCC 678,

g) **K.P. Thimmappa Gowda vs. State of Karnataka** reported in AIR 2011 SCW 2281, and

h) Judgement dated 10.03.2015 of the Apex Court in the case of **Satish Kumar Jayanti Lal Dabgar vs. State of Gujarat** in Criminal Appeal NO.230 of 2013.

22. Provisions of Section 363 I.P.C. read as under:

"363. Punishment for kidnapping- *Whoever kidnaps any person from [India] or from lawful guardianship, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine."*

24. Provisions of Section 376 I.P.C. read as follows :

"376. Punishment for rape --

(1) Whoever, except in the cases provided for by sub-section (2), commits rape shall be punished with imprisonment of either description for a term which shall not be less than seven years but which may be for life or for a term which may extend to ten years and shall also be liable to fine unless the women raped is his own wife and is not under twelve years of age, in which cases, he shall be punished with imprisonment of either description for a term which may extend to two years or with fine or with both: Provided that the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than seven years.

(2) Whoever,--

(a) being a police officer commits rape--

(i) within the limits of the police station to which he is appointed; or

(ii) in the premises of any station house whether or not situated in the police station to which he is appointed; or

(iii) on a woman in his custody or in the custody of a police officer subordinate to him; or

(b) being a public servant, takes advantage of his official position and commits rape on a woman in his custody as such public servant or in the custody of a public servant subordinate to him; or

(c) being on the management or on the staff of a jail, remand home or other place of custody established by or under any law for the time being in force or of a woman's or children's institution takes advantage of his official position and commits rape on any inmate of such jail, remand home, place or institution; or

(d) being on the management or on the staff of a hospital, takes advantage of his official position and commits rape on a woman in that hospital; or

(e) commits rape on a woman knowing her to be pregnant; or

(f) commits rape on a woman when she is under twelve years of age; or

(g) commits gang rape, shall be punished with rigorous imprisonment for a term which shall not be less than ten years but which may be for life and shall also be liable to fine: Provided that the Court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment of either description for a term of less than ten years. Explanation 1.--Where a woman is raped by one or more in a group of persons acting in furtherance of their common intention, each of the persons shall be deemed to have committed gang rape within the meaning of this sub-section. Explanation 2.--"Women's or children's institution" means an institution, whether called an orphanage or a home for neglected woman or children or a widows' home or by any other name, which is established and maintained for the reception and care of woman or children. Explanation 3.--"Hospital" means the precincts of the hospital and includes the precincts of any institution for the reception and treatment of persons during convalescence or of persons requiring medical attention or rehabilitation."

25. In respect of the prosecutrix, the doctor in medical report has opined as under :-

"General Examination: Young girl of average built Breast well developed. Axillary and pubic hair present. Hight 145 cm., weight 40 k.g. Teath 14/14. No mark of fresh injury any where on the body.

Internal Examination: No mark of fresh injury on her private parts. Hymen has old healed tears. Vagina admits two finger easily. Vagina ...(illegible).. at normal size. Vaginal smear made and sent for examination.

In supplementary report, the doctor has opined as under:

1. Xray Elbow- Epiphysis of elbow joint fused with their respected bones.

2. Xray Wrist- Epishysis of distal end of radius have not fused.

Vaginal Smear Report 25.11.2005 No.73 /2005-No spermatozoa seen in the vaginal smear.

Conclusion:

1. No opinion about rape can be given.

2. Her age is about 17 years.

26. The evidence as discussed by learned Judge shows that the mere fact that no external marks of injury was found by itself would not throw the testimony of the prosecutrix over board as it has been found that the prosecutrix had washed out all the tainted cloths worn at the time of occurrence as she was an illiterate lady.

27. We venture to discuss the evidence of the prosecutrix on which total reliance is placed and whether it inspires confidence or not so as to sustain the conviction of accused. In case of **Ganesan Versus State Represented by its Inspector of Police, Criminal Appeal No. 680 of 2020 (Arising from S.L.P. (Criminal) No.4976 of 2020)** decided on 14.10.2020 wherein the principles of accepting the evidence of the prosecutrix are enshrined, her testimony must be trustworthy and reliable then a conviction based on sole testimony of the victim can be based. In our case when we rely on the said decision, it is borne out that the testimony of the prosecutrix cannot be said to be that of a sterling witness and the medical evidence on evaluation belies the fact that any case is made out against the accused.

28. In our finding, the medical evidence goes to show that doctor did not find any sperm. The doctor categorically opined that no signs of forcible sexual intercourse were found. This was also based on the finding that there were no internal injuries on the prosecutrix.

29. For maintaining the conviction under Section 376 Cr.P.C., medical evidence has to be in conformity with the oral testimony. We may rely on the judgment rendered in the case of **Bhaiyamiyan @ Jardar Khan and another Versus State of Madhya Pradesh, 2011 SCW3104.** The chain of incident goes to show that the prosecutrix was not raped as would be clear from the provision of section 375 read with Section 376 of IPC.

30. The judgment relied on by the learned Advocate for the appellant will also not permit us to concur with the judgment impugned of the learned Trial Judge where perversity has crept in. Learned Trial Judge has not given any finding as to fact as to how commission of offence under Section 376 IPC was made out in the present case.

31. While perusing the entire evidence beginning from FIR to the statements of PWs-1, 2 and 3, we do not find that commission of offence was there because of the fact that the prosecutrix belonged to a certain community.

32. The learned Judge further has not put any question in the statement recorded under Section 313 Cr.P.Code, 1973 of the accused relating to rape or statement which is against him.

33. The factual data as it reveals from the testimony of the prosecutrix is that the victim herself had moved from place to place with the young accused. The evidence goes to show that she herself in her oral testimony has conveyed that she and the accused had kept a house on rent. It would be fruitful for us to reproduce the Hindi version, i.e., "hamne ghar kiraye par liya tha", which shows that she followed the accused. The provisions of Section 376 IPC would also not get attracted. The consent of the prosecutrix was too conscious and with a deliberate choice which can be detected from the factual data.

34. The possibility of the prosecutrix being above the age of 18 years on the date of incident is also not ruled out. The nature of allegations go to show that after being with the accused for two months, he either tutored or under great pressure to change her version. Though in the charge, it was mentioned that the prosecutrix was allured and thereby the accused was charged under Section 363 read with Section 366 IPC. No certificate whatsoever about the age of girl was given by father to Investigating Officer is an admitted position of fact which the witness father namely PW-3 (Diwari Lal) has

35. While going through the record also we donot find any certificate describing the age of the prosecutrix. The entire change of version of the prosecutrix goes to show that she was tutored. According to the prosecutrix, she has narrated the journey between her place to Faridabad. We are unable to satisfy ourselves that a grown up girl, would gain consciousness only after she reached Faridabad was transferred to train to bus by the accused. She has been with her parents. The statement before the Magistrate under Section 164 Cr.P.C. goes to show that she has taken U-turn in her oral testimony. The medical evidence also will not permit us to hold that there was forcible sex with her, which will fall under Section 375, the doctor has given opinion that no opinion can be given about rape as there was no injury and she was above the age of 17 years. Hence, we satisfy ourselves that no case under Section 376 IPC, for which the accused has been charged, is made out.

36. Rather, we now move to the provisions of Section 363 read with Section 366 IPC. The term "kidnapping" has been defined. Provisions of Section 366 I.P.C. read as under:

"366. Kidnapping, abducting or inducing woman to compel her marriage, etc.- *Whoever kidnaps or abducts any woman with intent that she may be*

compelled, or knowing it to be likely that she will be compelled, to marry any person against her will, or in order that she may be forced or seduced to illicit intercourse, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; [and whoever, by means of criminal intimidation as defined in this Code or of abuse of authority or any other method of compulsion, induces any woman to go from any place with intent that she may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person shall be punishable as aforesaid]."

In this case, can it be said that the girl was kidnapped. When we sift the evidence, the definition of kidnapping would be kidnapped from lawful guardianship. Minor under the age of 16 for male and 18 for female. We are concerned with female. In this case, the medical evidence does not prove that the girl was below the age of 18 years. It has come on record that no certificate showing the age of the girl was ever produced before the Investigating Authority. We can safely rely on the evidence of PW-8. The learned Judge has come to the conclusion that she was 14 years of age. The finding of the learned Judge is not in consonance with the medical evidence produced. The panchayat certificate showed her age to be 21 years, therefore, there is a doubt between this fact and the oral testimony. The oral testimony cannot be said to be so sterling that conviction could be based on the same. Hence, no conviction under Section 363 I.P.Code read with Section 366 I.P.Code can also be maintained. The decision of this Court in Mataruwa @ Amar (supra) would come to the aid of the accused. Similar is the judgement of this Court in Arvind Kumar (supra).

37. In view of the facts and evidence on record, we are convinced that the accused has been wrongly convicted, hence, the judgment and order impugned is reversed and the accused is acquitted. The accused appellant, if not warranted in any other case, be set free forthwith.

38. The appeal is, accordingly, allowed. Records be sent back to trial court.

(2021)02ILR A 843
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.01.2021

BEFORE

THE HON'BLE SAUMITRA DAYAL SINGH, J.

Writ Tax No. 278 of 2020

Sandeep Singh ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Imtiyaj Ali, Sri Muatuza Ali, Sri V.K. Singh

Counsel for the Respondent:
C.S.C.

Civil Law-Sec. 34- United Provinces Excise Act,1910-Petitioner had two country liquor shop excise licenses-originally first license was suspended over certain violation during inspection-thereafter both license cancelled-appeal dismissed-Writ -licensing authority may cancel a license for any violation of law so grave in the interest of revenue-either u/s34(1) of Act of Rule 21 Of Rules or terms and conditions on Form 5-C-another license may also be cancelled as one license of same licensee has already been cancelled-Matter remanded back to recommence proceeding only after decission of the Appealate authority.

Held, *there is nothing in the plain language of section 34(2) of the Act to oblige the licensing authority to establish an independent violation of clauses (a) to (e) of sub-section (1) of section 34 of the Act before proceeding to cancel any other license of a licensee, under section 34(2) of the Act. The only mandatory pre-condition prescribed to exercise that power is the prior cancellation of any other license of that licensee under any of the first three clauses of Section 34(1) of the Act. That fact alone exposes the licensee to further proceedings for cancellation of his another/other license/s under Section 34(2) of the Act.* **(para 20)**

In case a licensee commits separate violations with respect to each or more than one license held by him, he may stand exposed to proceedings for cancellation of each such license under section 34(1) of the Act, exclusively. If, however, one out of more license held by a licensee is cancelled, either under clause (a) or (b) or (c) of section 34(1) of the Act, it would expose such a licensee to cancellation of his another/other license/s, irrespective of a complete absence of any violation committed in the operation of the another/other license/s. That is the plain meaning of section 34(2) of the Act. **(para 22)**

List of Cases cited:-

1. Gorakhnath Vs St. of U.P. & ors.; (1996) 11 SCC 278 **(distinguished)**

2. Girishdutta Mishra Vs St. of U.P. & 4 ors.; **(distinguished)**

3. Sri Basdeo Prasad Vs The St. of U.P. & anr. 1956 ALJ 81

4. Mahaluxmi Rice Mills Vs St. of U.P., (1998) 6 SCC 590

5. Rao Shiv Bahadur Singh Vs St. of U.P., AIR 1953 SC 394

(Delivered by Hon'ble Saumitra Dayal Singh, J.)

1. Heard Sri V.K. Singh, learned senior counsel assisted by Sri Murtuza Ali, learned counsel for the petitioner and Sri A.C. Tripathi, learned standing counsel for the State.

2. Originally, the present petition was filed seeking quashing of the order dated 05.02.2020 passed by Additional Excise Commissioner (Administration) Uttar Pradesh, in Excise Appeal No. 95 of 2019 (Sandeep Singh Versus Collector/Licensing Authority & Another) as well as the order dated 30.10.2019 passed by the Collector/Licensing Authority Fatehpur cancelling the country liquor shop license of the petitioner - at village Majhenpurwa, District Fatehpur. Upon amendment, the petitioner has also challenged another order dated 17.06.2020 passed by Additional Excise Commissioner (Administration) Uttar Pradesh. At the outset, it may be noted that the order dated 17.06.2020 was passed with reference to the other country liquor shop license of the petitioner at Village Gehrukheda. That controversy has been dealt with a separate order passed in Writ-Tax No. 277 of 2020 decided on 19.01.2021. Therefore, the challenge raised in the present petition to the aforesaid order dated 17.06.2019, is misconceived. It is accordingly rejected.

3. Undisputedly, for the Excise Year 2018-2019, the petitioner held two country liquor shop excise licenses. One for his shop at village Gehrukheda (hereinafter referred to as the "Gehrukheda license) and another for his shop at village Majhenpurwa (hereinafter referred to as the "Majhenpurwa license"). Vide order dated 25.3.2019, the Gehrukheda license of the petitioner was suspended, arising from the facts noted during an inspection dated 23.3.2019. Then, vide order dated 28.05.2019, the licensing authority proceeded to cancel both the licenses of the petitioner without any prior notice

proposing to cancel the Majhenpurwa license. The order dated 28.05.2019 gave rise to two separate appeals being Excise Appeal No. 31 of 2019 (for Gehrukheda license) and Excise Appeal No. 32 of 2019 (for Majhenpurwa license). By order dated 10.08.2019, the appeal authority allowed the Excise Appeal no. 32 of 2019 and remitted that matter to the licensing authority after taking notice of the ground of challenge that no show cause notice had been issued to the petitioner before cancelling that license. Yet, the appeal authority left it open to the licensing authority to issue a fresh show cause notice in that regard. No challenge was raised to that order. It attained finality.

4. Thereafter, the licensing authority issued a show cause notice to the petitioner on 29.08.2019 proposing to cancel the petitioner's Majhenpurwa license. The notice reveals that it was issued on account of cancellation of the Gehrukheda license of the petitioner. It was consequently alleged- the petitioner's character was not good and he was guilty of violation of the Excise Act. The petitioner replied to the same vide his written reply dated 2.9.2019. Yet again, by his order dated 30.10.2019, the licensing authority cancelled the Majhenpurwa license. Against the order dated 30.10.2019, the petitioner filed Excise Appeal no. 95 of 2019. It has been dismissed vide order dated 05.02.2020 passed by Additional Excise Commissioner (Administration) Uttar Pradesh. That order is under challenge here.

5. At the outset, a preliminary objection has been raised by the learned standing counsel as to the maintainability of the present petition. He submits that the order of the Additional Excise Commissioner (Administration) Uttar Pradesh is revisable before the State Government. Opposing that preliminary objection, the learned counsel for the petitioner would submit, there was neither any jurisdiction nor notice nor any legal basis to cancel the petitioner's Majhenpurwa license. Alternatively, upon the matter pertaining to Gahrukhera license being remanded, the appeal order in the present case cannot survive. The objection being raised is thus stated to be too technical to merit acceptance by the Court.

6. On merits, learned Senior Advocate for the petitioner would submit that the orders passed by the licensing authority and the appeal authority arise from the proceedings that are wholly without jurisdiction in as much as no violation had been noted with respect to the Majhenpurwa license. Another jurisdictional defect has been cited as no notice had been issued before cancelling the petitioner's Majhenpurwa license vide order dated 28.05.2019. That jurisdictional defect did not stand cured by the observations made in the appeal order dated 16.08.2019. Then referring to Section 34 of the United Provinces Excise Act, 1910 (hereinafter referred to as the "Act") and Rule 21 of the Uttar Pradesh Excise Settlement of Licenses for Retail Sale of Country Liquor) Rules, 2020 (hereinafter referred to as the "Rules"), he would submit, unless a specific violation had been noted as to the operation of the Majhenpurwa license, that license could never be cancelled merely because any other violation may have been alleged against the petitioner with respect to the Gehrukheda license. Alternatively, it has been submitted, the allegations made in the notice even if accepted on their face value, are vague and such as may never fall within the scope of Section 34 of the Act or Rule

21 of the Rules or any of the terms and conditions of the license on Form 5-C. In such facts, it has been submitted, the orders passed by the licensing authority and the appeal authority are liable to be quashed and the Majhenpurwa license liable to be restored. He has relied on a decision of the Supreme Court in **Gorakhnath Vs. State of U.P. & Ors.; (1996) 11 SCC 278** and a decision of this Court in **Girishdutta Mishra Vs. State of U.P. & 4 Ors.; decided on 5.9.2014.**

7. On the other hand, the learned standing counsel would submit once the appeal authority had allowed the licensing authority to issue a fresh notice and that proceeding was undertaken without any let or objection at the appropriate stage, that challenge may no longer arise. Also, the licensing authority was right to cancel the Majhenpurwa license of the petitioner as it stood established that the petitioner had made violations in the operation of the Gehrukheda license. Since the petitioner was found to have committed violations of use of tampered QR code and caps against his Gehrukheda license referable to Section 34 (1) (b) of the Act, no other independent violation was required to be established with respect to operation of the Majhenpurwa license. Any other construction given to the statute would render redundant or superfluous the provisions of Section 34 (2) of the Act. Also relevant of Rule 21(3) of the Rules read with the terms and conditions of the license, it has been submitted that once the Gehrukheda license stood cancelled, by way of a necessary consequence, the Majhenpurwa license also became liable to cancellation. Alternatively, it has been submitted that in any case the proceedings arising from the cancellation of the Gehrukheda license having been remanded, the same fate must meet the present Majhenpurwa license as well.

8. Having heard the learned counsel for the parties and having perused the record, in the first place, the preliminary objection raised as to maintainability of the present petition is found not acceptable as a question of law does appear to exist as to the true meaning to be given to section 34(2) of the Act. Also, the proceeding for cancellation of the Gehrukheda license that occasioned the present proceeding has been remitted to the appeal authority by a separate order passed in Writ Tax No. 227 of 2020 on 19.01.2021. As, stated by both sides, the fate of the present petition hangs, at least partly, on the fate of the Gehrukheda license. Then affidavits have already been exchanged. No useful purpose may be served in requiring the petitioner to approach the revising authority at this stage, in such facts.

9. As to inherent lack of jurisdiction, claimed by the petitioner, it appears that the same may not be entirely correct, in the face of the proceedings as they stand today. Though it is true, no prior notice had been issued to the petitioner to cancel his Majhenpurwa license before the order dated 28.05.2019 came to be passed, two different appeals were filed by the petitioner against that order- one against the cancellation of the Gehrukheda license (Excise Appeal no. 31 of 2019) and the other against the cancellation of the Majhenpurwa license (Excise Appeal no. 32 of 2019). While allowing appeal no. 32 of 2019 on 10.08.2019, the appeal authority specifically observed that the licensing authority may issue a fresh notice to the petitioner to cancel the Majhenpurwa license. That order has attained finality.

10. After the remand made, undisputedly, a notice dated 29.08.2019

was issued to the petitioner by the licensing authority requiring the petitioner to show cause why Majhenpurwa license may not be cancelled. The petitioner replied vide his reply dated 2.9.2019. The subsequent order dated 30.10.2019 was passed by the licensing authority cancelling the petitioner's Majhenpurwa license on that proceeding. It was challenged in appeal being Excise Appeal no. 95 of 2019 which came to be decided by the impugned order dated 05.02.2020.

11. The ground of patent lack of jurisdiction to cancel the Majhenpurwa license may have existed with the petitioner, when that license came to be cancelled first, on 28.05.2019. Upon order dated 10.08.2019 passed in Excise Appeal No. 32 of 2019, the licensing authority issued the notice dated 29.08.2019. On that date the Gehrukheda license of the petitioner stood cancelled. As further discussed later, the jurisdictional fact to proceed against the Majhenpurwa license, under section 34(2) of the Act, thus arose on 28.05.2019 and it existed on 29.08.2019. The present proceedings arise solely from that notice. Hence, the challenge raised as to lack of jurisdiction does not survive for consideration in this writ petition. At present, the proceedings instituted after issuance of the notice dated 29.08.2019 alone are to be tested, on their merits. That notice was within jurisdiction.

12. Next, in the context of proceedings to cancel the Majhenpurwa license, it is difficult to accept the submission advanced by the learned Senior Advocate for the petitioner that an independent ground of violation must be made out (under section 34(1) of the Act read with Rule 21 of the Rules and terms and conditions of license on Form 5-C). That submission runs contrary to the statutory scheme. Relevant to our discussion, the provisions of Section 34 and 35 of the Act and 21 (3) of the Rules, may be quoted as below:

"34. Power to cancel or suspend licences, etc. - (1) Subject to such restrictions, as the State Government may prescribe, the authority granting any licence, permit or pass under this Act may cancel or suspend it-

(a) if any duty or fee payable by the holder thereof be not duly paid; or

(b) in the event of any breach by the holder of such licence, permit or pass or by his servants, or by any one acting on his behalf with his express or implied permission of any of the terms or conditions of such licence, permit or pass; or

(c) if the holder thereof is convicted of any offence punishable under this Act or any other law for the time being in force relating to revenue, or of any cognizable and non-bailable offence, or of any offence punishable under the [Dangerous Drugs Act, 1930,] or under the Merchandise Marks Act, 1889, or of any offence punishable under Sections 482 to 489 (both inclusive) of the Indian Penal Code; or

(d) where a licence, permit or pass has been granted on the application of the grantee of an exclusive privilege under this Act, on the requisition in writing of such grantee; or

(e) if the conditions of the licence or permit provide for such cancellations or suspension at will.

(2) When a licence, permit and pass held by any person is cancelled under clauses (a), (b) or (c) of sub-section (1), the authority aforesaid may cancel any other licence, permit or pass granted to such person by, or by the authority of the State Government under this Act or under any other law for the time being in force relating to excise revenue or under the [Opium Act, 1878.]

(3) The holder shall not be entitled to any compensation for the cancellation or suspension of his licence, permit or pass under this section nor to a refund of any fee paid or deposit made in respect thereof.

35. No compensation or refund claimable for cancellation or suspension of licence, etc., under this section. *- (1) Further power to cancel licences. - Whenever the authority granting a licence under this Act considers that such licence should be cancelled for any cause other than those specified in Section 34 it shall remit a sum equal to the amount of the fees payable in respect thereof for fifteen days, and may cancel the licence either-*

(a) on the expiration of fifteen days, notice in writing of its intention to do so, or

(b) forthwith, without notice.

(2) Compensation in the case of cancellation. - If any licence be cancelled under clause (b) of sub-section (1) in addition to the sum remitted as aforesaid there shall be paid to the licensee such further sum by way of compensation as the Excise Commissioner may direct.

(3) Refund of fee or deposit. - When a licence is cancelled under this section, any fee paid in advance or deposit made by the licensee in respect thereof shall be refunded to him, less the amount (if any) due to the State Government.

RULE

21 (3) *In case the license is cancelled the basic license fee, license fee and security amount deposited by him shall stand forfeited in favour of the Government and the licensee shall not be entitled to claim any compensation or refund. Such licensee may also be blacklisted and debarred from holding any other excise license."*

13. In the first place, by virtue of section 34(1) of the Act, if the licensing authority proposes to cancel a license, he may do so for any violation of the law noticed by him either in the context of section 34(1) of the Act or Rule 21 of the Rules or the terms and conditions of the license issued on Form 5-C. He may do so by making specific allegation/s with respect thereto. That condition applied to the Gehrukheda license as proceedings to cancel that license were initiated first, upon alleged violations noted during the inspection dated 23.3.2019.

14. Under section 34(2) of the Act, after, the licensing authority has cancelled an existing license under section 34(1) of the Act, he may, occasioned by that action choose to cancel another/other license of the same licensee. A question does arise whether another/other license/s of the same licensee may be cancelled only if similar or any other violations, as specified under section 34(1) read with Rule 21 of the Rules and terms and conditions mentioned on Form 5-C is/are established with respect to another/other license/s or another/other license/s may be cancelled merely because

the licensing authority has already cancelled one license of the same licensee.

15. It may also be noticed, under section 35 of the Act, the licensing authority has been given a further power to cancel an existing license, for any cause other than those specified under section 34 of the Act. However, that power may be exercised accompanied with proportional remission of license fee. In ***Sri Basdeo Prasad Vs The State of Uttar Pradesh and another 1956 ALJ 81***, the power under Section 35 of the Act was held to be administrative but, discretionary. A key difference between cancellation of license made under Sections 34 and 35 of the Act is- upon a cancellation made under Section 35 of the Act, the licensee may retain a right to proportionate refund of deposits made by him (towards license fees etc.), whereas forfeiture of such deposits follows the canellation of a license made under Section 34 of the Act.

16. Under section 34(1) of the Act, an existing license may be cancelled in face of any of the eventualities mentioned under clauses (a) to (e) of sub-section section 34 of the Act being found to exist. The legislature has used the word 'may' in section 34 (1) & (2) and section 35 of the Act. At the same time, it has used the word 'shall' in Chapter X of the Act while providing for impost of penalties prescribed for different infringements of law, including possession of any intoxicant in contravention of the Act or Rule or Order or license or permit or pass.

17. Thus, the legislature has used both words - 'may' and 'shall', in the same enactment, while dealing with two different consequences of cancellation of license/s and penalties, that may arise from a same or single fact situation, namely, violation of the Act, Rule or license. In ***Mahaluxmi Rice Mills v. State of U.P., (1998) 6 SCC 590***, a question arose to the meaning of the words 'may' and 'shall' used in section 17 of the U.P. Krishi Utpadan Mandi Adhiniyam, 1964 while dealing with the nature of liability of the purchaser to pay an amount towards market fees while buying goods inside a 'mandi' (word used 'may') and the liability of the seller to pay market fees (word used 'shall'). Though, in that case both consequences arose from a single transaction and were governed by a single provision of that Act, yet the ratio of that decision is attracted to the facts of the present case. In the present case also, both consequences of penalty and cancellation of license (covered under clauses (a), (b) and (c) of Section 34(1) of the Act) arise from a common/similar violation/fact.

18. In the language of section 17 of the U.P. Krishi Utpadan Mandi Adhiniyam, 1964, the Supreme Court had reasoned:

"9. It is significant to note that the word used for the seller to realise market fee from his purchaser is "may" while the word used for the seller to pay the market fee to the Committee is "shall". Employment of the said two monosyllables of great jurisprudential import in the same clause dealing with two rights regarding the same burden must have two different imports. The legislative intendment can easily be discerned from the frame of the sub-clause that what is conferred on the seller is only an option to collect market fee from his purchaser, but the seller has no such option and it is imperative for him to remit the fee to the Committee. In other words, the Market Committee is entitled to collect market fee from the seller irrespective of whether the seller has realised it from the purchaser or not".

19. Similarly, necessarily, an implied discretion is vested in the licensing authority to cancel or to not cancel an existing license even if any condition under section 34(1) (a) to (i) or 34 (2) or 35 exists. In ***Sri Basdeo Prasad Vs The State of Uttar Pradesh and another (supra)***, a division bench of this Court had clearly held the power to cancel a license under section 35 of the Act to be discretionary. There is no reason to hold Section 34(2) of the Act to be mandatory, as suggested by the learned Standing Counsel. It is a discretionary power.

20. Then, though it is necessary to establish violation of any of the stipulations contained in clauses (a) to (e) of sub-section (1) of section 34 of the Act to cancel an existing license, under that provision, there is nothing in the plain language of section 34(2) of the Act to oblige the licensing authority to establish an independent violation of clauses (a) to (e) of sub-section (1) of section 34 of the Act before proceeding to cancel any other license of a licensee, under section 34(2) of the Act. The only mandatory pre-condition prescribed to exercise that power is the prior cancellation of any other license of that licensee under any of the first three clauses of Section 34(1) of the Act. That fact alone exposes the licensee to further proceedings for cancellation of his another/other license/s under Section 34(2) of the Act.

21. To read the fulfilment of clauses (a) to (e) of sub-section (1) of section 34, into sub-section (2) of section 34 of the Act would be to read into the statute something that is plainly not there. It would also render superfluous, Section 34(2) of the Act. If the conditions enumerated under section 34(1) of the Act are necessary to be satisfied in a proceeding under 34(2) of the Act, there would be no eventuality when sub-section (2) of section 34 would ever have an application. In that case, in every situation, all proceedings to cancel a license would continue to arise under section 34(1) of the Act. An interpretation that renders any part of a legislation superfluous is to be avoided. In **Rao Shiv Bahadur Singh v. State of V.P., AIR 1953 SC 394** an early Constitution bench of the Supreme Court observed:

"5. Learned counsel strongly relied on Attorney-General v. Herman James Sillem [10 House of Lords Cases 704 : 11 ER 1200] to show that a provision such as the above was meant only to regulate the proceedings in a case within the four walls or limits of the court. The statutory provision which came up for construction in that case was however very differently worded, and was meant to regulate "the process, practice, and mode of pleading" i.e. the procedure in the court and not "the proceedings" of the court. While, no doubt, it is not permissible to supply a clear and obvious lacuna in a statute and imply a right of appeal, it is incumbent on the court to avoid a construction, if reasonably permissible on the language, which would render a part of the statute devoid of any meaning or application. The construction urged for the appellant renders Section 6 futile and leaves even a convicted person without appeal. We have no hesitation in rejecting it".

22. Thus, giving full play to the provisions of section 34(1) and (2) of the Act, in case a licensee commits separate violations with respect to each or more than one license held by him, he may stand exposed to proceedings for cancellation of

each such license under section 34(1) of the Act, exclusively. If, however, one out of more license held by a licensee is cancelled, either under clause (a) or (b) or (c) of section 34(1) of the Act, it would expose such a licensee to cancellation of his another/other license/s, irrespective of a complete absence of any violation committed in the operation of the another/other license/s. That is the plain meaning of section 34(2) of the Act.

23. Other than excluding the contingencies specified under clauses (d) & (e) of section 34(1) from the scope of applicability to the power conferred under section 34(2) of the Act, the legislature has vested a wide discretion on the licensing authority, in that regard. Thus, the legislative intent, is to confine the power under section 34(2) of the Act to situations involving specified violations - as to payment of fee, breach of any express or implied terms and conditions and conviction for any of the specified offences. Unless a license of a licensee is first cancelled for any such ground, another/other license/s of that licensee cannot be cancelled under section 34(2) of the Act.

24. At the same time, by very nature, the power under section 34(2) of the Act is harsher than that vested under section 34(1) of the Act. Though akin to the residuary power vested under section 35 of the Act-to cancel any existing license, that power is purely administrative, not involving any punitive consequence. Upon cancellation of a license under section 35, the affected licensee may remain entitled to refund of license fee, deposit etc. and also compensation. However, by virtue of sub-section (3) of section 34 of the Act, such claims are barred if the cancellation of a license is made under section 34(1) or section 34(2) of the Act. That consequence is mandatory.

25. Thus, upon cancellation of one license of a licensee under Section 34(1)(a) or 34(1)(b) or 34(1)(c) of the Act, the licensing authority may in its discretion choose to cancel another/other license/s of that licensee, whether issued under the Act or under any other law relating to excise revenue or under the Opium Act, 1878.

26. Without attempting to define the grounds on which such a license may be cancelled under section 34(2) of the Act, a few statutory pointers may be discerned from the language of the Act itself. First, the jurisdiction to exercise that power arises after and not during or before the exercise of power under section 34(1) of the Act with respect to another license. Second, by virtue of its linkage to clause (a), (b) and (c) of section 34(1) of the Act, that power may come to be exercised only if another license of the same licensee has been cancelled (prior in time), either upon a default in payment of license fees etc. or breach of any of the terms and conditions of his license, permit or pass or upon his conviction for any of the specified offences. Third, exercise of the power under section 34(2) visits the licensee with a very harsh consequence since he would suffer the consequence of cancellation of his (other) license/s without allegation of any express violation with respect to the same. Fourth, contrasted with the power vested under section 35, the power has heavy civil consequence as it deprives the licensee of any right to compensation and it also involves forfeiture of fees, deposits etc. Fifth, the power to cancel the other license/s extends not only to any other license granted under this Act but to any

other license issued under "any other law", "relating to excise revenue" or under the "Opium Act, 1878".

27. In that view, the submission advanced by the learned Standing Counsel that cancellation of the other license follows as an automatic consequence of the first cancellation proceeding also does not merit acceptance. The provisions of Section 34(2) of the Act are discretionary and not mandatory as suggested by the learned Standing Counsel. Also it's application can never be an automatic consequence of cancellation of another excise license of a licensee. Being a power exercisable only in the interest of revenue against a licensee who has already suffered cancellation of one license u/s 34(1) of the Act; such a power would have to be exercised with extreme caution only in cases where upon facts proven in the earlier proceedings it appears to the licensing authority that continuance of another/other license/s of a licensee would be detrimental to the interest of revenue. It is this fact that would have to be proven in such proceeding initiated under Section 34(2) of the Act.

28. Thus, the proceedings under section 34(2) may arise purely in the core interests of revenue, owing to the deliberate violation committed by the licensee, as may have been found/proven in an earlier proceeding of cancellation of any other license issued under the Act. Yet, no further and other violation may exist as a pre-condition to be satisfied or proven before action may be taken under section 34(2) of the Act to cancel any other license of that licensee. Therefore, the proceedings for cancellation of an earlier license must itself bring out existence of reason/s so grave and serious as may give rise to a satisfaction with the licensing authority, that all or any other license of that licensee be also cancelled in the interest of revenue. Illustratively, but not in any way exhaustively, those may be cases of large scale or organized evasion or avoidance of excise duty; breach of terms and conditions made by way of a regular business practice adopted by the licensee; disentitlement earned to hold any excise license, due to any of the specified convictions or operation of law or any other reason/ground that may spring form the facts already proven in the earlier proceeding, to cancel one or more licence of the same licensee, under section 34(1)(a) or (b) or (c) of the Act.

29. Before such discretionary power may be exercised, two requirements would have to be fulfilled. One, there must be shown to exist an order cancelling another license (issued under the Act) of the licensee, under Section 34(1)(a) or (b) or (c) of the Act. Two, a notice would have to be issued to the licensee requiring him to show cause why another/other license/s standing in his name may not be cancelled. The notice would state how/why in the proven facts of the other case/s, any other license is to be cancelled. No other allegation of a fresh violation is to be made or proved in those proceedings.

30. Coming to the facts of the present case, it would be wholly pre-mature to reach a conclusion that the ground specified in the showcause notice is wholly insufficient or is sufficient for the purposes of examining the correctness or otherwise of the cancellation of the Majhenpurwa licence. It is so because the basic facts giving rise to the cancellation of the Gehrukheda licence, have yet not attained finality. By the order passed in Writ Tax No. 277 of 2020, decided on 19.01.2021,

those proceedings have been remanded to the Appeal Authority to examine the same afresh and to record it's conclusions whether the petitioner was in possession of tampered QR Code and Caps. Till the Appeal Authority reaches a firm conclusion as to that, in the facts of the present case, the cancellation of Majhenpurwa licence may not be examined, simultaneously.

31. Thus, for the purpose of clarification, it is stated that in case the petitioner succeeds in establishing that his Gehrukheda licence was not liable to be cancelled as he had not violated either section 34(1) (a) or (b) or (c) of the Act, the present proceedings to cancel the Majhenpurwa license would necessarily fall. However, if the Appeal Authority does reach a conclusion adverse to the petitioner (in that case), it would be for the Licensing Authority to then examine the existence or otherwise of an adequate reason or ground to exercise his extra-ordinary discretionary power to cancel the Majhenpurwa licence of the petitioner under Section 34(2) of the Act, keeping in mind the observations made above.

32. Ordinarily, if the present writ proceedings were being finalized during the Excise Year of 2018-2019, the petitioner may have remained entitled to restoration of his Majhenpurwa license. However, since that year is long over, and the current Excise Year 2020-21 is at its end, it is provided that the orders dated 05.02.2020 and 30.10.2019 are set aside and the matter remitted to the licensing authority with a stipulation that such remanded proceedings may be recommenced, if required, only after the decision of the Appeal Authority with respect to the Gehrukheda license of the petitioner. If no case is made out for cancellation of petitioner's Majhenpurwa license, under section 34(2) of the Act (as discussed above), his claim for renewal of that license, if otherwise eligible, for the Excise Year 2021-22 may be considered by treating the petitioner to be a continuing licensee, on notional basis or (if the petitioner does not seek renewal, at that stage), to grant proportional refund to him in terms of section 35 of the Act, as in that case the cancellation of the Majhenpurwa license would remain referable to that provision of law only. Such proceedings be completed by 15.04.2021.

33. The ratio of **Gorakhnath (supra) and Girishdutta Mishra (supra)** is found inapposite. The ratio of those decisions is to the rights of the original licensee viz a viz his replacement licensee who came to be appointed after the license of the original licensee had been cancelled. Once the license of the original licensee was restored, the replacement licensee was found to have no rights surviving with him to claim continuance of his license. Such is not the case here. As observed above, the Gehrukheda license stands cancelled and also, it is not clear if the Majhenpurwa license had ever been renewed for the Excise Year 2018-2019. In any case, that Excise Year is long over. Hence revival of that license is not warranted, at this stage.

34. Accordingly, the writ petition is **partly allowed.**

(2021)02ILR A 853
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.01.2021

BEFORE

THE HON'BLE SAUMITRA DAYAL SINGH, J.

Writ Tax No. 503 of 2020

M/s Anandeshwar Traders, Kanpur Nagar ...Petitioner

Versus

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

Counsel for the Petitioners:
Sri Aditya Pandey

Counsel for the Respondent:
C.S.C.

Tax Law-Petitioner is trader in Pan masala & other goods-sold disputed goods to a dealer-two e-way bills and two bilty prepared-seizure order passed-for reuse of eway bill-but no such finding recorded in final order u/s 129 (3) of CGST Act, 2017-presumption cannot be drawn from e-way bills-no evidence of actual transaction exist-and no statutory presumption available- at appeal stage-certain additional evidence entertained-rules does not allow- impugned order set aside.

W.P. allowed. (E-7)

List of Cases cited: -

1. Mohinder Singh Gill & anr. Vs The Chief Election Commissioner, New Delhi & ors., AIR 1978 SC 851.

(Delivered by Hon'ble Saumitra Dayal Singh, J.)

1. Heard Sri Aditya Pandey, learned counsel for the petitioner and Sri Jagdish Mishra, learned Standing Counsel.

2. The present petition is directed against the order dated 3.12.2019 passed by the Additional Commissioner Grade-2 (Appeal)-5, Commercial Tax, Kanpur, whereby the demand of tax and penalty amounting to Rs. 29,76,110/- has been confirmed.

3. Undisputedly, the petitioner is a trader in Pan Masala and other goods. It claims to have sold disputed goods to a dealer - Shri Durga Trading Company, Darjeeling, West Bengal, against its Tax Invoice nos. SAT/19-20/0059, dated 24.11.2019 and SAT/19-20/0060, also dated 24.11.2019. Two e-way bills were also prepared being e-way bill nos. 491096371734 and 491096371789. Both e-way bills were prepared on 24.11.2019 at 02.32 PM and 02.33 PM respectively. Bilty of M/s Ganpati Road Carriers Pvt. Ltd. being LR/321 and LR/322 were also prepared for transportation of those goods.

4. It is also undisputed that the goods in question along with the aforesaid two tax invoices, e-way bills and, two Bilty were found accompanying the goods on 28.11.2019 when the same were intercepted by the revenue authorities. At the stage of seizure i.e when the order under Section 129(1) of the Central Goods and Service Tax Act, 2017 (hereinafter referred to as the Act) was passed, only one allegation was proposed to be levelled by the proper officer - of reuse of the aforesaid e-way bills. However, at the stage of final order passed under Section 129(3) of the Central Goods and Service Tax Act, 2017 (hereinafter referred to as the Act), no finding came to be recorded to that effect. Accordingly, by order dated 3.12.2019, the Assistant Commisioner (Mobile Squad)-4, Kanpur, revised a demand of tax and penalty Rs. 29,76,110/-.

5. The petitioner's appeal against that order came to be dismissed by order dated 22.6.2020 passed by the Additional Commissioner Grade-2 (Appeal)-5, Commercial Tax, Kanpur. However, it is noted that at the stage of the appeal, certain additional evidence has been entertained by the appeal authority in the shape of receipt of toll plaza indicating (according to the revenue authority) that the goods had moved on 24.11.2019 itself, at 7.31 PM. Relying on that, the penalty appeal was also dismissed. Relying on Rule 138(9) of the Central Goods and Service Tax Rules, 2017 (hereinafter referred to as the Rules), it has been reasoned by the appeal authority that since the goods were not being

transported immediately upon preparation of the e-way bills on 24.11.2019, the same should have been cancelled. Since the e-way bills were not cancelled and the transportation of the goods commenced four days thereafter, it has been inferred that the said e-way bills had been reused.

6. Learned counsel for the petitioner submits that Rule 138(9) of the Rules does not, in any way, provide either automatic cancellation of e-way bills or cancellation of e-way bills by way of necessary option to be adopted by a dealer, in case, the goods are not transported within 24 hours of such e-way bills being generated. Merely because transportation of the goods did not commence for four days thereafter, it may not itself lead to any adverse inference of second use of that e-way bills. Second, it has been submitted that, in any case, the reason for assessment and penalty has to be tested on the strength of the original order. The reasoning given therein could not be supplemented or supplanted at the stage of appeal. Relying on Rule 112 of the Rules, it has been further submitted that the right to lead additional evidence at the stage of appeal, has been granted to the appellant only. Therefore, the appeal authority has wrongly allowed the application of the revenue authority who was the respondent in the appeal. In that regard, reliance has been placed on the decision of the Supreme Court in the case of **Mohinder Singh Gill & Anr. Vs. The Chief Election Commissioner, New Delhi & Ors., AIR 1978 SC 851.**

7. On the other hand, learned Standing Counsel opposed the petition and submitted that, in case the petitioner had not transported the goods as disclosed on the e-way bills, he should have acted in accordance with law and cancelled the same under Rule 138(9) of the Rules. The fact that the e-way bills were not cancelled, itself is a evidence of the goods having been twice transported, thereon. Then, referring to the evidence received by the appeal authority, it has been submitted that clearly the petitioner-assessee had made second use of the e-way bills.

8. Having heard learned counsel for the parties and having perused the record, the rights of the parties, in the instant case, are found to be governed by the Rule 138(9) of the Rules, which reads as below:-

"*Where an e-way bill has been generated under this rule, but goods are either not transported or are not transported as per the details furnished in the e-way bill, the e-way bill may be cancelled electronically on the common portal within twenty four hours of generation of the e-way bill:*

Provided that an e-way bill cannot be cancelled if it has been verified in transit in accordance with the provisions of rule 138B:

Provided further that the unique number generated under sub-rule (1) shall be valid for a period of fifteen days for updation of Part B of FORM GST EWB-01."

9. The Rule does not prescribe that the dealer must necessarily cancel the e-way bill if no transportation of the goods is made within 24 hours of its generation. It certainly does not provide any consequence that may follow if such cancellation does not take place. On the contrary, the Rule permits a dealer to cancel the e-way bill only if the transportation does not take place and the dealer choses to cancel such e-way bill within 24 hours of its generation.

10. Even if the dealer does not cancel the e-way bill within 24 hours of its

generation, it would remain a matter of inquiry to determine on evidence whether an actual transaction had taken place or not. That would be subject to evidence received by the authority. As such it was open to the seizing authority to make all fact inquiries and ascertain on that basis whether the goods had or had not been transported pursuant to the e-way bills generated on 24.11.2019. Since the petitioner-assessee had pleaded a negative fact, the initial onus was on the assessing authority to lead positive evidence to establish that the goods had been transported on an earlier occasion. Neither any inquiry appears to have been made at that stage from the purchasing dealer or any toll plaza or other source, nor the petitioner was confronted with any adverse material as may have shifted the onus on the assessee to establish non-transportation of goods on an earlier occasion.

11. The presumption could not be drawn on the basis of the existence of the e-way bills though there did not exist evidence of actual transaction performed and though there is no statutory presumption available. Also, there is no finding of the assessing authority to that effect only. Mere assertion made at the end of the seizure order that it was clearly established that the assessee had made double use of the e-way bills is merely a conclusion drawn bereft of material on record. It is the reason based on facts and evidence found by the assessing authority that has to be examined to test the correctness of the order and not the conclusions, recorded without any material on record.

12. Then, as to the power of the appeal authority to entertain additional evidence, again, there can be no doubt that Rule 112 of the Rules does not allow for additional evidence to be led at the instance of the respondent in the appeal. In the case of penalty or assessment, where the appeal may be filed by the assessee alone, the correctness of the order is to be tested on the strength of the reasons given in that order and not on the basis of any supplementary or other material that may be brought on record by the revenue authority during the appeal proceedings. To do that would be to allow the order impugned in an appeal proceeding to be tested and affirmed on fresh reasons, existing outside the assessment or penalty order. Clearly, that is impermissible and against the principle laid down by the Supreme Court in **Mohinder Singh Gill (supra)**. In absence of specific Rule of procedure allowing the appeal authority to admit additional evidence at the behest of the respondent, it never became open to it to confront the petitioner with that evidence and draw it's independent conclusions based thereon.

13. In view of the above position, though the petitioner-assessee has also disputed the correctness of the additional evidence, that issue is not required to be gone into in the present case. Accordingly, it is found that the order passed by the appeal authority is erroneous, being contrary to the provisions of law. The appeal authority had no jurisdiction to examine fresh evidence at the behest of the revenue or record fresh reasons to support original order. The proper authority, had not recorded any reason to establish evasion of tax or attempt to evade tax or even reuse of the documents by the petitioner. Though he raised that issue in the seizure proceedings, he did not record any finding that effect in the final order dated 3.12.2019 passed under Section

129(3) of the Act. He simply rejected the explanation furnished by the assessee without recording any reason and consequently imposed tax and penalty.

14. In view of the above, no useful purpose would be served to remand the proceeding now as that would amount to giving the revenue a second inning to built a fresh case that too after being aware of the defense set out by the assessee in the first leg of the proceedings. The order dated 3.12.2019 passed by the proper authority under Section 129(3) of the Act is found to be perverse and is set aside. Any amount that may have been deposited by the petitioner-assessee, may be returned to it, in accordance

15. Accordingly, the present petition is **allowed.**

(2021)02ILR A857
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.01.2021

BEFORE

THE HON'BLE MUNISHWAR NATH BHANDARI, J.
THE HON'BLE ROHIT RANJAN AGARWAL, J.

Writ C No. 27147 of 2020
&
Writ C No. 27104 of 2020
&
Writ C No. 27175 of 2020

M/s Proview Realtech Pvt. Ltd....Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Siddharth Singhal, Sri Ankita Singhal

Counsel for the Respondents:
C.S.C., Sri Wasim Masood

A. Civil Law – Real Estate Regulation - Real Estate (Regulation and Development) Act, 2016- Sections 21, 29, 30, 40(1), 40(2), 43(5) - U.P. Real Estate (Regulation and Development) (Agreement for Sale/Lease) Rules, 2018 - U.P. Real Estate (Regulation and Development) Rules, 2016 - Rules 23, 24 -

Real Estate (Regulation and Development) Act, 2016 - Sections 21, 29, 30 - Whether one member was competent to pass the order – S. 30 of Act of 2016 is relevant and address the issue raised in this petition. It shows that in case of vacancy, or any defect in the constitution of the Authority or any defect in the appointment of a person acting as a Member of the Authority, the proceeding of the Authority would not be invalidated. It is not that whatever composition given u/s 21 of the Act alone can decide the complaint rather reference of S. 29 has been given to indicate that complaint can be heard even in absence of the Chairperson and, in any case, due to the vacancy or any defect in the constitution of Authority, the proceeding would not be invalidated. (Para 8, 9, 13, 14)

Petitioner in the present case, kept silence on the hearing of the complaint by one Member and thereby he cannot now be allowed and to seek invalidation of the proceeding going contrary to S. 30 of the Act of 2016 and his conduct. The first argument cannot be addressed simply by referring to S. 21 of the Act of 2016 but has to be reference of other provisions, more specifically, S. 30 of the Act of 2016, which was inserted by the legislature to save the proceeding if the vacancy exist in the Authority or other reason. It is otherwise a fact that an order was issued to delegate the power to a Member for hearing of the complaint, which was considered by this Court in earlier judgment. Thus the first ground raised by the petitioner cannot be accepted. (Para 11, 15)

B. The second issue regarding rate of interest is nothing but a challenge on the merit of the order. Writ petition has been held not to be maintainable as petitioner has remedy

of appeal. No interference has been caused in the order but petitioner has been allowed to take the aforesaid alternative remedy. (Para 16)

C. The purpose and object of S. 40(1) is to allow recovery of the amount as arrears of land revenue so as to expeditiously give the relief to the consumer having suffered in the hands of the Promoter. S. 40(2) covers basically the case of an order of injunction or mandatory injunction. (Para 17, 22)

In the instant case, the consumer had deposited a sum of Rs. 25 lacs and odd, in instalments but despite an agreement for giving possession of the flat in the year 2017, it was not handed over to the consumer. The direction for return of the amount with interest has been given in those circumstances. If a consumer is to seek execution of the part of the order through the Civil Court then the very purpose of the enactment of Act of 2016 to provide speedy dispute redressal mechanism would frustrate. If the argument of the petitioner is accepted then for recovery of a sum of Rs. 25 lacs and odd, the non petitioner consumer is to be sent to Civil Court while recovery of amount of interest of Rs. 15 lacs can be made as arrears of land revenue, as admitted by the counsel for the petitioner himself.

If recovery of amount is to be sought by dividing it in two parts and by different method, it would be against the object of the Act of 2016. The object of speedy redressal would frustrate if recovery of the amount is also sought through the Civil Court. S. 40(1) has to be given interpretation by reading down the provision to make it purposeful and akin to the object of the Act of 2016. S. 40(2) is for any other direction either to act in a particular manner or to restrain a party to do certain act and execution of it can be made by the Adjudicating Authority and in case of failure, by the Civil Court. (Para 22)

Writ petitions dismissed.(E-3)

Precedent followed:

1. M/s K.D.P. Build Well Pvt. Ltd. Vs. St. of U.P. & 4 ors., Writ-C No. 2248 of 2020, judgment dated 04.02.2020 (Para 9)

2. Rudra Buildwell Construction Pvt. Vs. Poonam Sood & anr., Writ-C No. 3289 of 2020, judgment dated 06.02.2020 (Para 9)

Precedent distinguished:

1. Janta Land Promoters Pvt. Ltd. Vs U.O.I. & ors., Civil Misc. Writ Petition No. 8548 of 2020, judgment dated 16.10.2020 (Para 10, 14)

Present petitions challenge order dated 20.03.2020, passed by Real Estate Regulatory Authority.

(Delivered by Hon'ble Munishwar Nath Bhandari, J.
&
Hon'ble Rohit Ranjan Agarwal)

1. Heard learned counsel for the petitioner, Sri Anit Tiwari, Senior Advocate assisted by Sri Wasim Masood, learned counsel for the respondent No.2 and learned Standing Counsel for respondent Nos.1, 3 and 4.

2. Since the question of law involved in all the three writ petitions is similar, and as agreed by the counsel for the parties, they are heard together and decided by this common judgment.

3. The writ petition No.27147 of 2020, which is taken to be leading case, has been filed with the following prayers:

"(i) Issue a writ, order or direction in the nature of Certiorari calling for the records and quashing the recovery certificate dated 27.10.2020 and citation dated 07.11.2020 (Annexure No.1 to the present writ petition)

(ii) Issue a writ, order or direction in the nature of Certiorari calling for the records and quashing the impugned order dated 20.03.2020 passed by respondent no.2 (Annexure-2 to the present writ petition).

(iii) issue a writ, order or direction in the nature of Certiorari calling the record and quashing the minutes/resolutions dated 14.08.2018 alleged to have been passed by the respondent no.2 (Annexure No.3 to the writ petition).

(iv) Issue a writ, order or direction in the nature of Certiorari calling for the records and quashing the minutes/resolution dated 05.12.2018 alleged to have been passed by respondent no.2 (Annexure -4 to the writ petition).

(v) Issue an appropriate writ, order or direction for striking down Regulation 24(a) of the U.P. Real Estate Regulatory Authority (General) Regulation, 2019."

4. The petitioner has challenged the order passed by Real Estate Regulatory Authority (in short "RERA") dated 20.03.2020 though an appeal against the said order lies under Section 43(5) of Real Estate (Regulation and Development) Act, 2016 (in short "Act of 2016").

5. It is a case where a complaint was filed by the non-petitioner alleging that despite payment towards unit No.08 in the scheme introduced by the petitioner, the possession of a unit has not been given. The unit (flat) was booked on 28.01.2012 and was to be delivered in the year 2017. The prayer was made for refund of the amount of Rs.25,36,985/- with interest. The Authority found that as per the agreement entered between the parties, possession of the flat in question should have been delivered by 29.02.2017. The petitioner-Company failed to show delivery of possession of the flat in question. Thus, taking into consideration the default of the Promoter (petitioner herein) and referring to the judgment of Apex Court, an order was passed by RERA on 20.0.2020 for refund of the principal amount alongwith interest. In pursuance thereof, order dated 27.10.2020 was issued for its execution. The amount of Rs.25,36,985/- was shown towards the principal amount while component of interest was Rs.15,68.814/-. The petitioner has filed this writ petition to challenge not only the order dated 20.03.2020 passed by RERA but the order dated 27.10.2020 on the execution application.

6. Learned counsel for the petitioner submits that an appeal against the order passed by RERA is maintainable but this case has exceptional circumstances thus even a writ petition would be maintainable. One member of RERA has passed the order going against the Act of 2016. Section 21 provides for formation of Authority consist of Chairperson alongwith two whole time Members. The impugned order is by one Member alone going against the mandate of Section 21 of the Act of 2016. In view of the above, there is no need to prefer an appeal as the order dated 20.03.2020 is without jurisdiction.

7. It is also stated that the order to award interest by the Authority is again going contrary to the provisions. Rules for award of interest was introduced in the year 2018. The amount deposited with the Promotor has been ordered to be returned with interest. The interest has been allowed even for the period prior to introduction of U.P. Real Estate (Regulation and Development)(Agreement for Sale/Lease)

Rules, 2018 *(in short "Rules of 2018").* It is even ignoring the rate of interest agreed by the parties. Challenge to the order has been made on that ground also.

8. We are first taking challenge to the order dated 20.03.2020, passed by the Authority to find out as to whether one member was competent to pass the order.

9. The issue has been raised in reference to Section 21 but it is not open for debate having been decided by this Court in **Writ -C No.2248 of 2020 (M/s K.D.P. Build Well Pvt. Ltd. vs. State of U.P. and 4 Others)** vide judgment dated 04.02.2020 and in **Writ- C No.3289 of 2020 (Rudra Buildwell Constructions Pvt. Ltd. vs. Poonam Sood and Another)** vide judgment dated 06.02.2020 holding order by one member to be legal. The issue regarding composition of RERA was considered in reference to Sections 21 and 81 of the Act of 2016. Section 81 provides for delegation of power/function and taking the aforesaid provision into consideration, the argument was not accepted.

10. At this stage, learned counsel for the petitioner has made a reference to the judgment of Punjab and Haryana High Court on the same issue in **Civil Writ Petition No.8548 of 2020 (Janta Land Promoters Private Limited vs. Union of India and others)** vide judgment dated 16.10.2020. It is stated that judgment of this Court has been referred by Punjab and Haryana High Court and has taken a different view.

11. What we find is binding effect of the judgment rendered by this Court than to follow the judgment of other High Court. Accordingly, we are unable to accept the first argument in reference to Section 21 of the Act of 2016. It is more so when the petitioner did not raise objection before the single Member about his competence to adjudicate the complaint. In absence of objection, the Authority proceeded with the matter. If the objection would have been taken and was sustainable, the complaint could have been decided by the Authority consisting of three Members. The petitioner has challenged the order in reference to the composition only when he lost in the complaint.

12. It is further necessary to refer Sections 21, 29 and 30 of the Act of 2016 to discuss the issue independent to the earlier judgments. The provisions aforesaid are quoted hereunder :

*"**21. Composition of Authority**.- The Authority shall consist of a Chairperson and not less than two whole time Members to be appointed by the appropriate Government."*

***29. Meeting of Authority.-** (1) The Authority shall meet at such places and times, and shall follow such rules of procedure in regard to the transaction of business at its meetings, (including quorum at such meetings), as may be specified by the regulations made by the Authority.*

(2) If the Chairperson for any reason, is unable to attend a meeting of the Authority, any other Member chosen by the Members present amongst themselves at the meeting, shall preside at the meeting.

(3) All questions which come up before any meeting of the Authority shall be decided by a majority of votes by the Members present and voting, and in the event of an equality of votes, the Chairperson or in his absence, the person presiding shall have a second or casting vote.

(4) The questions which come up before the Authority shall be dealt with as expeditiously as possible and the Authority shall dispose of the same within a period of

sixty days from the date of receipt of the application.

Provided that where any such application could not be disposed of within the said period of sixty days, the Authority shall record its reasons in writing for not disposing of the application within that period.

30. Vacancies, etc., not to invalidate proceeding of Authority.- *No act or proceeding of the Authority shall be invalid merely by reason of--*

(a) any vacancy in, or any defect in the constitution of, the Authority; or

(b) any defect in the appointment of a person acting as a Member of the Authority; or

(c) any irregularity in the procedure of the Authority not affecting the merits of the case."

13. Section 21 of Act of 2016 speaks about composition of the Authority, which shall consist of a Chairperson and not less than two whole time Members to be appointed by the appropriate Government. Section 29, however, talks about the meeting of Authority and perusal of sub-section (2) thereof shows that in absence of Chairperson for any reason, the other Member chosen by the Members present amongst themselves at the meeting, shall preside thereby. Sub-section (2) to Section 29 permits adjudication of complaint even in absence of Chairperson so appointed by the appropriate Government. Thus, it is not necessary that the adjudication of the complaint has to be made by the composition of Authority, as given under Section 21 of the Act of 2016 though as per Section 29 also, it should be by two Members in absence of the Chairperson.

14. Section 30 of Act of 2016 is, however, relevant and address the issue raised in this petition. The vacancies, etc. not to invalidate proceeding of the Authority. It shows that in case of vacancy, or any defect in the constitution of the Authority or any defect in the appointment of a person acting as a Member of the Authority, the proceeding of the Authority would not be invalidated. Section 30 of the Act of 2016 give complete answer to the objection raised by the petitioner regarding composition of the Authority. It is not that whatever composition given under Section 21 of the Act alone can decide the complaint rather reference of Section 29 has been given to indicate that complaint can be heard even in absence of the Chairperson and, in any case, due to the vacancy or any defect in the constitution of Authority, the proceeding would not be invalidated. This aspect was not brought to the notice of Punjab and Haryana High Court in the case of **Janta Land Promoters Private Limited (supra).**

15. It is otherwise a fact that the petitioner kept silence on the hearing of the complaint by one Member and thereby he cannot now be allowed and to seek invalidation of the proceeding going contrary to Section 30 of the Act of 2016 and his conduct. The first argument cannot be addressed simply by referring to Section 21 of the Act of 2016 but has to be reference of other provisions, more specifically, Section 30 of the Act of 2016, which was inserted by the legislature to save the proceeding if the vacancy exist in the Authority or other reason. It is otherwise a fact that an order was issued to delegate the power to a Member for hearing of the complaint, which was considered by this Court in earlier judgment. Thus the

first ground raised by the petitioner cannot be accepted.

16. So far the second issue regarding rate of interest is concerned, it is nothing but a challenge on the merit of the order. We hold writ petition for it to be not maintainable as petitioner has remedy of appeal. Thus we are not causing interference in the order on merit but allowing the petitioner to take remedy of appeal, if so desires. It is after taking note of the fact that the order of RERA is not otherwise onerous so as to maintain a writ petition.

17. The other challenge in the writ petition is to execution of the order made in reference to Section 40(1) of the Act of 2016. The recovery of the amount is to be made as arrears of land revenue. It is stated that recovery of interest, penalty or compensation alone can be made as arrears of land revenue. In the instance case, RERA has issued citation for return of the amount so deposited with the Promoter with interest. The refund of the principal amount cannot be through the process of execution given under Section 40(1) of the Act of 2016 but can be as per Section 40(2) of the Act of 2016.

18. To deal with the argument aforesaid, we are quoting Section 40 of the Act of 2016, hereunder :

*"**40 Recovery of interest or penalty or compensation and enforcement of order, etc.-** (1) If a promoter or an allottee or a real estate agent, as the case may be, fails to pay any interest or penalty or compensation imposed on him, by the adjudicating officer or the Regulatory Authority or the Appellate Authority, as the case may be, under this Act or the rules and regulations made thereunder, it shall be recoverable from such promoter or allottee or real estate agent, in such manner as may be prescribed as an arrears of land revenue.*

(2) If any adjudicating officer or the Regulatory Authority or the Appellate Tribunal, as the case may be, issues any order or directs any person to do any act, or refrain from doing any act, which it is empowered to do under this Act or the rules or regulations made thereunder, then in case of failure by any person to comply with such order or direction, the same shall be enforced, in such manner as may be prescribed.

19. Before addressing the issue further it would be necessary to go through the object of the enactment i.e. as to why the Parliament brought the Act of 2016. The object of Act of 2016 is to protect the interest of consumer in real estate sector apart from others. The Bill was introduced with the following object :

"An Act to establish the Real Estate Regulatory Authority for regulation and promotion of the real estate sector and to ensure sale of plot, apartment or building, as the case may be, or sale of real estate project, in an efficient and transparent manner and to protect the interest of consumers in the real estate sector and to establish an adjudicating mechanism for speedy dispute redressal and also to establish the Appellate Tribunal to hear appeals from the decisions, directions or orders of the Real Estate Regulatory Authority and the adjudicating officer and for matters connected therewith or incidental thereto.

20. A perusal of the object reveals that the Act of 2016 has been enacted to save

interest of consumers apart from others and thereby to regulate real estate in a proper manner. It is even to give speedy dispute redressal mechanism. Section 40(1) of Act of 2016 no doubt provides for mechanism for recovery of interest, penalty or compensation. It cannot however be ignored that recovery of the amount is provided under Section 40(1) alone. Section 40(2) is for execution of any other order or direction to any person to do any act, or refrain from doing any act, which is not empowered to do under the Act of 2016 and in case of failure to comply, execution can be enforced in the manner prescribed. Sub-section (2) of Section 40 was to enforce any direction of the nature of restrain or injunction which cannot be enforced as an arrears of land revenue. After coming into the force of the rules framed by the State of Uttar Pradesh, the matter of execution can be taken by the Adjudicating Authority. Sub-Section (2) of Section 40 is not meant for recovery of the amount but for any other direction either to act in a particular manner or to refrain a party in doing any act. Such order can be enforced firstly by the Adjudicating Authority and in case of failure, through the civil court. Rules 23 and 24 of Uttar Pradesh Real Estate (Regulation and Development) Rules, 2016 *(in short "Rules of 2016")* were brought for that purpose and provides the machanism for execution of the order.

21. In the light of the aforesaid, we are required to give proper interpretation to Section 40 so that the object sought to be achieved by enactment of Act of 2016 is carried out.

22. In the instant case, the consumer had deposited a sum of Rs.25 lacs and odd, in instalments but despite an agreement for giving possession of the flat in the year 2017, it was not handed over to the consumer. The direction for return of the amount with interest has been given in those circumstances. If a consumer is to seek execution of the part of the order through the civil court then the very purpose of the enactment of Act of 2016 to provide speedy dispute redressal mechanism would frustrate. If the argument of the petitioner is accepted then for recovery of a sum of Rs.25 lacs and odd, the non petitioner consumer is to be send to civil court while recovery of amount of interest of Rs.15 lacs can be made as arrears of land revenue, as admitted by the counsel for the petitioner himself. If recovery of amount is to be sought by dividing it in two parts and by different method, it would be against the object of the Act of 2016. The object of speedy redressal would frustrate if recovery of the amount is also sought through the civil court. We thus hold that the purpose and object of Section 40(1) is to allow recovery of the amount as arrears of land revenue so as to expeditiously give the relief to the consumer having suffered in the hands of the Promoter. Section 40(1) has to be given interpretation by reading down the provision to make it purposeful and akin to the object of the Act of 2016. Section 40(2) is for any other direction either to act in a particular manner or to restrain a party to do certain act and execution of it can be made by the Adjudicating Authority and in case of failure, by the civil court. Section 40(2) covers basically the case of an order of injunction or mandatory injunction.

23. Accordingly, we are unable to accept even the last argument raised by the counsel for the petitioner. It would otherwise frustrate the very object of the Act of 2016 and would give rise to the

anarchy, existing earlier, in the hands of Promoters.

24. Thus, for all the reasons, we are unable to accept any of the arguments raised by the counsel for the petitioner. All the writ petitions are accordingly **dismissed,** however, with the liberty to avail the remedy of appeal if other than the issue decided by us remains, which may include the issue towards interest.

(2021)02ILR A864
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 12.02.2021

BEFORE

THE HON'BLE ALOK MATHUR, J.

Bail No. 5883 of 2020

Sukumar Jain (Anticipatory Bail)
...Applicant
Versus
U.O.I. ...Opposite Party

Counsel for the Applicant:
Amrendra Singh, Diwakar Singh

Counsel for the Opposite Party:
G.A., Anurag Singh

A. Criminal law – Code of Criminal Procedure - Sections 82, 195 - Indian Penal Code – Sections 201, 204, 409, 420, 467, 468, 471, 477(A) - Prevention of Corruption Act - Sections 13(1)(c) & (d) - Information Technology Act, 2000 - Section 66 – Anticipatory bail – Normally a person who has been declared as an absconder/proclaimed offender is not entitled to be granted anticipatory bail. Court has used the word "normally", meaning thereby the Court itself was aware that there are certain other factors which may be duly considered by the Courts in exercising discretionary power for grant of bail, including cases where process u/s 82 Cr.P.C. has been initiated. (Para 11)

B. The bail decision is made after considering variety of circumstances justifying the grant or refusal of bail. In case proceedings u/s. 82 Cr.P.C. have been initiated, declaring the applicant a proclaimed offender, then it would be a relevant fact, while considering the application for anticipatory bail, but it is not necessary that the anticipatory bail application ought to be rejected only on the ground that a person has been declared absconder/proclaimed offender. Even otherwise learned counsel for the respondent could not point out any bar provided in Section 82 or 435 Cr.P.C. where a person could be disentitled for anticipatory bail where proceedings u/s 82 Cr.P.C. have commenced. (Para 14)

C. While considering the application for anticipatory bail it is also relevant to consider the stage at which it is sought. (Para 15)

Considering the entire set of facts, specially that the applicant is a retired Government servant, aged about 65 years, he had participated in the investigation, there are no chances of his fleeing from justice and also that he has assailed his prosecution before the High Court in proceedings u/s 482 Cr.P.C. on the ground of want of sanction, are certain facts which have persuaded this Court to favourably consider the present anticipatory bail application filed by the applicant. Hence without expressing any opinion on the merits of the case and considering the nature of accusations and antecedents of applicant, the applicant may be enlarged on anticipatory bail. (Para 16, 17)

Anticipatory bail application allowed. (E-3)

Precedent followed:

1. N.K. Ganguli Vs C.B.I., (2016) 2 SCC 143 (Para 6)

2. Siddharam Satlingappa Mhetre Vs St. of Mah., (2011) 1 SCC 694 (Para 10)

3. Lavesh Vs State (NCT of Delhi, (2012) 8 SCC 730 (Para 11)

4. Gurbaksh Singh Sibbia & ors. Vs St. of Punj., 1980 (2) SCC 565 (Para 14)

5. Dataram Singh Vs St. of U.P. (2018) 3 SCC 22 (Para 15)

6. Sushila Aggarwal Vs State (NCT of Delhi), 2020 SCC Online SC 98 (Para 17)

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

1. Heard Sri I.B. Singh, learned Senior Advocate assisted by Sri Amrendra Singh, learned counsel for the applicant as well as learned Anurag Singh, learned counsel appearing on behalf of C.B.I.

2. Present application has been moved by the applicant seeking anticipatory bail in connection with Criminal Case No. 1426 of 2017 - C.B.I. Vs. Indrajeet Tiwari and Others, arising out of RC No. 0532014A0006, under Sections 120-B read with Section 201, 204, 409, 420, 467, 468, 471, 477(A) I.P.C. and Sections 13(2) read with Section 13(1)(c) & (d) of Prevention of Corruption Act and Section 66 of the Information Technology Act, 2000, pending in the Court of the Special Judge, CBI Court No. 6, Lucknow.

3. It has been submitted by learned counsel for the applicant that according to the first information report, the entire records of the Head Post Office, Lalitpur, were digitilized and the process of digitilization was out sourced. This process was carried out during the period 2013-14. According to the first information report the accused persons in consipracy with each other installed Data Entry Module (a kind of software to change the data in the computer entries) in their respective system in the Account Branch and other system placed in the Head Post Office and Sri Indra Jeet Tiwari and Sri Shailesh Khare used the computer of Account Branch to modify the deposit amount in the data entry module in the Post Office computer record. Thereafter, they use to send someone at the counter to withdraw the money so deposited in fake accounts. At the counter, Vinod Kumar Chaudhary, Postal Assistant used to facilitate them in taking withdrawals of huge amount. In order to facilitate in these fraudulent withdrawals, they used to take witness of above mentioned National Savings Agents on the withdrawal vouchers which is prohibited as per rules. On the basis of fake witness done by National Savings Agents Anil Kumar Jain S/o Sri Suresh Chandra Jain, National Saving Agent No. 79 R/o 24, Saraipura Lalitpur and Manoj Singhai S/o Sri Mahendra Singhai, National Saving Agent No. 100 R/P 275, Katra Bazar Lalitpur, huge amount of money was misappropriated by them, which caused a wrongful loss to Government Exchequer and a wrongful gain to themselves.

4. It has also been submitted that in the first information report the applicant was not named, and it is only during the course of investigation his name came up and was included in the charge sheet. It is next submitted by learned Senior Advocate that the applicant retired from service on 30.06.2016 and had duly participated in the investigation and his statement under Section 161 Cr.P.C. was also recorded. It is submitted that the charge sheet was filed subsequent to his retirement on 30.06.2017 against ten persons including the applicant.

5. In support of the present application it has been submitted that during the process of digitilization passwords were given to the Agency for the purpose of digitilization and during the said process they had misused the said IDs and

passwords and therefore, the applicant cannot be blamed for the misdeeds of the Agency. It has been further submitted that the applicant has fully participated in the investigation and he has now attained age of 65 years. It is also stated that the matter relates to the year 2013-14 and the charge sheet was filed nearly after four years of his retirement and after about 7 years from the incident, and now the applicant is being sought to be apprehended.

6. Learned counsel for the applicant further submits that all the other co-accused have been enlarged on bail and therefore there is good chance of the applicant being also enlarged on bail. The applicant had moved an application for discharge, on the ground that prior sanction for prosecution under Section 195 Cr.P.C. had not been obtained, and therefore the Trial Court cannot proceed against the applicant. The said application for discharge preferred by the applicant was rejected, against which the applicant moved an application u/s 482 Cr.P.C. before this Court which is pending consideration. Sri I.B. Singh, Senior Advocate has submitted that in the light of the judgment of Hon'ble Supreme Court in the case of **N.K. Ganguli Vs. C.B.I., (2016) 2 SCC 143**, prior sanction was mandatory, and in absence of the same no cognizance could be taken and therefore the trial of the applicant is illegal and arbitrary.

7. Sri Anurag Singh, learned counsel appearing on behalf of C.B.I. has opposed the prayer for anticipatory bail. He has submitted that in the charge sheet, the role of the applicant has been clearly brought forth, wherein it is stated that the applicant alongwith other persons had unauthorizedly deleted certain accounts with malafide intention. He also submits that due to non appearance of the applicant non bailable warrant has been issued by the Trial Court and proceedings under Section 83/83 Cr.P.C. have also been initiated against the applicant.

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

9. From the facts as they emerge in the application as well as counter affidavit, it is evident that the incident relates to the year 2013-14, when the process of digitilization was carried out at the Head Post Office, Lalitpur where the applicant was posted. Initially the applicant was not named in the FIR and during investigation he had fully cooperated and participated and his statement under Section 161 Cr.P.C. was also recorded. The applicant subsequently retired in the year 2016 and is presently aged about 65 years. It is also noticed that all the other co-accused have been granted bail and applicant is wanted by the trial Court for participating in the trial as an accused.

10. In considering as to whether the applicant is entitled for grant of anticipatory bail, this Court must take into account and weigh the relevant considerations with the facts of the case. The relevant considerations for grant of anticipatory bail have been duly considered by the Hon'ble Supreme Court in the case of **Siddharam Satlingappa Mhetre v. State of Maharashtra, (2011) 1 SCC 694** which reads as under:

"112. The following factors and parameters can be taken into consideration while dealing with the anticipatory bail:

(i) The nature and gravity of the accusation and the exact role of the

accused must be properly comprehended before arrest is made.

(ii) The antecedents of the applicant including the fact as to whether the accused has previously undergone imprisonment on conviction by a court in respect of any cognizable offence.

(iii) The possibility of the applicant to flee from justice.

(iv) The possibility of the accused's likelihood to repeat similar or other offences.

(v) Where the accusations have been made only with the object of injuring or humiliating the applicant by arresting him or her.

(vi) Impact of grant of anticipatory bail particularly in cases of large magnitude affecting a very large number of people.

(vii) The courts must evaluate the entire available material against the accused very carefully. The court must also clearly comprehend the exact role of the accused in the case. The cases in which the accused is implicated with the help of Sections 34 and 149 of the Penal Code, 1860 the court should consider with even greater care and caution because over implication in the cases is a matter of common knowledge and concern.

(viii) While considering the prayer for grant of anticipatory bail, a balance has to be struck between two factors, namely, no prejudice should be caused to the free, fair and full investigation and there should be prevention of harassment, humiliation and unjustified detention of the accused.

(ix) The court to consider reasonable apprehension of tampering of the witness or apprehension of threat to the complainant.

(x) Frivolity in prosecution should always be considered and it is only the element of genuineness that shall have to be considered in the matter of grant of bail and in the event of there being some doubt as to the genuineness of the prosecution, in the normal course of events, the accused is entitled to an order of bail."

11. I have also considered the judgments of the Hon'ble Supreme Court in the case of **Lavesh Vs. State (NCT of Delhi), (2012) 8 SCC 730**, wherein the Apex Court has stated that normally a person who has been declared as an absconder/proclaimed offender is not entitled to be granted ancitipatory bail. The aforesaid judgment has used words "normally", meaning thereby the Court itself was aware that there are certain other factors which may be duly considered by the Courts in exercising discretionary power for grant of bail, including cases where process under Section 82 Cr.P.C. has been initiated. It is also noticed that the Apex Court in the aforesaid case has also stated that the order under Section 82 Cr.P.C. should have been passed during the stage of investigation.

12. Learned counsel appearing for the C.B.I. has clearly stated that investigation is over and charge sheet has been filed and the applicant is not required for participating in the investigation and is only required to participate in the trial.

13. In the aforesaid circumstances, this Court is of the view that merely because proceedings under Section 82 Cr.P.C. have been initiated, anticipatory bail cannot be denied to the applicant on this ground alone.

14. In **Gurbaksh Singh Sibbia and Others Vs. State of Punjab, 1980 (2) SCC 565** (Para 30), a Constitutional Bench of

the Hon'ble Apex Court has held that the bail decision is made after considering variety of circumstances justifying the grant or refusal of bail. Applying the ratio of the above decision, I am of the considered opinion that in case proceedings u/s 82 Cr.P.C. have been initiated, declaring the applicant a proclaimed offender, then it would be a relevant fact, while considering the application for anticipatory bail, but it is not necessary that the anticipatory bail application ought to be rejected only on the ground that a person has been declared absconder/proclaimed offender. Even otherwise learned counsel for the respondent could not point out any bar provided in Section 82 or 435 Cr.P.C. where a person could be disentitled for anticipatory bail where proceedings under Section 82 Cr.P.C. have commenced.

15. While considering the application for anticipatory bail it is also relevant to consider the stage at which it is sought, as held by the Hon'ble Supreme Court in the case of **Dataram Singh Vs. State of Uttar Pradesh, (2018) 3 SCC 22**, wherein the Court in para 3 and 16 has held as under :

"3. 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 the Parliament by inserting Section 436-A in the Code of Criminal Procedure, 1973."

"16. In our opinion, it is not necessary to go into the correctness or otherwise of the allegations made against the appellant. This is a matter that will, of course, be dealt with by the trial Judge. However, what is important, as far as we are concerned, is that during the entire period of investigations which appear to have been spread over seven months, the appellant was not arrested by the investigating officer. Even when the appellant apprehended that he might be arrested after the charge-sheet was filed against him, he was not arrested for a considerable period of time. When he approached the Allahabad High Court for quashing the FIR lodged against him, he was granted two months' time to appear before the trial Judge. All these facts are an indication that there was no apprehension that the appellant would abscond or would hamper the trial in any manner. That being the case, the trial Judge, as well as the High Court ought to have judiciously

exercised discretion and granted bail to the appellant. It is nobody's case that the appellant is a shady character and there is nothing on record to indicate that the appellant had earlier been involved in any unacceptable activity, let alone any alleged illegal activity."

16. Considering the entire set of facts as narrated above, specially that the applicant is a retired Government servant, aged about 65 years, he had participated in the investigation, there are no chances of his fleeing from justice and also that he has assailed his prosecution before the High Court in proceedings under Section 482 Cr.P.C. on the ground of want of sanction, are certain facts which have pursuaded this Court to favourably consider the present anticipatory bail application filed by the applicant.

17. Hence without expressing any opinion on the merits of the case and considering the nature of accusations and antecedents of applicant, the applicant may be enlarged on anticipatory bail as per the Constitution Bench judgment of the Apex Court in the case of **Sushila Aggarwal vs. State (NCT of Delhi)-2020 SCC Online SC 98**. The future contingencies regarding anticipatory bail being granted to applicant shall also be taken care of as per the aforesaid judgment of the Apex Court.

18. The Court has considered the rival submissions and looking into the circumstances as well as annexures which have been annexed with the application for anticipatory bail as well as counter and rejoinder affidavits, this Court finds it a fit case to allow the present anticipatory bail application.

19. The anticipatory bail application is **allowed**.

20. This Court directs that in the event of arrest, the accused-applicant **Sukumar Jain** involved in Criminal Case No. 1426 of 2017 - C.B.I. Vs. Indrajeet Tiwari and Others, arising out of RC No. 0532014A0006, under Sections 120-B read with Section 201, 204, 409, 420, 467, 468, 471, 477(A) I.P.C. and Sections 13(2) read with Section 13(1)(c) & (d) of Prevention of Corruption Act and Section 66 of the Information Technology Act, 2000, shall be released forthwith on bail on furnishing a personal bond and two sureties each in the like amount to the satisfaction of the Arresting officer/Investigating Officer/ S.H.O. concerned on the following conditions:-

(i) That the accused-applicant shall make himself available for interrogation by police authorities as and when required and will cooperate with the investigation;

(ii). That the accused-applicant shall not, directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the court or to any police officer; and

(iii). That the accused-applicant shall not leave India without the previous permission of the Court.

21. The papers regarding bail submitted to the police officer on behalf of the accused/applicant shall form part of the case diary and would be submitted to the court concerned along with same at the time of submission of report under Section 173(2) Cr.P.C.

22. In case there is breach of any of the above conditions or in case it is otherwise found for any other reason the bail is required to be cancelled, it shall be open for the State or the appropriate authority to move application for cancellation of bail in accordance with law.

(2021)02ILR A870
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 17.02.2021

BEFORE

THE HON'BLE DINESH KUMAR SINGH, J.

Bail No. 10281 of 2020

Dheeraj Singh ...Applicant
Versus
State of U.P. ...Opposite Party

Counsel for the Applicant:
Meenakshi Singh Parihar, Bipin Kumar Singh, Prashant Kumar Singh

Counsel for the Opposite Party:
G.A.

A. Criminal Law –Code of Criminal Procedure – under 439 -Application for Bail - Narcotic Drugs and Psychotropic Substances Act, 1985- Section 37 - In case of bail under the provisions of N.D.P.S. Act where quantity of contraband is more than the commercial quantity prescribed under the Statute, reference to S. 37 of the N.D.P.S. Act has to be taken into consideration and the level of satisfaction as prescribed under section 37(1)(b) of the Act is required to be recorded. If the Court granting bail has not taken into consideration the provisions of section 37 of the N.D.P.S. Act and, recorded the level of satisfaction as mandated under section 37 of the N.D.P.S. Act, the order granting bail to such an accused would not be sustainable. (Para 15)

Therefore, unless two conditions i.e. (i) satisfaction of the Court that there are reasonable grounds for believing that the accused is not guilty and (ii) he is not likely to commit any offence while on bail, are satisfied, the accused cannot be released on bail as this is the bar which operates while considering the bail application under the provisions of the N.D.P.S. Act if the quantity of contraband recovered is above the commercial quantity. (Para 14)

In the present case, the Court does not find any reasonable ground to believe that the accused-applicant prima facie has not committed the offence and, would not commit any offence in future while on bail inasmuch as he has criminal history of identical cases. Since, in the present case bar prescribed under section 37(1)(b) of the N.D.P.S. Act is not crossed, this Court does not find any ground to enlarge the accused-applicant on bail. (Para 16)

B. Narcotic Drugs and Psychotropic Substances Act, 1985: Section 50 - There is no denial from the accused-applicant that the car in question does not belong to him or a large quantity of the contraband was not recovered from two vehicles. Recovery of contraband from two vehicles was made in the presence of Gazetted Officer and, there has been no violation of section 50 of the N.D.P.S. Act. The accused-applicant has criminal history of identical cases and while he was on bail, he has allegedly committed the present offence. (Para 12)

Bail application rejected. (E-3)

Precedent followed:

1. U.O.I. Vs Shiv Shankar Kesari, (2007) 7 SCC 798 (Para 8)

2. Satpal Singh Vs St. of Punj., (2018) 13 SCC 813 (Para 15)

Present application u/s 439 Cr.P.C. has been filed seeking bail in FIR No. 0337 of 2020 u/s 8/20 of the NDPS Act, 1985, Police Station Antoo, District Pratapgarh.

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

1. This bail application under Section 439 Cr.P.C. has been filed seeking bail in FIR No.0337 of 2020 under Section 8/20 of the Narcotic Drugs and Psychotropic Substance Act, 1985 (for short 'N.D.P.S. Act'), Police Station Antoo, District Pratapgarh.

2. As per the prosecution story, on 16.07.2020, the Station House Officer, Mr. Manoj Kumar Tiwari, Police Station Antoo, Pratapgarh along with other members of his team was checking suspicious vehicles and wanted criminals. He received an information/input from in-charge S.O.G. that some illegal articles were suspected to be delievered in the area of the police station under his jurisdiction. On this information, checking points were alerted and the personnel posted there, were directed to check vehicles with alertness and alacrity. On specific inputs regarding two vehicles, the police party reached at the place where these vehicles were parked and, some articles were being downloaded from truck. The police party noticed that sacks were being transferred from truck to dicky of the car standing there. These vehicles were encircled by the police team and five people present in those vehicles who tried to flee away, were apprehended. One of them was the present accused-applicant and from his possession, Rs.7,000/- was recovered. From other accused also money was recovered. In the truck bearing Reg.No.UP44AT 1312, sacks filled with narcotic substance were found. Similarly, in the dicky of the Car No.UP32LL 8788 KIA SELTOS, two sacks of white color filled with some substance were found. The accused accepted that sacks were having Marizuana/Ganja.

3. All five persons including the accused-applicant were taken in custody at 7:30 P.M. and were made aware of their rights under Section 50 of the N.D.P.S. Act. They were asked to go with the police party before the Gazetted Officer for their personal search. However, these persons did not respond. Since, it was a large quantity of Marizuana/Ganja which was found in two vehicles, the circle officer was informed who came on the spot and in his presence and directions truck and car were searched in accordance with law. Some of the sacks were opened, and it was found that the substance inside the sack was smelling like Marizuance/Ganja.

4. On investigation, the accused-applicant told the police that he had been bringing Marizuance/Ganja from Korapur, Vishakhapatnam in trucks ferrying coal with the help of these persons taken in custody. Total contraband recovered from the truck and the car was 1,606.8 Kg which was stacked in 48 sacks. Samples from all the sacks were collected. The market value of the contraband recovered was more than two crores. Out of 48 sacks, 3 sacks were recovered from the dicky of the car. The truck in question belongs to the father of co-accused-Ravi Yadav and, the car was of the present accused-applicant.

5. Heard Mr. H.G.S. Parihar, Senior Advocate assisted by Ms. Minakshi Singh Parihar, learned counsel for the accused-applicant and Mr. Rao Narendra Singh, learned A.G.A. for the State.

6. It has been submitted on behalf of the accused-applicant that the accused-applicant was arrested on 15.07.2020 but his arrest was shown on 16.07.2020. In para 8 of the affidavit filed in support of the bail application this fact has been specifically mentioned. There is no specific denial to this averment in the counter

affidavit filed by the State. It has further been submitted that charge-sheet has been filed in the case. The accused-applicant has no concern with the case and recovery allegedly made from the car of the accused-applicant is a false recovery. It has been also submitted that charge-sheet has been submitted without Forensic Science Laboratory's report of the contraband allegedly recovered form the possession of the accused-applicant. The accused-applicant has criminal history of three cases which are mentioned in para 28 of the affidavit as hereunder:-

(i) Case Crime No.470 of 2009 under Sections 18/20 N.D.P.S. Act, Police Station Aaspur Deosara, Pratapgarh.

(ii) Case Crime No.26 of 2010 under Section 2/3 of U.P. Gangsters and Anti-Social Activities (Prevention) Act, Police Station Aaspur Deosara, Pratapgarh.

(iii) Case Crime No.37 of 2019, under Section 8/20 of the N.D.P.S. Act, Police Station Aaspur Devsara, Pratapgarh.

7. It is submitted that the criminal history of the accused-applicant has been explained. In the first case i.e. Case Crime No.470 of 2009 (supra), the accused-applicant has been acquitted by the trial court vide judgment and order dated 27.01.2016 and in other two cases the accused-applicant has been enlarged on bail by this Court. Bail orders have been placed on record with the bail application.

8. He has thus, submitted that *prima facie*, the accused-applicant has not committed any offence and in future there is no possibility of him committing similar offence and therefore, he is entitled to be enlarged on bail. Learned counsel for the accused-applicant has placed reliance on the judgment of the Supreme Court in the case of ***Union of India versus Shiv Shankar Kesari: (2007) 7 SCC 798*** in support of his submissions.

9. On the other hand, Mr. Rao Narendra Singh, learned A.G.A. appearing for the State has opposed the bail application and has submitted that recovery of such a large quantity of contraband from two vehicles of the present accused-applicant and other co-accused cannot be doubted. Search was conducted in presence of the Gazetted Officer. All 48 sacks filled with Marizuana were recovered and total quantity recovered from the possession of the accused-applicant and others is 1606.8 kg. He has further submitted that the accused-applicant has criminal history of identical cases and while he was on bail, he has committed the present offence. It has been further submitted that the accused-applicant does not satisfy the twin conditions mentioned under Section 37(1)(b) of the N.D.P.S. Act and, therefore, he is not entitled for bail.

10. It has been further submitted that in the counter affidavit filed on behalf of the State, averments in para 8 of the affidavit filed in support of the bail application have been said to be wholly incorrect and denied. Learned A.G.A. has further submitted that judgment in the case of *Union of India vs Shiv Shanker Kesari (supra)* does not support the case of the accused-applicant but it supports the prosecution case. The two conditions i.e. satisfaction of the Court that there are reasonable ground for believing that the accused-applicant is not guilty and, he is not likely to commit any offence while on bail, are not satisfied in the present case inasmuch as the accused-applicant has criminal history of identical cases and while on bail, he has committed another

offence. Recovery of such a large quantity of narcotic substance from two vehicles belonging to the accused-applicant and other co-accused cannot be doubted and therefore, there is no ground to believe that the accused-applicant is not guilty of commission of the offence. He, therefore, has submitted that the present application is liable to be rejected.

11. I have considered the submissions advanced on behalf of the learned counsel for the accused-applicant and learned A.G.A. for the State.

12. There is no denial from the accused-applicant that the car in question does not belong to him or such a large quantity of the contraband was not recovered from two vehicles. Recovery of contraband from two vehicles was made in the presence of Gazetted officer and, there has been no violation of Section 50 of the N.D.P.S. Act. The accused-applicant has criminal history of identical cases and while he was on bail, he has allegedly committed the present offence.

13. Section 37 of the N.D.P.S. Act reads as under:-

"37. Offences to be cognizable and non-bailable.--(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974),--

(a) every offence punishable under this Act shall be cognizable;

(b) no person accused of an offence punishable for a term of imprisonment of five years or more under this Act shall be released on bail or on his own bond unless--

(i) the Public Prosecutor has been given an opportunity to oppose the application for such release, and

(ii) where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.

(2) The limitations on granting of bail specified in Clause (b) of sub-section (1) are in addition to the limitations under the Code of Criminal Procedure, 1973 (2 of 1974), or any other law for the time being in force on granting of bail."

14. Therefore, unless two conditions i.e. (i) satisfaction of the Court that there are reasonable grounds for believing that the accused is not guilty: and (ii) he is not likely to commit any offence while on bail, are satisfied, the accused cannot be released on bail as this is the bar which operates while considering the bail application under the provisions of the N.D.P.S. Act if the quantity of contraband recovered is above the commercial quantity. The Supreme Court in the case of *Union of India vs Shiv Shanker Kesari (supra)* in para 11 and 12 has held as under:-

"11. The court while considering the application for bail with reference to Section 37 of the Act is not called upon to record a finding of not guilty. It is for the limited purpose essentially confined to the question of releasing the accused on bail that the court is called upon to see if there are reasonable grounds for believing that the accused is not guilty and records its satisfaction about the existence of such grounds. But the court has not to consider the matter as if it is pronouncing a judgment of acquittal and recording a finding of not guilty.

12. Additionally, the court has to record a finding that while on bail the accused is not likely to commit any offence

and there should also exist some materials to come to such a conclusion."

15. The Supreme Court in the case of ***Satpal Singh vs State of Punjab : (2018) 13 SCC 813*** has held that in case of bail under the provisions of N.D.P.S. Act where quantity of contraband is more than the commercial quantity prescribed under the Statute, reference to Section 37 of the N.D.P.S. Act has to be taken into consideration and the level of satisfaction as prescribed under Section 37(1)(b) of the Act is required to be recorded. If the Court granting bail has not taken into consideration the provisions of Section 37 of the N.D.P.S. Act and, recorded the level of satisfaction as mandated under Section 37 of the N.D.P.S. Act, the order granting bail to such an accused would not be sustainable.

Para 13 and 14 of the aforesaid judgment are extracted hereinbelow:-

"13. In any case, the protection under Section 438 CrPC is available to the accused only till the court summons the accused based on the charge-sheet [report under Section 173(2) CrPC]. On such appearance, the accused has to seek regular bail under Section 439 CrPC and that application has to be considered by the court on its own merits. Merely because an accused was under the protection of anticipatory bail granted under Section 438 CrPC that does not mean that he is automatically entitled to regular bail under Section 439 CrPC. The satisfaction of the court for granting protection under Section 438 CrPC is different from the one under Section 439 CrPC while considering regular bail.

14. Be that as it may, the order dated 21-9-2017 [Beant Singh v. State of Punjab, 2017 SCC OnLine P&H 3801] passed by the High Court does not show that there is any reference to Section 37 of the NDPS Act. The quantity is reportedly commercial. In the facts and circumstances of the case, the High Court could not have and should not have passed the order under Section 438 or 439 CrPC without reference to Section 37 of the NDPS Act and without entering a finding on the required level of satisfaction in case the Court was otherwise inclined to grant the bail. Such a satisfaction having not being entered, the order dated 21-9-2017 [Beant Singh v. State of Punjab, 2017 SCC OnLine P&H 3801] is only to be set aside and we do so."

16. Considering the facts of the present case, the Court does not find any reasonable ground to believe that the accused-applicant *prima facie* has not committed the offence and, would not commit any offence in future while on bail inasmuch as he has criminal history of identical cases. Since, in the present case bar prescribed under Section 37(1)(b) of the N.D.P.S. Act is not crossed, this Court does not find any ground to enlarge the accused-applicant on bail

17. This bail application is ***rejected***.

(2021)02ILR A874
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 27.01.2021

BEFORE

THE HON'BLE RAJNISH KUMAR, J.

Consolidation No. 97 of 1998

Chheda Khan & Ors. ...Petitioners
Versus
D.D.C. Raebareli & Ors. ...Respondents

Counsel for the Petitioners:

V.K. Pandey, A.K. Jauhari, Kr. U.B. Singh, S.P. Singh, Surendra Singh

Counsel for the Respondents:
C.S.C., Dilip Kumar Pandey, Gopesh Tripathi, R.N. Gupta, Sanjay Kumar Singh, Yogendra Nath Yadav

A. Civil Law – Consolidation of Holdings Act, 1953 - Section 9-A(2), 48 - **The question for consideration, is as to whether the revision under Section 48 of the Consolidation of Holdings Act could have been decided without issuing notices and affording opportunity to the affected parties or not. (Para 9)**

In the instant case, the revisions under Section 48 were registered on the report of the consolidation officer. S.48(3) provides that any authority, subordinate to the director of consolidation may, after allowing the parties concerned an opportunity of being heard refer the record of any case or proceedings to the Director of Consolidation for action u/sub-section 1. The reference/report made by the consolidation officer has been filed by the opposite parties alongwith the counter-affidavit. (Para 11)

Hon'ble Court relied upon various decisions and followed the principle that **the duty to give reasons for coming to a decision is of decisive importance which cannot be lawfully disregarded. Reason is the heartbeat of every conclusion. It introduces clarity in an order and without the same, it becomes lifeless. Reasons substitute subjectivity by objectivity. Absence of reasons renders the order indefensible/unsustainable particularly when the order is subject to further challenge before a higher forum.** (Para 17)

The revisional authority, merely, on the basis of a report, without issuing notices and recording any reasons, has set aside the orders passed by the Courts below. The recording of reasons is must, which discloses as to how the mind has been applied by the authority in arriving at the conclusion. Secondly, Even if the authority, on the basis of report, is of the view that the entries are forged, the affected persons are required to be given opportunity of being heard to show the justification of entries made in their favour. The authority is also under obligation to record reasons as to how the entries are forged. (Para 19, 20)

The impugned order has been passed not only in flagrant **violation of the principles of natural justice as well as provisions contained in S. 48 of the Consolidation of Holdings Act** but it is cryptic order without assigning any reasons. (Para 21)

Writ petition partly allowed.(E-3)

Precedent followed:

1. Sheo Nand Vs Deputy Director of Consolidation; (2000) 3 SCC 103 (Para 14)

2. Sher Singh (Dead) by LR's Vs Joint Director of Consolidation & ors.; (1978) 3 SCC 172 (Para 15)

3. Ram Phal Vs St. of Har. & ors.; (2009) 3 SCC 258 (Para 17)

4. Secretary & Curator Victorial Memorial Hall Vs Howrah Ganatantrik Nagrik Samity (Para 18)

Present petition has been filed challenging the order dated 10.12.1997, passed by Deputy Director of Consolidation, Raibareily.

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

1. Heard Sri A.K. Jauhari, learned counsel for the petitioners, Sri Mahendra Kumar Mishra, learned Standing counsel for the opposite party nos. 1,2 and 3 and Sri Dilip Kumar Pandey, learned counsel for the opposite party no.4.

2. This petition has been filed challenging the order dated 10.12.1997 passed by the Deputy Director of Consolidation(hereinafter referred as D.D.C.), Raibareily by means of which the

revision under Section 48 of the Consolidation of Holdings Act has been allowed without issuing notices or affording opportunity to the petitioners.

3. The facts, for adjudication of the instant writ petition as emerged from the pleadings, are that the lease of the disputed lands was granted to the petitioners. The opposite party nos. 6 and 9 had filed objections under Section 9-A(2) of the Consolidation of Holdings Act, which were allowed by the consolidation officer after affording opportunity to adduce the evidence and after considering the same by means of the orders dated 11.12.1996. Thereafter the Gaon Sabha had filed an application for restoration. Considering the same, the order dated 11.12.1996 was stayed by means of the order dated 31.12.1996. Challenging the same, the revisions were filed. In the meantime, Gaon Sabha had also filed the appeals against the orders dated 11.12.1996. The appeals were rejected by means of the order dated 29.10.1997. The Gaon Sabha had filed a revision against the same, which was registered as Revision No.1150 of 1997.

4. A report dated 08.12.1997 was submitted by the Consolidation officer to the effect that the entries in the name of the petitioners in the revenue records are forged because the land in dispute is recorded as 'Oosar' in the Khatauni. On the basis of the said report, three revisions were registered under Section 48 of Consolidation of Holdings Act. The D.D.C., after perusing the report and the records, allowed the revisions without issuing notices to the petitioners on the ground that for cancelling the forged entries, parties need not be informed, as has been held by the Board of Revenue as well as the High Court and set aside the order dated 29.10.1997 passed by the Settlement Officer Consolidation and order dated 11.12.1996 passed by the Consolidation Officer. Hence the present writ petition has been filed.

5. Submission of learned counsel for the petitioners is that the petitioners had got the lease of the lands in dispute from the Gaon Sabha. Objections filed by the petitioner nos. 6 and 9 were allowed by the Consolidation Officer and the appeal filed against the same was dismissed by the Settlement Officer Consolidation, which was challenged in revision. In the meantime a report was submitted on 08.12.1997 by the Consolidation Officer before the Deputy Director of Consolidation alleging that the entries made in the name of the petitioners are forged, on the basis of which also the revision was registered. He further submitted that the report was submitted without affording any opportunity to the petitioners and the Deputy Director of Consolidation also without issuing notice or affording any opportunity to the petitioners allowed the revisions without authority of law and the order passed by the Settlement Officer Consolidation and Consolidation Officer have been set aside in an arbitrary and illegal manner, which could not have been done.

6. Learned Standing Counsel on the basis of report submitted by the Consolidation Officer submitted that it was found that the entries made in favour of the petitioners are forged one and for forged entries, there is no requirement of issuing any notice or affording any opportunity to the concerned. Therefore the impugned order has rightly been passed in accordance with law and it does not suffer from any illegality or error.

7. Learned counsel for the Gaon Sabha does not dispute that the order has been passed without affording any opportunity. However, he submitted that the entries were made without approval of patta as per the pleadings and records annexed with the writ petition. Therefore the entries made in favour of the petitioners are forged and the impugned order has rightly been passed.

8. I have considered the submissions of learned counsel for the parties and perused the orders and documents placed on record.

9. The question for consideration, in the present writ petition, is as to whether the revision under Section 48 of the Consolidation of Holdings Act could have been decided without issuing notices and affording opportunity to the affected parties or not. For consideration of the issue, it would be appropriate to reproduce Section 48, which reads as under:-

48. Revision and reference.- *(1) The Director of Consolidation may call for and examine the record of any case decided or proceedings taken by any subordinate authority for the purpose of satisfying himself as to the regularity of the proceedings; or as to the correctness, legality or propriety of any order][other than an interlocutory order]passed by such authority in the case or proceedings, may, after allowing the parties concerned an opportunity of being heard, make such order in the case or proceedings as he thinks fit.*

(2) Powers under sub-section (1) may be exercised by the Director of Consolidation also on a reference under sub-section (3).

(3) Any authority subordinate to the Director of Consolidation may, after allowing the parties concerned an opportunity of being heard, refer the record of any case or proceedings to the Director of Consolidation for action under sub-section (1).

[Explanation. -][(1)]For the purposes of this section, Settlement Officers, Consolidation, Consolidation Officers, Assistant Consolidation Officers, Consolidator and Consolidation Lekhpals shall be subordinate to the Director of Consolidation.

Explanation(2) - For the purposes of this section the expression 'interlocutory order' in relation to a case or proceeding, means such order deciding any matter arising in such case or proceeding or collateral thereto as does not have the effect to finally disposing of such case or proceeding.

[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.]

10. Section 48 provides that the Director of Consolidation may call for and examine the record of any case decided or proceedings taken by any subordinate authority for the purpose of satisfying himself as to the regularity of the proceedings, or as to the correctness, legality or propriety of any order passed by such authority in the case of proceedings, may after allowing the parties concerned an opportunity of being heard make such order in the case or proceedings as he thinks fit. Therefore the revision and reference under Section 48 can be decided only after

allowing the parties concerned opportunity of hearing but in the present case even the notices have not been issued on the ground that on the basis of the report submitted by the consolidation officer and looking to the records as per requirement, it is apparent that all the entries are forged. The revisional authority has also not recorded as to which of the records were seen and how he came to the conclusion that the entries are forged, while the orders dated 11.12.1996 was passed on the basis of oral as well as documentary evidence.

11. In the instant case, the revisions under Section 48 were registered on the report of the consolidation officer. Sub Section 3 of Section 48 provides that any authority, subordinate to the director of consolidation may, after allowing the parties concerned an opportunity of being heard refer the record of any case or proceedings to the Director of Consolidation for action under sub-section 1. The reference/report made by the consolidation officer has been filed by the opposite parties alongwith the counter affidavit.

12. Perusal of the report/reference dated 08.12.1997 filed alongwith the counter affidavit indicates that before submitting the report, no opportunity of hearing was afforded by the consolidation officer to the affected persons, i.e, petitioners. Learned counsel for the petitioner has also submitted that no opportunity was afforded. Therefore this Court is of the view that the report/reference submitted by the Consolidation Officer was without following the due process of law. Therefore the same could not have been accepted, that too without issuing notices and affording opportunity to the affected parties i.e. the petitioners.

13. The power conferred under Section 48 on the Director of Consolidation, are wide enough so that the claims of the parties under the Act may be effectively adjudicated upon and determined so as to confer finality to the rights of the parties and the revenue records may be prepared accordingly. Therefore in case any such report was submitted in accordance with law that the entries are forged one, the propriety/legality, regularity and correctness of the same and the order challenged in revision can be considered by him after re-appreciating or re-evaluating the evidence on record.

14. The Hon'ble Apex Court, in the case of ***Sheo Nand versus Deputy Director of Consolidation; 2000(3) SCC 103***, has held as under in paragraph 20 and 21:-

"20. The Section gives very wide powers to the Deputy Director. It enables him either suo motu on his own motion or on the application of any person to consider the propriety, legality, regularity and correctness of all the proceedings held under the Act and to pass appropriate orders. These powers have been conferred on the Deputy Director in the widest terms so that the claims of the parties under the Act may be effectively adjudicated upon and determined so as to confer finality to the rights of the parties and the Revenue Records may be prepared accordingly."

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 record 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 underSection 48to re-appraise 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."

15. The Hon'ble Apex Court, in the case of ***Sher Singh(Dead) by LR's versus Joint Director of Consolidation and others;(1978) 3 SCC 172***, has held that the powers conferred under Section 48 of the Consolidation of Holdings Act is pari materia to Section 115 of the Code of Civil Procedure. The relevant paragraphs 4,5 and 12 are reproduced below:-

4.The principal question that falls for our determination in this case is whether in passing the impugned order, the Joint Director of Consolidation, exceeded the limits of the jurisdiction conferred on him under section 48 of the 1953 Act. For a proper decision of this question, it is necessary to advert to section 48 of the 1953 Act is it stood on the relevant date before its amendment by Act No. VIII of 1963 "Section 48 of the U.P. Consolidation of Holdings Act: The Director of Consolidation may call for the record of any case if the Officer (other than the Arbitrator) by whom the case was decided appears to have exercised a jurisdiction not vested in him by law or to have failed to exercise jurisdiction so vested, or to have acted in the exercise of his jurisdiction illegally or with substantial irregularity and may pass such orders in the case as it thinks fit."

5.As the above section is pari materia with section 115 of the Code of Civil Procedure, it will be profitable to ascertain the scope of the revisional jurisdiction of the High Court. It is now well settled that the revisional jurisdiction of the High Court is confined to cases of illegal or irregular exercise or non-exercise or illegal assumption of the jurisdiction by the subordinate courts. If a subordinate court is found to possess the jurisdiction to decide a matter, it cannot be said to exercise it illegally or with material irregularity even if it decides the matter wrongly. In other words, it is not open to the High Court while exer- cising its jurisdiction under section 115 of the Code of Civil Procedure to correct errors of fact howsoever gross or even errors of law unless the errors have relation to the jurisdiction of the- court to try the dispute itself.

12.The position that emerges from these decisions is that section 115 of the Code of Civil Procedure empowers the High Court to satisfy itself on three matters : (a) that the order of the subordinate court is within its jurisdiction;(b) that the case is one in which the court ought to have exercised jurisdiction; and failed to do so (c) that in exercising jurisdiction the Court has not acted illegally, that is, in breach of some provisions of law, or with material irregularity by committing some error of procedure in the course of the trial which is material in that it may have affected the) ultimate decision. And if the High Court is satisfied that there is no error in regard to any of these three matters, it has no power to interfere merely because it differs from the conclusions of the subordinate court on

questions of fact or law. A distinction must be drawn between the errors committed by subordinate courts in deciding question of law which have relation to, or are concerned with, questions of jurisdiction of the said courts, and errors of law which have no such relation or connection. An erroneous decision on a question of fact or of law reached by the subordinate court which has no relation to question of jurisdiction of that court, cannot be corrected by the High Court under section 115."

16. In view of above, it is not in dispute that the D.D.C. is conferred with the widest powers under which he could have examined the report/reference made to it, if it was in accordance with law but in terms of section 48 after affording opportunity of hearing to the affected parties. It has not been done in the present case. The impugned order has been passed without issuing notices and even without recording any finding as to how he came to conclusion that the entries are forged and the orders passed by the lower court passed on the basis of evidence are not sustainable.

17. The Hon'ble Apex Court in the case of ***Ram Phal versus State of Haryana and others; 2009(3) SCC 258*** has held that the duty to give reasons for coming to a decision is of decisive importance which cannot be lawfully disregarded. The relevant paragraph 6 is reproduced below:-

"6.The duty to give reasons for coming to a decision is of decisive importance which cannot be lawfully disregarded. The giving of the satisfactory reasons is required by the ordinary man's sense of justice and also a healthy discipline for all those who exercise power over others."

18. The Hon'ble Apex Court, in the case of ***Secretary and Curator Victorial Memorial Hall versus Howrah Ganatantrik Nagrik Samity***, has held that reason is the heartbeat of every conclusion.The relevant paragraph 41 is reproduced below:-

"41. Reason is the heartbeat of every conclusion. It introduces clarity in an order and without the same, it becomes lifeless. Reasons substitute subjectivity by objectivity. Absence of reasons renders the order indefensible/unsustainable particularly when the order is subject to further challenge before a higher forum."

19. In view of above, it was required to be considered as to whether the subordinate consolidation authorities have acted illegally in exercising their jurisdiction or exceeded their jurisdiction but the revisional authority has failed to do so and, merely, on the basis of a report, without issuing notices and recording any reasons, has set aside the orders passed by the courts below. The recording of reasons is must, which discloses as to how the mind has been applied by the authority in arriving at the conclusion. Therefore the reasons are like a bridge. It also ensures transparency and fairness in the decision making. It is also necessary for the affected party to know the reasons on which the order has been passed against him so that he may challenge the same raising his ground. It is also necessary for the higher court for examining the correctness of the order because unless the reasons are recorded, the higher Court cannot examine as to what transpired to the concerned authority in reaching to the decision and the decision is based on correct reasoning or not.

20. Even if the authority, on the basis of report, is of the view that the entries are forged, the affected persons are required to be given opportunity of being heard to show the justification of entries made in their favour. The authority is also under obligation to record reasons as to how the entries are forged.

21. In view of above, this Court is of the considered opinion that the impugned order has been passed not only in flagrant violation of the principles of natural justice as well as provisions contained in Section 48 of the Consolidation of Holdings Act but it is cryptic order without assigning any reasons. Therefore it has no legs to stand in the eyes of law and is liable to be set aside with direction to the opposite party no.1 to consider afresh and pass the order in accordance with law after affording opportunity to the petitioners.

22. Accordingly, the impugned order dated 10.11.1997 passed in Revision No.1150,1112, 1113 and 1114 of 1997(Chedda Khan and others versus Deputy Director of Consolidation) is set aside. The opposite party no.1 is directed to decide the revisions afresh in accordance with law and the observations made here-in-above.

23. The parties shall appear before the opposite party no.1 alongwith the certified copy of this order on 22.02.2021. The opposite party no.1 shall make its earnest endeavour to decide the revisions expeditiously and within a period of six months from the date of production of certified copy of this order.

24. With the aforesaid, the writ petition is partly **allowed.** No order as to costs.

(2021)02ILR A881
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 25.02.2021

BEFORE

THE HON'BLE RAJNISH KUMAR, J.

Consolidation No. 543 of 1994

Fateh Bahadur Singh ...Petitioner
Versus
D.D.C. & Ors. ...Respondents

Counsel for the Petitioner:
R.P. Singh, Vijay Kumar

Counsel for the Respondents:
M.P. Yadav

A. Civil Law – Consolidation of Holdings Act, 1953 - Sections 9-A, 11(1), 48 - Land Records Manual - Para 89-A, 89-B, 102-B - The entries will have no evidentiary value if they are not in accordance with the provisions of Land Records Manual and the burden to prove is on the person who is asserting the possession on the basis of adverse possession. (Para 18)

Therefore, it was for the petitioner to prove that entry was made after following the due procedure of law as prescribed under the Land Records Manual and was duly communicated to the main tenant and it was within his knowledge. But he has failed to prove it. Therefore the petitioner is not entitled on the basis of adverse possession and alleged permissive possession is also not sustainable as the petitioner could not show as to how Bhagauti Deen (whose name was recorded in the revenue records) was representative of family and the possession of father of petitioner was also not found in basic year. (Para 21)

B. In case of adverse possession, communication to the owner and his hostility towards the possession is must. (Para 20)

The revisional authority has allowed the revision without considering as to how the land in dispute has come to the opposite parties and whether the claim of the respondents is sustainable in the eyes of law or not. (Para 22)

Writ petition partly allowed. (E-3)

Precedent followed:

1. P.T. Munichikkanna Reddy & ors. Vs Revamma & ors., 2008 (26) LCD 15 (Para 9)

2. Gurumukh Singh & ors. Vs Deputy Director of Consolidation, Nanital & ors., 1997 (80) RD 276 (Para 9)

3. Mohd. Raza Vs Dy. Director of Consolidation & anr., 1990 RD 165 (Para 9)

4. Sandhu Saran & anr. Vs. Assistant Director of Consolidation, Gorakhpur & ors., 2003 (94) RD 535 (Para 9)

5. Mohd. Raza Vs. Deputy Director of Consolidation & anr.; R.D. 1997 (R.D.) 276 (Para 17)

Present petition challenges order dated 20.05.1994, passed by Deputy Director of Consolidation.

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

1. Heard, Shri Vijay Kumar, learned counsel for the petitioner and Shri M.P. Yadav, learned counsel for the respondent no.3.

2. On the statement of learned counsel for the respondents no.3 and 4 Shri M.P. Yadav that the legal heirs and representatives of the respondent no.4 have entered into compromise with the petitioner and they are no longer interested in pursuing the matter and only respondent no.3 wishes to contest the case, it is recorded in the order dated 04.01.2021 and he argued only on behalf of respondent no.3. The present writ petition has been filed for quashing the order dated 20.05.1994 passed in Revision No.1658, under Section 48 of U.P. Consolidation of Holdings Act, 1953 (here-in-after referred as Act of 1953) by the respondent no.1.

3. The dispute in the instant case relates to plot no.4350, area 0-18-0 of Khata No.518 which was recorded in the name of Gherai S/o of Rekhai and plot no.3908 and 3909 of Khata No.577 which was recorded jointly in the name of Dargahi S/o Sampat i.e. respondent no.4 and Gherai S/o Rekhai in the basic year of consolidation started from 22.08.1978. However on the aforesaid plots the name of father of petitioner namely Sarju Singh was recorded in clause-9. However, during verification (Padtal) possession of Shri Kamla Pratap Singh S/o Akchhaibar Singh was found.

4. On publication of records, four objections were filed under Section-9A of the Act of 1953. One by Kamla Prasad Singh S/o Akchhaibar Singh claiming the right on Gata No.4350, area 0-15-0 on the basis of possession. Second objection was filed by the father of the petitioner Sarju Singh claiming plot no.4350 area 0-15-0 on the basis of continuous possession from prior zamindari abolition consequently being bhumidar and adverse possession by virtue of entries in clause-9 on plot no.3908 area 0-8-0 and 3909 area 0-9-0. The third objection was filed by Babu Lal i.e. respondent no.3 claiming succession on plot no.3908, area 0-8-0 and 3909, area 0-9-0 on account of death of his father Gherai S/o Rekhai. The fourth objection was filed by Ram Sukh Singh and others. The objections of Kamla Prasad Singh and others was rejected for want of prosecution. The objections of Ram Sukh Singh and

others for co-tenancy was also rejected. The objections of the petitioner in regard to plot no.4350, 3908 and 3909, on the basis of clause-9 entry, was rejected. The objections of respondent no.3 were allowed by the Consolidation Officer by means of the order dated 17.04.1986.

5. Being aggrieved the petitioner had filed an appeal under Section 11(1) of the Act of 1953, which was allowed by the Settlement Officer Consolidation (here-in-after referred as SOC) by means of the order dated 21.12.1987 and the order passed by the Consolidation Officer was amended. The name of the petitioner was directed to be recorded in Gata No.4350, 3908 and 3909. The respondents no.3 and 4 filed a revision under Section 48 of the Act of 1953 which has been allowed by the Deputy Director of Consolidation (here-in-after referred as DDC) and the order dated 21.12.1987 passed by the SOC has been set-aside and the order passed by the Consolidation Officer has been upheld. Hence the present writ petition has been filed challenging the order dated 20.05.1994 passed by the DDC.

6. Submission of learned counsel for the petitioner was that the name of the father of the petitioner was recorded on the plots in question on the basis of order passed by the supervisor Kanoongo on 23.02.1965 under P.A. 10 in place of Bhagauti Deen S/o Samsher which is apparent from a copy of Khatauni of 1369-73 Fasli, a copy of which has been filed by the petitioner alongwith the Supplementary affidavit. He further submitted that name of the father of the petitioner was recorded in 1385 Fasli also. The entry, in the name of the grand father of the petitioner namely Vishwanath Singh, is coming on plot no.3908 and 3909 since 3rd settlement i.e. Soyam, a copy of which has been filed alongwith supplementary affidavit and no reply has been submitted. The learned Consolidation Officer had wrongly and illegally rejected the objections filed by the petitioner merely on the ground that the date of order is not mentioned as such the name of the father of the petitioner was not recorded in accordance with para 80-A and 81-A which appears to be a typographical error as the correct provision is 89-A and 89-B while the respondent had failed to prove their title and possession. Therefore the petitioner had filed the appeal before the SOC which was allowed after considering the pleadings and evidence in accordance with law recording a finding that the name of the father of the petitioner Sarju Singh was recorded as occupant in 1359 Fasli on Gata No.4350 and on disputed Gata No.3908 and 3909 in 1359 Fasli. The name of the father of the petitioner is recorded in clause-9 and as actual cultivator Sarju Singh is recorded.

7. He further submitted that the revisional authority, without setting-aside the finding of SOC, allowed the revision on the ground that the provisions of Land Records Manual have not been followed in issuing P.A. 10 under para 102 (C) of the Land Records Manual and the crop is not shown, only the name of Sarju Singh is recorded. But failed to consider that the name of the father of the petitioner was recorded in place of Bhagauti Deen who was representative of the family of the petitioner therefore the impugned order is not sustainable in the eyes of law.

8. Learned counsel for the respondent no.3 vehemently opposed the submissions of learned counsel for the petitioner and had submitted that the petitioner has taken inconsistent pleadings of title as well as

adverse which are not permissible. For adverse possession, the petitioner was required to show as against whom he is claiming the adverse possession and the period and date of entry was required to be proved. He further submitted that the case of petitioner on the basis of adverse possession is in accordance with the provisions of the Land Records Manual and admittedly the title of the petitioner was not there. Therefore the petitioner has no right on the plot in question. He further submitted that finding regarding entry in the revenue records recorded by the revisional authority has not been challenged. Admittedly, in the basic year entry the name of the respondent was recorded and possession of Kamla Prasad was found. The alleged entry made in favour of the petitioner under clause-9 is not in accordance with Land Records Manual therefore the same does not give any right to the petitioner.

9. On the basis of above, learned counsel for the respondent no.3 submitted that the order passed by the DDC is in accordance with law which does not suffer from any illegality or error and the writ petition has been filed on misconceived and baseless grounds and it is liable to be dismissed. Learned counsel for the respondent has relied on ***P.T. Munichikkanna Reddy and Others Vs. Revamma and Others; 2008 (26) LCD 15, Gurumukh Singh and Others Vs. Deputy Director of Consolidation, Nainital and Others; 1997 (80) RD 276, Mohd. Raza Vs. Dy. Director of Consolidation and another; 1990 RD 165 and Sadhu Saran and Another Vs. Assistant Director of Consolidation, Gorakhpur and Others; 2003 (94) RD 535.***

10. Refuting to the arguments of the learned counsel for the respondent no.3, learned counsel for the petitioner submitted that the possession may be permissive or adverse and the petitioner had permissive possession as no objection was ever raised. He had further submitted that the question of following the procedure of recording the entry of clause-9 in PA-10 does not arise because the name of Bhagauti Deen, representative of the family of the petitioner, was recorded in the revenue records. He also submitted that the submission of learned counsel for the respondent is also misconceived because para 102-B is in regard to Khasra whereas the name of the petitioner was recorded in Khatauni. The name of the father of the petitioner was recorded in Khatauni on the basis of order of the supervisor kanoongo dated 23.02.1965. Therefore the impugned order is not sustainable in the eyes of law and liable to be quashed.

11. I have considered the submissions of learned counsel for the parties, perused the orders and the documents placed on record.

12. The name of Sarju Singh father of the petitioner was recorded under clause-9 on the basis of adverse possession in the basic year. The name of Gherai S/o Rekhai father of the respondent no.3 was recorded on Gata No.4350/0-18-0 in Khata No.158 and Dargahi S/o Sampat, the respondent no.4 (deceased & substituted by his legal heirs in the petition) and Gherai S/o Rekhai in Gata No.3808/0-8-0 and 3909/0-9-0 in Khata No.577. The objection of the petitioner was rejected and objection of the respondents no.3 and 4 was allowed by Consolidation Officer on the ground that the name of Sarju Singh was recorded on the basis of an order passed by the Supervisor Kanoongo which is not in accordance with para 80-A and 81-A of the Land Records Manual and PA-10 and date

is not mentioned. The appeal filed by the petitioner was allowed and the order passed by the Consolidation Officer was amended and a direction was issued to record the name of the petitioner on the plots in question on the ground that the respondents have failed to prove as to how their names were recorded in the revenue records and the Consolidation Officer has made a mistake by not allowing the petitioner on the basis of possession where the name of the Sarju Singh was recorded under Clause-9 on the basis of an order passed by the Supervisor Kanoongo in 1366-1370 Fasli, 1371-1373 Fasli and continued to be recorded as Sikimi in Khasra of 1372-1374 Fasli.

13. The respondents had filed revision, aggrieved by the order passed in appeal, on the ground that the land in dispute was obtained by the revisionist i.e. the respondents from Akchhaibar Singh and not from petitioner and he has no concerned with the petitioner or his father. The objection raised by the petitioner was that the name of Sarju Singh was recoded under Clause-9 by the Supervisor Kanoongo and the possession is proved by the Khasra of 12 years. The revisional court allowed the revision on the ground that the entry in the name of Sarju Singh was not in accordance with the Land Records Manual and no crop is also recorded in Khasra of 12 years and only the name of Sarju Singh is recorded and no date is mentioned and plot no.4029 was sold by Rekhai to Akchhaibar Singh S/o Surya Bali Singh on the basis of which the Sub-Divisional Officer had passed an order for mutation in 16.02.1966 from which it is proved that in 1366 Fasli the title of Gherai S/o Rekhai was undisputed and he has also sold some of the plots of his Khata.

14. The petitioner had initially claimed the right over the plot no.4053 area 0-15-0 on the basis of being cultivator as Kashtkar Maurushi, who became Sirdar after abolition of Zamidari and after a long possession he has become the Bhumidar. On the other two plots i.e. 3908 and 3909 on the basis of entry under clause-9 in pursuance of an order passed by the Supervisor Kannongo. But subsequently on the basis of entry in clause-9 by the order of Suprvisor Kannongo on plot no.4350 but no date is given and on plot nos.3908 and 3909 on the basis of order dated 23.02.1965 passed by Supervisor Kannongo, as is in paragraph 9 of writ-petition also. Therefore, the petitioner claimed the right on the plots in question on the basis of adverse possession but failed to show as to against whom in plot no.4350 and against Bhagauti Deen in plot no.3908 and 3909, who is said to be representative of family and it has argued before this court that possession was permissive. Therefore the stand has been changed again. However the permissive possession may not give any right and the inconsistent stand has been taken. The right on the basis of adverse possession will accrue only if it is in accordance with law. The learned Consolidation Officer and Revisional Authority have found the entry not in accordance with the U.P. Land Records Manual.

15. The para-89-A, 89-B and 102-B of the Land Records Manual (here-in-after referred as 'the manual'), relevant for the purpose, are extracted below:-

"89-A. List of changes.*-After each Kharif and rabi portal of a village the Lekhpal shall prepare in triplicate a consolidated list of new and modified entries in the Khasra in the following form:*

Form No.P-10

Khasra No. of Plot	Area	Details of entry in the last year	Details of entry made in the current year	Verification report by the Revenue Inspector	Remarks
1	2	3	4	5	6

(ii) The Lekhpal shall fill in the first four Columns and hand over a copy of the list to the Chairman of the Land Management Committee. He shall also prepare extract from the list and issue to the person or persons concerned recorded in Columns 3 and 4 to their heirs, if the person or persons concerned have died, obtaining their signature in the copy of the list retained by him. Another copy shall be sent to the Revenue Inspector.

(iii) The Revenue Inspector shall ensure at the time of his partial of the village the extract have been issued in all the cases and signatures obtained of the recipients.

89-B. Report of changes.- *The copy of the list with the Lekhpal containing the signatures of the recipients of the extracts shall be attached to the Khasra concerned and filed with the Registrar (Revenue Inspector) alongwith it on or before 31st July, of the following year (sub-paragraph (iv) of the paragraph 60).*

102-B. Entry of possession (Column 22) (Remarks column)*.- (1) The Lekhpal shall while recording the fact of possession in the remarks Column of the Khasra, write on the same day the fact of possession with the name of the person in possession in his diary also, and the date and the serial number of the dairy in the remarks Column of the Khasra against the entry concerned.*

(2) As the list of changes in Form p-10 is prepared after the completion of the patal of village, the serial number of the list of changes shall be noted in red ink below the entry concerned in the remarks column of the Khasra in order to ensure that all such entries have been brought on the list.

(3) If the Lekhpal fails to comply with any of the provisions contained in paragraph 89-A, the entry in the remarks Column of the Khasra will not be deemed to have been made in the discharge of his official duty."

16. Reading of the aforesaid provisions makes it clear that if any entry is made in P-10, the same shall be communicated to the person or persons concerned recorded in columns 3 and 4 or their heirs and obtain their signatures. Records on being submitted to the Revenue Inspector he shall ensure at the time of Padtal i.e. verification of the village that it has been issued in all the cases and the signatures obtained by the recipients. Therefore, in case,any entry made on the basis of adverse possession the same is to be communicated to the person concerned and the person claiming is required to prove that it was in accordance with the manual and as to what was nature of possession and when it started in the knowledge of the tenant and the possession was continuous and how long it continued.

17. This Court considered this issue in the case of ***Mohd. Raza Vs. Deputy Director of Consolidation and Another; R.D. 1997 (R.D.) 276*** and held that the entries in the revenue papers not prepared by following the procedure prescribed under the Uttar Pradesh Land Records Manual and PA-10 notice was not served

on the main tenant, such entries are of no evidentiary value and would not confer any right.

18. This court, in the case of ***Gurumukh Singh and Others Vs. Deputy Director of Consolidation, Nainital and Others; 1997 (80) RD 276***, has also held that the entries will have no evidentiary value if they are not in accordance with the provisions of Land Records Manual and the burden to prove is on the person who is asserting the possession on the basis of adverse possession. Relevant paragraphs 6 and 7 are extracted below:-

"6. It is clear from Para A-102C of the Land Records Manual that the entries will have no evidentiary value if they are not made in accordance with the provisions of Land Records Manual. There is presumption of correctness of the entries provided it is made in accordance with the relevant provision of Land Records Manual and secondly, in case where a person is claiming adverse possession against the recorded tenure-holder and he denies that he had not received any P.A. 10 or he had no knowledge of the entries made in the revenue records, the burden of proof is further upon the person claiming adverse possession to prove that the tenure-holder was duly given notice in prescribed Form P.A. 10. Para A-81 itself provides that the notice will be given by the Lekhpal and he will obtain the signature of the Chairman, Land Management Committee as well as from the recorded tenure-holder. It is also otherwise necessary to be provided by the person claiming adverse possession. The law of adverse possession contemplates that there is not only continuity of possession as against the true owner but also that such person had full knowledge that the person in possession was claiming a title and possession hostile to the true owner. If a person comes in possession of the land of another person, he cannot establish his title by adverse possession unless it is further proved by him that the tenure-holder had knowledge of such adverse possession.

7. In ***Jamuna Prasad v. Deputy Director of Consolidation, Agra and Others****, this Court repelled the contention that the burden of proof was upon the person who challenges the correctness of the entries. It was observed:*

"Learned counsel for the Petitioner argued that there was a presumption of correctness about the entries in the revenue records and the onus lay upon the Respondent to prove that the entries showing the Petitioner's possession had not been in accordance with law. This contention is untenable Firstly, it is not possible for a party to prove a negative fact. Secondly, the question as to whether the notice in Form P.A. 10 was issued and served upon the Petitioner also is a fact which was within his exclusive knowledge."

"Petitioner's contention that the burden lay on the Respondents to disprove the authenticity and destroy the probative value of the entry of possession cannot be accepted. In my opinion, where possession is asserted by a party who relies mainly on the entry of adverse possession in his favour and such possession is denied by the recorded tenure-holder, the burden is on the former to establish that the entries in regard to his possession was made in accordance with law."

19. This Court, in the case of ***Sadhu Saran and Another Vs. Assistant Director of Consolidation, Gorakhpur and Others; 2003 (94) RD 535,*** has held that it is well settled in law that the illegal entry does not confer title.

20. The Hon'ble Apex Court, in the case of ***P.T. Munichikkanna Reddy and Others Vs. Revamma and Others; 2008 (26) LCD 15,*** has held that in case of adverse possession, communication to the owner and his hostility towards the possession is must. The relevant paragraphs 19 to 23 are extracted below:-

"19. Thus, there must be intention to dispossess. And it needs to be open and hostile enough to bring the same to the knowledge and plaintiff has an opportunity to object. After all adverse possession right is not a substantive right but a result of the waiving (willful) or omission (negligent or otherwise) of right to defend or care for the integrity of property on the part of the paper owner of the land. Adverse possession statutes, like other statutes of limitation, rest on a public policy that do not promote litigation and aims at the repose of conditions that the parties have suffered to remain unquestioned long enough to indicate their acquiescence.

20. While dealing with the aspect of intention in the Adverse possession law, it is important to understand its nuances from varied angles.

21. Intention implies knowledge on the part of adverse possessor. The case of ***Saroop Singh v. Banto and Others; (2005) 8 SCC 330*** *in that context held:*

"29. In terms of Article 65 the starting point of limitation does not commence from the date when the right of ownership arises to the plaintiff but commences from the date the defendants possession becomes adverse. (See ***Vasantiben Prahladji Nayak v. Somnath Muljibhai Nayak, (2004) 3 SCC 376****).*

30. Animus possidendi is one of the ingredients of adverse possession. Unless the person possessing the land has a requisite animus the period for prescription does not commence. As in the instant case, the appellant categorically states that his possession is not adverse as that of true owner, the logical corollary is that he did not have the requisite animus. (See ***Mohd Mohd. Ali v. Jagadish Kalita, SCC para 21****)"*

22. A peaceful, open and continuous possession as engraved in the maxim nec vi, nec clam, nec precario has been noticed by this Court in ***Karnataka Board of Wakf v. Government of India and Other; (2004) 10 SCC 779*** *in the following terms:*

"Physical fact of exclusive possession and the animus possidendi to hold as owner in exclusion to the actual owner are the most important factors that are to be accounted in cases of this nature. Plea of adverse possession is not a pure question of law but a blended one of fact and law. Therefore, a person who claims adverse possession should show: (a) on what date he came into possession, (b) what was the nature of his possession, (c) whether the factum of possession was known to the other party, (d) how long his possession has continued, and (e) his possession was open and undisturbed. A person pleading adverse possession has no equities in his favour. Since he is trying to defeat the rights of the true owner, it is for him to clearly plead and establish all facts necessary to establish his adverse possession"

23. It is important to appreciate the question of intention as it would have appeared to the paper-owner. The issue is that intention of the adverse user gets communicated to the paper owner of the property. This is where the law gives importance to hostility and openness as pertinent qualities of manner of possession. It follows that the possession of the adverse possessor must be hostile enough to give

rise to a reasonable notice and opportunity to the paper owner."

21. The copy of the Khatauni of 1369-73 Fasli filed by the petitioner alongwith the supplementary affidavit indicates that the name of Sarju Singh S/o Vishvanath is recorded in plot no.4350 which the petitioner states was recorded on the basis of order passed by Supervisor Kannoongo but no date has been disclosed and in plot no.3908 and 3909, the name of Sarju Singh has been recorded under clause-9 in place of one Bhagauti Deen on the basis of the order dated 23.02.1965 under PA-10 but in the bottom the signatures are not clear and the date is not mentioned. Therefore, it was for the petitioner to prove that this entry was made after following the due procedure of law as prescribed under the Land Records Manual and was duly communicated to the main tenant and it was within his knowledge. But he has failed to prove it. Therefore the petitioner is not entitled on the basis of adverse possession and alleged permissive possession is also not sustainable as the petitioner could not show as to how Bhagauti Deen was representative of family and the possession of father of petitioner was also not found in basic year.

22. The Revisional Authority on the basis of sale of Plot No.4029 of the same Khata by Rekhai to Akchhaibar Singh has allowed the revision of the respondents without considering that the revisionist had taken a plea that the revisionist had got the land in dispute from Akchhaibar Singh. It is also not in dispute to the parties that in the basic year the petitioner and respondents were not in possession. Therefore the revisional authority has allowed the revision without considering as to how the land in dispute has come to the opposite parties and whether the claim of the respondents is sustainable in the eyes of law or not.

23. The petitioner has filed supplementary affidavits and certain documents before this Court to show that the name of the grand father of petitioner and representative of the family of the petitioner was recorded in the third settlement i.e. Soyam but it was not disclosed before the courts below.

24. In view of above, this Court is of the opinion that the matter is required to be reconsidered by the Revisional Authority in accordance with law and in the light of the observations made here-in-above. The petitioner may file the documents, filed before this Court, before the Revisional Authority, for his consideration in accordance with law while deciding afresh.

25. The Writ Petition is, accordingly, **partly allowed**. The order dated 20.05.1994 passed by Deputy Director of Consolidation, Sultanpur is hereby quashed. The matter is remanded to Deputy Director of Consolidation, Sultanpur, who shall decide the revision a fresh within a period of six months from the date of production of certified copy of this order. No order as to costs.

(2021)02ILR A889
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 22.02.2021

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE GAUTAM CHOWDHARY, J.

Criminal Appeal No. 5657 of 2011

Santosh ...Appellant (In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:

Swati Agrawal Srivastava, Sri Sanjay Shukla, Sri Kamal Kishore Mishra, Sri Rakesh Kumar Singh

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

A. Criminal law – Indian Penal Code, 1860 - Sections 300, 302, 304, 498A - Code of Criminal Procedure - Sections 161, 216, 313 - Dowry Prohibition Act - Section ¾ - Evidence Act, 1872- Section 106, 114 - Dowry Death - The total effect of the evidence led and the documents proved has to be satisfied before addition or alteration of the charge. The ingredients of S. 302 of IPC were not present though charge was framed. Reliance by the Court on the evidence of hostile witnesses is permissible but the Court at least has to be aware that prima facie a witness who makes different statements at different times has no regard for truth. (Para 25)

If the testimony of hostile witnesses is to be made the basis of punishment or conviction, there must be corroboration. The learned judge, unfortunately, has come to the conclusion that the hostile witnesses mentioned that the death was in the matrimonial home. (Para 26)

The question which arises before us is that when no cogent evidence to convict the accused despite that the learned Judge has relied on what can be said to be his own conjectures which are not borne out even on interpretation of S.106 of the Evidence Act, 1872. (Para 20)

B. No doubt the stage of framing new charge u/s 216 of the Cr.P.C. can be at any stage, but the charge for alteration or addition has to be so that the accused is put to circumstance which are against him. The basic feature for framing and/or altering charge in criminal trial is based on principle of fair play. In judging the question of prejudice as of guilt, the Trial Court was supposed to act with a broad vision and look to the substance and not to the technicalities. The main concern should be to see whether accused has/had a fair trial though he may know or not of what he was being tried for, once the evidence is over, he would not have a fair chance of cross-examination of the witnesses for the new charge added which is u/s 302 of I.P.C. and no evidence was recorded so as to bring home charge of S. 302 of IPC. (Para 29, 33)

In the situation where demand of dowry and harassment soon before the death was found to be lacking, the presumption u/s 113B of Act, 1872 has not been believed. The learned Trial Judge in view of the unsupported evidence has acquitted the accused as well as other in-laws of the charges under Section 498A, 304B of IPC and Section 3/4 of D.P. Act, but with the recourse of Section 216 of Cr.P.C., altered the charge and with a recourse of Section 106 read with Section 114 of Act, 1872, convicted and sentenced the appellant alone u/s 302 of IPC as he was the husband of the deceased. (Para 30, 32, 34)

C. It is well settled by plethora of judicial pronouncements by this Court that suspicion, however strong cannot take the place of proof. An accused is presumed to be innocent unless proved guilty beyond reasonable doubt. (Para 42)

The evidence must be such that the guilt of the accused would have to be proved by consistent evidence which would be proved by the attending circumstances from which cogent evidence would emerge. (Para 43)

The chronology of events as narrated in the F.I.R. and the depositions of the hostile witnesses go to show that the accused had married the deceased. She was his legally wedded wife. The death took place within seven years of their marriage. The witnesses who have turned hostile also conveyed that there were certain demands. In that view of the matter, the death having occurred in the house of the accused, he can be held for the unnatural death u/s 304B but not u/s 302 of IPC. The converse cannot be applied as in S. 302, it is for the State to prove that the accused was guilty of the charges which were levelled against him. In that

view of the matter, the accused has been held guilty as he is in jail for a period of more than 10 years. His incarceration can be said to be enough punishment for him for untimely death of his legally wedded wife. (Para 44, 45)

S. 304B of IPC does not categorize death. It covers every kind of death that occurred otherwise than in normal circumstances. The deeming fiction is invoked. The onus on the accused, in-laws or the husband to show otherwise is on them. The onus u/s 302 is on the prosecution. (Para 48)

Appeal partly allowed. (E-3)

Precedent followed:

1. L.S. Rao Vs St. of A.P., 2004 (3) Crl. 70 SC (Para 9)

2. Babu Vs Babu, 2003 (3) Crl. 285 SC (Para 9)

3. Shanker Vs St. of Karn., 2003 (1) Crl. 44 SC (Para 9)

4. R. Rachaiah Vs Home Secretary, 2016 0 Supreme (SC) 383 (Para 10)

5. Dharmendra Rajbhar Vs St. of U.P, Criminal Appeal No. 234 of 2017, decided on 19.01.2021 (Para 10)

6. Trimukh Maroti Kirkan Vs St. of Mah., (2006) 10 SCC 681 (Para 12)

7. St. of Guj.Vs B.L. Dave, Criminal Appeal 99 of 2021, decided on 02.02.2021 (Para 16)

8. St. of Raj. Vs Bhawani, AIR 2003 SC 4230 (Para 25)

9. Sanjay Maurya Vs St. of U.P., Criminal Appeal No. 3660 of 2013, decided on 29.01.2021 (Para 28)

10. Nallapareddi Sridhar Reddy Vs St. of A.P., (2020) 12 SCC 467 (Para 31)

11. St. of Orissa Vs Banabihari Mohapatra, Special Leave to Petition (Crl.) No. 1156 of 2021, (Coram: Hon'ble Mrs. Justice Indira Banerjee and Hon'ble Mr. Justice Hemant Gupta), reported in Live Law 2021 SC 103 (Para 42)

12. Preetpal Singh Vs St. of U.P.& anr., (2020) 8 SCC 645 (Para 48)

Precedent distinguished:

1. Sahabuddin & anr. Vs St. of Assam, (2012) 13 SCC 213 (Para 12)

2. Smt. Krishna Vs St. of U.P., 2017 (100) ACC 774 (Para 12)

3. Kalu @ Laxminarayan Vs St. of M.P. (2019) 10 SCC 211 (Para 12)

Present appeal challenges judgment and order dated 06.09.2011, passed by Additional Sessions Judge/Special Judge (E.C. Act), Gorakhpur.

(Delivered by Hon'ble Dr. Kaushal Jayendra Thaker, J.
& Hon'ble Gautam Chowdhary, J.)

1. Heard Mrs. Swati Agrawal Srivastava, learned counsel for the appellant, Sri Nagendra Kumar Srivastava and Sri Rupak Chaubey, learned A.G.As for the State.

2. The present appeal challenges the judgment and order dated 6.9.2011 passed by Additional Sessions Judge/Special Judge (E.C. Act), Gorakhpur in Sessions Trial No.68 of 2010 convicting and sentencing the appellant alone under Section 302 of Indian Penal Code, 1860 (hereinafter referred to as 'IPC') for life imprisonment with fine of Rs.2,000/- and, in case of default of payment of fine, further to undergo imprisonment for one month.

3. Factual data as culled out from the record is that a First Information Report being Case Crime No.664/2009 was lodged

on 18.4.2009 at Police Station Khorawar, Gorakhpur on the complaint made by one Jitendra Kumar Sahani s/o Dheesh Rawat, resident of Domar Ghat, Police Station Khajni, Gorakhpur who stated that his sister was married to Santosh s/o Bhagwan Kewat, Village Dumri Tola Bakhariya, P.S. Khorawar, Gorakhpur three years ago and in the F.I.R. it was mentioned that the in-laws of the deceased were demanding sum of Rs.50,000/- time and again and when their demands were not fulfilled, his sister was being harassed and on the intervening night of 17/18.2.2009 at about 2.00 a.m. the accused-appellant along with Jhinak, Bhagwan, Rajmati and Tetari did the death of her sister by strangulating her with saree and thereafter hanged her.

4. On the aforesaid F.I.R., the investigation was moved into motion. The red saree which was mentioned in the F.I.R. was recovered. The dead body was sent for postmortem and wherein it was opined that the cause of death was asphyxia due to strangulation. The Investigation Officer recorded the statements of several witnesses under Section 161 of Cr.P.C. and submitted the charge-sheet against the accused-appellant as also against Bhagwan and Rajmati under Sections 498A, 304 B of I.P.C. 3/4 of Dowry Prohibition Act.
The accused were facing charges which were exclusively triable by the Court of Sessions, hence, the case was committed to the Court of Sessions.

5. On being summoned, all the three accused pleaded not guilty and wanted to be tried, hence, the trial started and the prosecution examined about 13 witnesses who are as follows:

1	Jitendra Kumar Sahani	PW1
2	Ghisrawan	PW2
3	Sumitra Devi	PW3
4	Dhanwanti Devi	PW4
5	Pana Devi	PW5
6	Chikhuri Prasad	PW6
7	Dr. V.P. Singh	PW7
8	Jayanti Pd. Sharma	PW8
9	Bhim	PW9
10	Triloki	PW 10
11	Vishwajeet Srivastava	PW11
12	Brijesh Kumar Mishra	PW 12
13	Ram Pyare	PW 13

In support of ocular version following documents were filed:

1	Written Report	Ex.Ka.1
2	F.I.R.	Ex.Ka.3
3	Recovery memo	Ex. Ka. 13
4	Postmortem Report	Ex. Ka.5

5	Panchayatnama	Ex.Ka.2
6	Charge-sheet	Ex. Ka.11

6. A very strange fact requires to be mentioned here that the accused were originally charged with commission of offences under Section 498A, 304B of IPC and Section 3/4 of D.P.Act. The charge was framed on 30.4.2010 and witnesses number 1 to 12 were examined on oath. P.W.11 was examined on 22.3.2011. The learned Judge who had framed the charge on 30.4.2010 was Mr. K.K. Pandey. Unfortunately, for the appellant who had settled the dispute with the other side met with Sri Lukmanul Haq, learned Additional Sessions Judge who without any application, of his own decided to have charge substituted/altered after oral testimony of maximum witnesses was recorded and charged all the three accused with Section 302 read with Section 34 of I.P.C.

7. The learned ASJ/Special Judge, after examining P.W.12, all of a sudden, altered and framed additional charge on 14.7.2011 and put the accused-appellant herein and other two co-accused to question under Section 313 of Cr.P.C. on 26.7.2011 and 12.8.2011 which means that the learned Judge did not re-examine any of the witnesses except P.W.13 namely I.O and no fresh evidence was led pursuant to alteration of charge.

8. It appears that the learned judge who had subsequently taken charge of the matter had made up his mind that despite there being no evidence which proved the guilt against the accused-husband. The learned judge convicted the accused-appellant on the basis of what is known as morale conviction. This is the submission made by learned counsel for the appellant.

9. It is submitted by learned counsel for the appellant that the learned judge has misread the judgment of the Apex Court in **L.S. Rao Vs. State of Andhra Pradesh, 2004 (3) Crl. 70 SC** and has come to the conclusion that the death occurred in matrimonial home of the deceased and therefore, provisions of Section 114 of the Evidence Act would be attracted and has come to the conclusion that Santosh has not discharged the burden of proof cast on him that at the time of incident he was not at home (place of incidence). It is submitted that the learned Judge had heavily relied on the decisions titled **Babu Vs. Babu, 2003 (3) Crl. 285 SC** and **Shiv Shanker Vs. State of Karnataka, 2003 (1) Crl. 44 SC.** The learned judge even came to the conclusion that police had no reason to file a false charge-sheet and that is why he convicted the accused-husband under Section 302 of I.P.C. for life and acquitted the other two accused.

10. Learned counsel for the appellant has contended that the charge could not have been altered in the fashion and in the manner in which it has been done which has acted prejudicial to the appellant herein and learned counsel has relied on the decision in **R. Rachaiah Vs. Home Secretary, 2016 0 Supreme (SC) 383** and decision of this Court in Criminal Appeal No.234 of 2017 **(Dharmendra Rajbhar Vs. State of U.P.)**, decided on 19.1.2021 so as to contend that accused requires to be given benefit of doubt as the prosecution has failed to prove the circumstances connecting accused to death of deceased.

11. Learned counsel for the State has vehemently submitted that the burden of

proof has been shifted on the accused as per Section 106 of the Evidence Act, 1872 as the death was unnatural and at the dwelling place of husband.

12. Learned A.G.A. has relied on the cases titled (1) **Trimukh Maroti Kirkan vs. State of Maharashtra, (2006) 10 SCC 681, (2) Sahabuddin and another Vs. State of Assam, (2012) 13 SCC 213, (3) Smt. Krishna Vs. State of U.P., 2017 (100) ACC 774, (4) Kalu alias Laxminarayan Vs. State of Madhya Pradesh, (2019) 10 SCC 211** to contend that the judgment cannot be found fault with.

13. Heard the learned counsel for the parties and perused the judgment and order impugned.

14. While considering the decision of the Court below, we would have to go through the evidence of the hostile witnesses though they have scantly supported the case of the prosecution. The learned judge has relied on their testimonies.

15. The postmortem report has been proved by P.W.7 who has conducted the postmortem report. According to him, the body had boils at several places, the face had blue spot, on neck also there was injury, the brain was liquefied, the respiratory tract was deeply congested and there was faecal matter. The death was, according to P.W.7, due to asphyxia and had occurred three days before the date on which postmortem was carried out. Even in his cross-examination, he has accepted that the death was due to strangulation. On the basis of this evidence, it can be said that the death of the deceased was homicidal.

16. We are sifting the evidences led in view of the recent decision of the Apex Court in **Criminal Appeal 99 of 2021 (State of Gujarat Vs. B.L.Dave) decided on 2.2.2021.**

17. Investigation of the case had taken place and the charge-sheet was laid under Section 498A, 304B of IPC and Section 3/4 of D.P.Act. Learned Sessions Judge acquitted two accused and also the present appellant for charges under Section 498A, 304B of IPC and Section 3/4 of D.P.Act but as we can see, convicted the accused under Section 302 of IPC after altering the charge.

18. It is further submitted by learned counsel for the appellant that once Trial Court came into conclusion that when no offence was committed under Section 498A of IPC, the presumption under Section 114 of Evidence Act, 1872 could not be raised.

19. It would be pertinent to reproduce Section 216 of Cr.P.C. regarding alteration of charge which reads as follows:

"216. Court may alter charge.

(1)Any Court may alter or add to any charge at any time before judgment is pronounced.

(2)Every such alteration or addition shall be read and explained to the accused.

(3)If the alteration or addition to a charge is such that proceeding immediately with the trial is not likely, in the opinion of the Court, to prejudice the accused in his defence or the prosecutor in the conduct of the case, the Court may, in its discretion, after such alteration or addition has been made, proceed with the trial as if the altered or added charge had been the original charge.

(4)If the alteration or addition is such that proceeding immediately with the

trial is likely, in the opinion of the Court, to prejudice the accused or the prosecutor as aforesaid, the Court may either direct a new trial or adjourn the trial for such period as may be necessary.

(5)If the offence stated in the altered or added charge is one for the prosecution of which previous sanction is necessary, the case shall not be proceeded with until such sanction is obtained, unless sanction has been already obtained for a prosecution on the same facts as those on which the altered or added charge is founded

20. The question which arises before us is that when no cogent evidence to convict the accused despite that the learned Judge has relied on what can be said to be his own conjectures which are not borne out even on interpretation of Section 106 of the Evidence Act, 1872 (hereinafter referred to as 'Act, 1872') which reads as follows:

"106. ***Burden of proving fact especially within knowledge.****--When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. Illustrations*

(a)When a person does an act with some intention other than that which the character and circumstances of the act suggest, the burden of proving that intention is upon him.

(b)A is charged with travelling on a railway without a ticket. The burden of proving that he had a ticket is on him."

21. Section 113B and 114 of the Act, 1872 reads as follows:

".1[113B. Presumption as to dowry death.--When the question is whether a person has committed the dowry death of a woman and it is shown that soon before her death such woman has been subjected by such person to cruelty or harassment for, or in connection with, any demand for dowry, the Court shall presume that such person had caused the dowry death. Explanation.--For the purposes of this section, "dowry death" shall have the same meaning as in section 304B, of the Indian Penal Code, (45 of 1860).]."

114 Court may presume existence of certain facts. *--The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.*

22. Provisions of Section 106 and 114 of Act, 1872 were raised by the learned Judge below but oral and other reliable evidence would not permit this Court to raise such presumption as the said presumption is rebuttable. The fact that the deceased died in the matrimonial home is not in dispute but whether it was accused who authored the act which would fulfill the ingredients of Section 300 of IPC and whether it would fall within its purview, such presumption cannot take place of proof. The learned judge with utmost respect could not have convicted the accused under Section 302 of I.P.C. on evidence which was not laid or rather the evidence which was led, was never put to him under Section 313 of Cr.P.C statement and, therefore, he was taken off guard. The presumption under Section 106 of Act, 1872 will not also come to the aid of the prosecution as it was not proved beyond reasonable doubt that the charge which was added did not even mention the satisfaction of the learned Judge below and the conviction was not from major to minor but was from minor to major offence.

23. The submission of learned A.G.A. is that no objection was raised at the time of alteration of charge.

24. We may hasten to mention here that the charge was added at the fag end of the trial. The accused could not have thought that the said alteration of charge would be acted upon within seven days and the trial would culminate into returning the finding of punishment to him under Section 302 of IPC though the evidence was not completing the right of 1872, Act.

25. The total effect of the evidence led and the documents proved has to be satisfied before addition or alteration of the charge. The ingredients of Section 302 of IPC were not present though charge was framed. Reliance by the Court on the evidence of hostile witnesses is permissible but the Court at least has to be aware that prima facie a witness who makes different statements at different times has no regard for truth. Reliance can be placed on the decision in **State of Rajasthan Vs. Bhawani, AIR 2003 SC 4230.**

26. If the testimony of hostile witnesses is to be made the basis of punishment or conviction, there must be corroboration. The learned judge, unfortunately, has come to the conclusion that the hostile witnesses mentioned that the death was in the matrimonial home. The question is, can this statement be sufficient to convict the accused under Section 302 of IPC? The answer is, no.

27. In our case, we can safely hold that the alteration of charge was bad and reliance is placed on the decision in **R. Rachaiah (Supra)** which will apply in full force.

28. We are pained to state that this is the second case which is similar to the case recently decided namely in Criminal Appeal No. 3660 of 2013 (**Sanjay Maurya Vs. State of U.P.**) decided on 29.1.2021, on which, heavy reliance is being placed by learned counsel for the appellant.

29. In judging the question of prejudice as of guilt, the Trial Court was supposed to act with a broad vision and look to the substance and not to the technicalities. The main concern should be to see whether accused has/had a fair trial though he may know or not of what he was being tried for, once the evidence is over, he would not have a fair chance of cross-examination of the witnesses for the new charge added which is under Section 302 of I.P.C. and no evidence was recorded so as to bring home charge of Section 302 of IPC. No doubt the stage of framing new charge under Section 216 of the Cr.P.C. can be at any stage, but the charge for alteration or addition has to be so that the accused is put to circumstance which **are against him**. The basic feature for framing and/or altering charge in criminal trial is based on principle of fair play.

30. The charges which were levelled and in absence of any evidence, being proved and when there was no charge of murder, the Trial Court could not have altered the charge at the fag end of the Trial and raised presumption as to commission of offence under Section 302 of IPC.

31. The object and scope of altering the charge and the principles therein have been summarized by the Apex Court in **Nallapareddi Sridhar Reddy Vs. State of A.P., (2020) 12 SCC 467** which are applicable in our case.

32. In this case, the learned Trial Judge perused the charges and suddenly after most of the witnesses were examined and when it appeared that he could not base the conviction, on the basis of presumption under Section 106 and 114 of the Evidence Act, 1872, he altered the charge to Section 302 of I.P.C.

33. The Apex Court in **R. Rachaiah Vs. Home Secretary, 2016 0 Supreme (SC) 383** has held that alteration of charge in violation of mandate as per Sections 216 and 217 of Cr.P.C., and conviction recorded under altered charges seriously causes prejudice to the accused. Thereafter, this impropriety of the Trial Court stands vitiated and there could have been no conviction under altered charge namely under Section 302 of IPC.

34. In the situation where demand of dowry and harassment soon before the death was found to be lacking, the presumption under Section 113B of Act, 1872 has not been believed. The learned Trial Judge in view of the unsupported evidence has acquitted the accused as well as other in-laws of the charges under Section 498A, 304B of IPC and Section 3/4 of D.P.Act, but with the recourse of Section 216 of Cr.P.C., altered the charge and with a recourse of Section 106 read with Section 114 of Act, 1872, convicted and sentenced the appellant alone under Section 302 of IPC as he was the husband of the deceased.

35. Recently, this Court in **Dharmendra Rajbhar Vs. State of U.P. (Supra)** in similar situation has considered legal position as far as Section 106 of the Act, 1872 is concerned. We do not want to burden our judgment with reproduction of the said findings and analysis except para 40 of the said judgment wherein the Court has held as under:

"40. Section 101 to Section 114A of Chapter-VII of the Indian Evidence Act, 1872 deal with subject "OF THE BURDEN OF PROOF." Section 106 of the Indian Evidence Act provides that when any fact is especially within the knowledge of any person, the burden of proof to prove that fact is upon him. Section 106 is an exception to Section 101 of the Evidence Act which stipulates that whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. Section 106 of the evidence act has to be read in conjunction with and not in derogation of Section 101 Evidence Act. Section 106 of the Indian Evidence Act does not relieve prosecution of it's primary and foremost duty to establish the guilt of the accused beyond all reasonable doubts independent of weaknesses of the defence. It is only when prosecution, for well perceptible and acceptable reasons, is unable to lead evidence because of circumstances beyond it's control including the reason that the fact required to be proved was "within the special knowledge of an accused alone" and prosecution could not have known it by due care and diligence, that Section 106 can be resorted to by shifting burden on the accused to disclose that fact which is "in his special knowledge" and if accused fails to offer any reasonable explanation to satiate judicial inquisitive scrutiny, he is liable to be punished. Section 106 is not meant to be utilized to make up for the prosecution's inability to establish its case by leading, cogent and reliable evidence"

36. What is the situation in the present case? Considering the testimony which has come before us, we are unable to subscribe ourselves to the submission of learned A.G.A. that the decision in **Sahabuddin and another (Supra)** would apply to the facts of this case. In the said matter the Apex Court has sifted the evidence of entrusted witnesses who had not turned hostile and the evidence was corroborated. In our case, there is lack of proper evidence, there was no credible evidence available and the statement under Section 313 Cr.P.C. also does not give accused proper chance.

37. The judgment in **R. Rachaiah (Supra)** would be applicable to the facts of this case in contradiction with the judgment relied upon by learned A.G.A in the case of **Kalu alias Laxminarayan** and in **Smt. Krishna (Supra).**

38. In our case, there is no dying declaration. The demand of dowry was not established. In **Smt. Krishna (Supra)**, the High Court has felt that it is not necessary for the Court to reexamine all the witnesses and the burden gets shifted on the accused. Had the learned judge decided to convict the accused under Section 304B of IPC, the said judgment would have been helpful to the State.

39. The decision of the Apex Court in **Trimukh Maroti Kirkan (Supra)** will apply to the facts of this case though it is nobody's case that the husband was last seen with the deceased. It is proved that the husband and wife were last seen together. No doubt, the offence was committed in the matrimonial home but it was near the dwelling house. The Apex Court has held the conviction of the accused under Section 304B would be just and proper.

40. The factual data shows that the provisions of Section 113 of the Act, 1873 as submitted by learned A.G.A. for the state can be raised against the accused that the death was within the period of seven years. The depositions of the witnesses though they became hostile, confirms the fact that the accused used to demand certain amounts and that might have been cause of the death of the deceased.

41. The recovery memo of saree, postmortem report and the panchayatnama would permit us to hold the accused-appellant guilty under Section 304B of IPC. Depositions of P.W.1 to P.W.4 go to show that the accused can be convicted under Section 304B of IPC. The acquittal of the other two accused cannot be disturbed.

42. While penning this judgment, this Court has come across the judgment of the Apex Court in the case of Special Leave to Petition (Crl.) No.1156 of 2021, **State of Orissa Vs. Banabihari Mohapatra (Coram: Hon'ble Mrs. Justice Indira Banerjee and Hon'ble Mr. Justice Hemant Gupta),** reported in **Live Law 2021 SC 103** wherein the Apex Court has held as under:

"It is well settled by plethora of judicial pronouncements by this Court that suspicion, however strong cannot take the place of proof. An accused is presumed to be innocent unless proved guilty beyond reasonable doubt"

43. The evidence must be such that the guilt of the accused would have to be proved by consistent evidence which would be proved by the attending circumstances from which cogent evidence would emerge.

44. In our case, there are no evidences of Section 302 of IPC being fulfilled but at

the same time it would have been much better for the learned Additional Sessions Judge to record a finding of no guilt and the presumption against the accused cannot take place of evidence for convicting the accused under Section 302 of IPC but for 304B, a presumption under Section 113 of the Act, 1872 could have been pressed into service which we are doing, the reason being, as we narrated herein above, the death took place within period stipulated under the Act.

45. The chronology of events as narrated in the F.I.R. and the depositions of the hostile witnesses go to show that the accused had married the deceased. She was his legally wedded wife. The death took place within seven years of their marriage. The witnesses who have turned hostile also conveyed that there were certain demands. In that view of the matter, the death having occurred in the house of the accused, he can be held for the unnatural death under Section 304B but not under Section 302 of IPC. The converse cannot be applied as in Section 302, it is for the State to prove that the accused was guilty of the charges which were levelled against him. In that view of the matter, we have held the accused guilty as he is in jail for a period of more than 10 years. His incarceration can be said to be enough punishment for him for untimely death of his legally wedded wife.

46. The decisions cited by learned A.G.As would have permitted us to upturn the finding under Section 304B of IPC but in case of Section 302, we must have what is known as credible evidence before convicting the accused. In our case the variation of evidence relating to all the aspects make the conviction vulnerable under Section 302 of IPC.

47. The judgment in **Sanjay Maurya Vs. State of U.P. (Supra)** will also come to the aid of the accused.

48. However, in this case, as there is no dying declaration, though the presumption could have been raised and as the accused has been in jail for more than 10 years and as the State has not preferred the appeal as the conviction was under Section 302 of IPC, we hasten to convict the accused under Section 304B of IPC. The reason being, it is a crime against women and children. We are supported in our view by the recent decision in **Preetpal Singh Vs. State of U.P. and another, (2020) 8 SCC 645** which we have decided to apply to the facts of this case, reason being, Section 304B of IPC does not categorize death. It covers every kind of death that occurred otherwise than in normal circumstances. The deeming fiction is invoked by us. The onus on the accused, in-laws or the husband to show otherwise is on them. The onus under Section 302 is on the prosecution.

49. We have no other option but to acquit the accused under Section 302 of I.P.C. as this is a case of no evidence.

50. The deceased died of unnatural death which would have been a case of Section 304B but the learned Judge has come to the conclusion that it was not the case of Section 304B of IPC but of Section 302 of I.P.C.

51. In the end, we acquit the accused-appellant under Section 302 of IPC and convict him under Section 304B. The reason is, the evidence is writ large that the death occurred within seven years and the

dead body was found near the dwelling house of the accused.

52. In view of the above, the appeal is partly allowed. The accused-appellant is sentenced to undergo 10 years rigorous imprisonment. If 10 years of incarceration is over, he shall be released forthwith, if not required in any other case. The fine and default sentence is maintained. The default sentence to run after 10 years of incarceration is over. The judgment and order impugned in this appeal is modified to the aforesaid extent. Let a copy of this judgment along with the trial court record be sent to the Court and Jail Authorities concerned for compliance.

(2021)02ILR A900
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 19.01.2021

BEFORE

THE HON'BLE RAHUL CHATURVEDI, J.

Criminal Misc. Bail Application No. 46273 of 2020

Mohan Shyam ...Applicant(In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Applicant:
Sri Pankaj Kumar Shukla

Counsel for the Opposite Party:
A.G.A., Sri Sandeep Kumar, Sri Amit Daga

A. Criminal Law –Indian Penal Code - Sections 107, 147, 307, 504, 506, 306 - Application for bail – The moot pertinent question of law is as to whether any conduct of the applicant would fall within the ambit of Section 107/306, I.P.C.? (Para 14)

Words and Phrases – *'instigate', 'instigation'* - The word instigate literally means to goad, urge forward, provoke, incite, encourage to do an act. A person is said to instigate another person, when he actively suggests or stimulates him to do an act by means of language, direct or indirect or whether it takes the form of expression, solicitation or of hints of incitement or encouragement. Instigation may be in expression, word or may be simply by conduct of a person creating such a situation exploiting his position, that the other person have no other option but to take the extreme step. Such a person would be liable for abetment. (Para 15)

Where the accused had, by his acts or omission or by a continued course of conduct, created such circumstances that the deceased was left with no other option except to commit suicide, in which case, an "instigation" may have to be inferred. (Para 17)

Before holding an accused guilty of an offence u/s 306 I.P.C., the court must scrupulously examine the facts and circumstances of the case. It is to be borne in mind that in cases of alleged abetment of suicide there must be proof of direct or indirect acts of incitement to the commission of suicide. Merely on the allegation of harassment without there being any positive action proximate to the time of occurrence on the part of the accused which led or compelled the person to commit suicide, conviction in terms of Section 306, I.P.C. is not sustainable. (Para 18)

In order to bring a case within the purview of Section 306 of I.P.C. there must be a case of suicide and in the commission of the said offence, the person who is said to have abetted the commission of suicide must have played an active role by an act of instigation or by doing certain act to facilitate the commission of suicide. (Para 18)

It has been contended that the applicant is completely innocent and at best he could be liable for not rendering desired assistance to the informant Jagdish (deceased's son) in pacifying the situation. The harassment part is attributed to other co-accused persons (Bablu, Satyapal and one Shamma). If assuming for the sake of argument that the dying-declaration is

authentic6, even then the case would not fall within the ambit of Section 306, I.P.C. (Para 13)

B. Constitution of India: Article 21 - While it is true that Article 21 is of great importance because it enshrines the fundamental right to individual liberty, but at the same time a balance has to be struck between the right to individual liberty and the interest of society. No right can be absolute, and reasonable restrictions can be placed on them. While it is true that one of the considerations in deciding whether to grant bail to an accused or not is whether he has been in jail for a long time, the court has also to take into consideration other facts and circumstances, such as the interest of the society. (Para 30, 35)

No doubt there are 16 cases to the credit of the applicant but fact remains that, in most of them the police has either submitted the closure report, which has been accepted by the court or rest of them are State sponsored. (Para 28, 31)

C. It is settled principle of law that the principles of parity do not apply in rejection. Therefore, if the bail applications of co-accused persons have been rejected then it cannot be said that the applicant too deserves the same treatment. The applicant is in jail since 30.10.2019 and there is no possibility of early conclusion of trial in near future and prima facie it seems that none of the conduct of the applicant would attract any of the provisions of S. 107 of I.P.C. (if taken the dying-declaration of Jogendra Singh to be true for the sake of argument). It also seems that it is the handiwork of police personnel who used the deceased's son Jagdish as a tool to falsely implicate all his opponents. (Para 32, 33)

Application for bail allowed. (E-3)

Precedent followed:

1. Chitresh Kumar Chopra Vs State (Gov. of NCT of Delhi), (2010) 3 SCC (Crl.) 367 (Para 17)

2. Amalendu Pal @ Jhantu Vs St. of W.B., (2010) 1 SCC 707 (Para 18)

3. Ramesh Kumar Vs St.of Chh., (2001) 9 SCC 618 (Para 19)

4. St. of W.B. Vs Orilal Jaiswal, (1994) 1 SCC 73 (Para 20)

5. Arnab Manoranjan Goswami Vs St. of Mah. & ors., decided on 27.11.2020, Crl. Misc. Criminal Appeal No. 742 of 2020 (Para 22)

6. Neeru Yadav Vs St.of U.P. & anr., decided on 29.09.2015, Criminal Appeal No. 1272 of 2015 (Para 29)

7. Rajesh Ranjan Yadav Vs CBI, (2007) 1 SCC (Cri) 254 (Para 30)

8. Ash Mohammad Vs Shiv Raj Singh, (2012) 9 SCC 446 (Para 30)

9. Dataram Singh Vs State of U.P. and another, (2018) 3 SCC 22 (Para 35)

(Delivered by Hon'ble Rahul Chaturvedi, J.)

1. Supplementary affidavit filed on behalf of applicant, taken on record.

2. Heard Shri Pankaj Kumar Shukla, learned counsel for the applicant, Shri Amit Daga, Advocate assisted by Shri Sandeep Kumar, learned counsel for the informant and learned A.G.A. Perused the record.

3. By means of the present bail application the applicant, who is facing prosecution in connection with Case Crime No.179 of 2019, u/s 147, 307, 504, 506, 306 I.P.C., P.S.-Surir, District-Mathura, is seeking his enlargement on bail during trial. The applicant is an elderly person of 75 years and is in jail since 03.10.2019.

4. Text of the F.I.R. is that on 23.8.2019 at 15.30 hours all the named accused i.e. Satyapal, Bablu, Than Singh, Shibbo and the applicant Mohan Shyam armed with lathi, danda and sariya intruded

the house of the complainant and inflicted serious injuries on the parent of the complainant i.e. Smt. Chandrawati and Jogendra, with the intention to grab the house, of which a written report was made but the FIR could not be registered under the clout of the applicant who happens to be a muscleman and a man of chequered history. Taking advantage of the situation, the applicant and other named accused persons used to regularly visit the parent of the complainant and threaten them with dire consequences. Somehow the persons in duress mustered enough courage to get the FIR registered at Police Station Surir, but their misfortune followed them as the applicant along with the accomplices caught hold of them near the police station, set them ablaze after sprinkling some oily material and took to their heels. The ill-fated old burning couple managed to rush in the police station premises itself. Experiencing heat of the hours, the police personnel got them admitted in the hospital. On 30.8.2019 the FIR in this regard was got registered by one Jagdish at Police Station Surir, District Mathura.

5. Injured Jogendra, on 31.8.2019 after getting recorded his dying-declaration, flat lined his breath at Safdarganj Hospital, Delhi on 01.9.2019 at 7.50 A.M. The cause of death is shown to be septic shock as he sustained 75% deep thermal burn over his body. The dying-declaration of the deceased is annexed as Annexure-4 to the petition.

6. At this juncture, learned counsel for the applicant requested the Court that before evaluating the text of the F.I.R. (Case Crime No.179 of 2019) and dying-declaration of the deceased dated 31.8.2019, the incident prior to the instant one, must also be taken into account as the same have a vital and pivotal role in adjudicating the present bail application.

7. It has been further submitted by learned counsel for the applicant that the applicant, aged about 75 years has been implicated due to perfunctory handiwork of the police, just to save the skin of some erring police personnel, who if at all taken timely action with alacrity against the offenders then this early incident might not have occurred. While pleading the innocence of the present octogenarian applicant, the counsel uttered an old saying "All are not thieves that the dogs bark at". It has been strenuously contended by learned counsel for the applicant that the present F.I.R. is a typically handiwork and a typical *modus operandi* of the local police to save themselves from the clutches of departmental inquiry and consequent actions.

8. Learned counsel for the applicant has drawn attention of the Court to Annexure-2 to the petition i.e. the F.I.R. No.173 of 2019, u/s 452, 354, 323, 324 I.P.C., referring the date of incident 23.8.2019, of which the F.I.R. was got lodged on 28.8.2019 at 12.21 hours by Jogendra Singh, when he was alive, against only one accused Satyapal s/o Than Singh, with specific allegation that on 23.8.2019 the named accused, in intoxicated condition, intruded his house and started misbehaving with his wife Chandrawati and on resistance by the wife, he committed marpeet and hit iron rod (sariya) blow over her head. Soon thereafter, the informant along with his wife, rushed to the police station. Upon the *Majrubi Chitthi* of the police the injured Chandrawati was examined by the concerned Medical Officer, on the same day i.e. 23.8.2019 at 4.10 P.M. The M.L.C. Report , annexed as

Annexure-1, categorically establishes that the injured Chandrawati sustained one lacerated wound of 1 cm x 1 cm over right side of frontal region of her skull and another injury is of almost same dimension over the left side of frontal region of her scull. The fresh bleeding was present, though both the injuries were said to be simple in nature. But when Jogendra Singh (since deceased) tried to lodge an F.I.R. against Satyapal, the police personnel instead lodging the F.I.R., misbehaved, humiliated and ousted him from the police station. On this, it has been argued by learned counsel for the applicant that a ruthless and insensitive approach has been adopted by the police personnel. If the police at the point of time had taken action against erring offenders, this unfortunate incident would not have happened. Disgusted and disgruntled by the action on the part of police, the couple namely Jogendra and Chandrawati, as a mark of protest, self immolated themselves by pouring kerosene oil all over them and setting themselves ablaze, right in front of Police Station Surir, District-Mathura on 28.8.2019. This unfortunate incident caused upheaval and turmoil in the area as well as local media. The son of Jogendra prepared video of this incident and made it viral and its audio has been made part of the Case Diary.

9. After the incident, the police sprang into action and one Shri Vijay Singh Chauhan, C.O. Math, P.S.-Surir, District-Mathura himself has registered yet another F.I.R. as Case Crime No.174 of 2019 on the same day i.e. 28.8.2019 at 20.44 hours against erring police officials namely Anoop Saroj, Deepak Nagar and Sunil Kumar with specific allegation that Jogendra Singh, the deceased, has given a written application referring the incident dated 23.8.2019 against Satyapal s/o Than Singh, informing the police about the alleged misbehaviour and assault with his wife but the police personnel refused to oblige him by not lodging the F.I.R. in this regard and thus, the aforesaid F.I.R. was got registered against erring police personnel u/s 166A (c) of I.P.C.

10. Shri Pankaj Kumar Shukla, learned counsel for the applicant has tried to raise his castle of the argument by referring aforesaid two F.I.Rs., which were lodged one after the other on 28.8.2019 itself only after the incident of self immolation by Jogendra Singh and his wife before the police station. On this learned counsel for the applicant submitted that if the Court evaluates the date and time of the F.I.R. No.179, it refers to 28.8.2019 at 8.00 in the morning, which is self in conformity with aforementioned facts and circumstances.

11. It has been further submitted by learned counsel for the applicant that after the incident the local police caught hold the son of the deceased namely Jagdish, adopting a typical *policia* might, after the said demise of Jogendra Singh, succeeded in lodging the F.I.R. by painting canvass of the story in contrast shades and colours, against Satyapal, Bablu, Than Singh, Mohan Shyam (applicant) and Shibbo, mentioning the prosecution story, which is already mentioned above.

12. It has been next contended by learned counsel for the applicant that there are plethora of witnesses who have testified that being disgusted by the police inaction, the couple under protest immolated themselves. The C.O. too has admitted that the deceased Jogendra immolated himself in front of police station and thus it has

been contended by the counsel that the applicant has been implicated by the police using his son Jagish as a tool, in order to save the culprits of Case Crime No.174 of 2019. Applicant's counsel has sarcastically submitted that the death of Jogendra and his wife came to the police as the "blessing in disguise" to save erring police personnel and to rope in the innocent people in this offence. In such a case, there seems that the sport of the police is the death of the evidence.

13. Learned counsel for the applicant has drawn attention of the Court to the dying-declaration of the deceased dated 31.8.2019 allegedly recorded when he was undergoing treatment at Safdarganj Hospital, Delhi. He has seriously disputed the authenticity of this dying-declaration and has submitted that even assuming for the sake of argument to be correct, even then from the said dying-declaration it is clearly emerging that co-accused Bablu s/o Viri Singh, who could be said to be beneficiary of alleged deal. From the alleged dying-declaration it is clear that the informant Jagdish came to the applicant, who happens to be Pradhan of the village, for addressing some grievance but instead addressing the grievance he extended threat to him and persuaded him to surrender his land. The harassment part is attributed to Bablu, Satyapal and one Shamma. In the last few lines of the said dying-declaration a tangent remark has been made that *"in front of the police station, the applicant dragged his wife by her heir and started hurling abuses"* and out of sheer frustration he has committed suicide by pouring kerosene over him and his wife and set themselves afire. On this it has been contended by learned counsel for the applicant that the applicant is completely innocent and at best he could be liable for not rendering desired assistance to the informant Jagdish in pacifying the situation. The applicant in no way could be said to be a beneficiary of alleged land, claimed by the co-accused Bablu and the applicant is a rank outsider to this deal and he has hurled abuses. Learned counsel for the applicant has seriously questioned the genuineness of aforesaid dying-declaration but as mentioned above, if assuming for the sake of argument that this is an authentic dying-declaration, even then the case would not fall within the ambit of Section 306 I.P.C.

14. After hearing the rival submissions by the learned counsels, lets decide the moot pertinent question of law as to whether any conduct of the applicant would fall within the ambit of Section 107/306 IPC? Lets spell out the bare provisions of above-mentioned sections and related citations of Hon'ble the Apex Court in this regard. They are :-

Section 306 IPC provides the punishment for abetment of suicide, which reads thus :-

"Section 306- Abetment of suicide.- *If any person commit suicide, whoever abets the commission of such suicide, shall be punished with imprisonment of either description for a term which may extended to ten years, and shall also be liable to file."*

Section 107 of the IPC defines abetment, which reads thus:-

"Section 107- Abetment of a thing.- *A person abets the doing of a thing, who--(Firstly)-- Instigates any person to do that thing; or*

(Secondly)--Engages with one or more other person or persons in any conspiracy for the doing of that thing, if an

act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or

(Thirdly)-- Intentionally aids, by any act or illegal omission, the doing of that thing."

15. The word instigate literally means to goad, urge, forward, provoke, incite, encourage to do an act. A person is said to instigate another person, when he actively suggests or stimulates him to do an act by means of language, direct or indirect or whether it takes the form of expression, solicitation or of hints of incitement or encouragement. Instigation may be in expression, word or may be simply by conduct of a person creating such a situation exploiting his position, that the other person have no other option but to take the extreme step. Such a person would be liable for abetment.

16. On this, learned counsel for the applicant has drawn the attention of the Court to the various legal pronouncement of Hon'ble Apex Court in this regard i.e. abetment.

17. In the case of ***Chitresh Kumar Chopra vs. State (Gov. of NCT of Delhi) reported in (2010) 3 SCC (Crl.) 367***, the relevant extract of paragraph 14 of the judgement quoted hereinbelow :-

"Speaking for the three-Judge Bench, R.C. Lahoti, J. (as His Lordship then was) said that instigation is to goad, urge forward, provoke, incite or encourage to do "an act". To satisfy the requirement of "instigation", though it is not necessary that actual words must be used to that effect or what constitutes "instigation" must necessarily and specifically be suggestive of the consequence. Yet a reasonable certainty to incite the consequence must spelt out. ***Where the accused had, by his acts or omission or by a continued course of conduct, created such circumstances that the deceased was left with no other option except to commit suicide, in which case, an "instigation" may have to be inferred.*** *A word uttered in a fit of anger or emotion without intending the consequences to actually follow, cannot be said to be instigation."*

18. There is yet another judgement of Hon'ble Apex Court in the case of ***Amalendu Pal alias Jhantu Vs. State of West Bengal reported in (2010) 1 SCC 707.*** Paragraph 12 and 13 of the judgement is quoted herein below:-

"12. Thus, this Court has consistently taken the view that before holding an accused guilty of an offence under Section 306 IPC, the Court must scrupulously examine the facts and circumstances of the case and also assess the evidence adduced before it in order to find out whether the cruelty and harassment meted out to the victim had left the victim with no other alternative but to put an end to her life. It is also to be borne in mind that in cases of alleged abetment of suicide there must be proof of direct or indirect acts of incitement to the commission of suicide. *Merely on the allegation of harassment without their being any positive action proximate to the time of occurrence on the part of the accused which led or compelled the person to commit suicide, conviction in terms of Section 306 IPC is not sustainable.*

13. In order to bring a case within the purview of Section 306 of IPC there must be a case of suicide and in the commission of the said offence, the person who is said to have abetted the

commission of suicide must have played an active role by an act of instigation or by doing certain act to facilitate the commission of suicide. *Therefore, the act of abetment by the person charged with the said offence must be proved and established by the prosecution before he could be convicted under Section 306 IPC."*

19. The pioneer judgement in this regard of Hon'ble Apex Court in the case of ***Ramesh Kumar Vs. State of Chhattisgarh*** reported in ***(2001) 9 SCC 618.*** For ready reference, the relevant extract of the judgement is quoted herein below:-

"20. Instigation is to goad, urge forward, provoke, incite or encourage to do "an act". To satisfy the requirement of instigation though it is not necessary that actual words must be used to that effect or what constitutes instigation must necessarily and specifically be suggestive of the consequence. Yet a reasonable certainty to incite the consequence must be capable of being spelt out. The present one is not a case where the accused had by his acts or omission or by a continued course of conduct created such circumstances that the deceased was left with no other option except to commit suicide in which case an instigation may have been inferred. *A word uttered in the fit of anger or emotion without intending the consequences to actually follow cannot be said to be instigation."*

20. There is yet another judgement of Hon'ble Apex Court in the case of ***State of West Bengal Vs. Orilal Jaiswal reported in (1994) 1 SCC 73.*** For ready reference the relevant extract of the judgement is quoted herein below:-

"This Court has cautioned that the court should be extremely careful in assessing the facts and circumstances of each case and the evidence adduced in the trial for the purpose of finding whether the cruelty meted out to the victim had in fact induced her to end the life by committing suicide. If it transpires to the court that a victim committing suicide was hypersensitive to ordinary petulance discord and differences in domestic life quite common to the society to which the victim belonged and such petulance discord and differences were not expected to induce a similarly circumstanced individual in a given society to commit suicide, the conscience of the Court should not be satisfied for basing a finding that the accused charged of abetting the offence of suicide should be found guilty."

21. In the case of ***Ramesh Kumar Vs. State of Chhattisgarh (supra)*** Hon'ble Apex Court again observed in paragraph 20 of the judgement which is quoted herein below:-

"20.... The question as to what this the cause of a suicide has no easy answers because suicidal ideation and behavious in human beings are complex and multifaceted. Different indivicuals in the same situation react and behave differently because of the personal meaing they add to each event, thus accounting for individual vulnerability to suicide. Each individual's suicidability pattern depends on his inner subjective experience of mental pain, fear and loss of self-respect. Each of these factors are crucial and exacerbating contributor to an individual's vulnerability to end his own life, which may either be an attempt for

self protection or an escapism from intolerable self."

22. In the latest judgement of Hon'ble Apex Court in the case of ***Arnab Manoranjan Goswami Vs. State of Maharashtra & Others*** decided on 27.11.2020 in Crl. Misc. Criminal Appeal No. 742 of 2020. Paragraph 57 of the judgement is quoted herein below:-

"The Hon'ble Apex Court has provided the guidelines that while considering the application for grant of bail under Article 226 in a suitable cases, the High Court must considered the settled factors, which emerges from the precedents of this Court. These factors can be summarized as follows:-

(i) The nature of the alleged offence, the nature of the accusation and the severity of the punishment in the case of a conviction;

(ii) Whether there exists a reasonable apprehension of the accused tampering with the witnesses or being a threat to the complainant or the witnesses;

(iii) The possibility of securing the presence of the accused at the trial or the likelihood of the accused fleeing from justice;

(iv) The antecedents of and circumstances which are peculiar to the accused;

(v) Whether prima facie the ingredients of the offence are made out, on the basis of the allegations as they stand, in the FIR; and

(vi) The significant interests of the public or the State and other similar considerations."

23. At this juncture, Shri Amit Daga, learned counsel for the complainant has raised his arguments in two folds;

24. Firstly, that the applicant being a Pradhan of village was not honest in his dealing and he was constantly taking the side of offenders. It is alleged that the applicant is having his hands in glove with the named accused persons and out of sheer frustration the couple have set themselves ablaze and;

25. Secondly, that the applicant is a political influential person having political inclination, affiliation and the fact that enjoys a long criminal history of 16 cases, description of which has been given in Annexure-8 to the petition.

26. I have perused the criminal history of the applicant and its final outcome. Out of 16 cases, in most of them, either final reports have been submitted and the same were accepted by the court or expunged by the court itself. There are three cases in which he has been acquitted.

27. On this, it has been submitted by learned counsel for the complainant that being a local politician (Pradhan), pasting such type of frivolous criminal cases i.e. FIRs, NCRs is rampant in the State especially against persons who are holding public office and that is why the police has submitted either final report or expunged the applicant from those cases and satisfied by the explanation given by learned counsel for the applicant in a form of annexed chart.

28. No doubt the criminal antecedents of an accused carries weight in invoking the discretionary power of the Court while granting bail, but in the present scenario where in most of the cases the police itself has submitted final report and accepted by the court and few cases are State sponsored under the Gunda Act and u/s 110(g) of

Cr.P.C. On this basis a person cannot be put behind the bars for ever.

29. But nonetheless the Hon'ble Apex Court while deciding the case of ***Neeru Yadav vs State of U.P. and another in Criminal Appeal No.1272 of 2015*** on 29.9.2015, has referred a few significant lines from Benjamin Disraeli, as follows :

"I repeat that all power is a trust-that we are accountable for its exercise -that, from the people and for the people, all springs, and all must exist.

That apart, it has to be remembered that justice in its conceptual eventuality and connotative expanse engulfs the magnanimity of the sun, the sternness of mountain, the complexity of creation, the simplicity and humility of a saint and the austerity of a Spartan, but it always remains wedded to rule of law absolutely unshaken, unterrified, unperturbed and loyal."

30. In yet another judgment of ***Rajesh Ranjan Yadav v. CBI, (2007) 1 SCC (Cri) 254*** and also in ***Ash Mohammad v. Shiv Raj Singh (2012) 9 SCC 446,*** the Hon'ble Apex Court lucidly explained the powers of the Court while considering bail application as "we are of the opinion that while it is true that Article 21 is of great importance because it enshrines the fundamental right to individual liberty, but at the same time a balance has to be struck between the right to individual liberty and the interest of society. No right can be absolute, and reasonable restrictions can be placed on them. While it is true that one of the considerations in deciding whether to grant bail to an accused or not is whether he has been in jail for a long time, the Court has also to take into consideration other facts and circumstances, such as the interest of the society."

31. Compelling the aforementioned parameters, no doubt there are 16 cases to the credit of the applicant but fact remains that, in most of them the police has either submitted the closure report, which has been accepted by the Court or rest of them are State sponsored.

32. Lastly it has been contended by learned counsel for the complainant that bail applications of co-accused persons Than Singh and Bablu were rejected by the Co-ordinate Bench of this Court and, as such, the applicant too deserves same treatment.

33. It is settled principles of law that the principles of parity do not apply in rejection. The applicant is in jail since 30.10.2019 and there is no possibility of early conclusion of trial in near future and prima facie it seems that none of the conduct of the applicant would attract any of the provisions of Section 107 of I.P.C. (if taken the dying-declaration of Jogendra Singh to be true for the sake of argument). It also seems that it is the handiwork of police personnel who used the deceased's son Jagdish as a tool to falsely implicate all his opponents.

34. Taking into account the totality of circumstances, the old age of applicant being 75 years, more particularly the genesis of F.I.R. No.179 of 2019 and its background this Court is impelled to put a grave question mark over the integrity and modus operandi of the police. As such, the applicant deserves to be bailed out.

35. Keeping in view the nature of the offence, evidence on record regarding complicity of the accused, 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, the Court is of the considered opinion that the applicant has made out a case for bail. The bail application is allowed.

36. Let the applicant Mohan Shyam, involved in aforementioned case 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, subject to following conditions. Further, before issuing the release order, the sureties be verified.

(i) THE APPLICANT SHALL FILE AN UNDERTAKING TO THE EFFECT THAT HE 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.

(ii) THE APPLICANT SHALL REMAIN PRESENT BEFORE THE TRIAL COURT ON EACH DATE FIXED, EITHER PERSONALLY OR THROUGH HIS COUNSEL. IN CASE OF HIS ABSENCE, WITHOUT SUFFICIENT CAUSE, THE TRIAL COURT MAY PROCEED AGAINST HIM UNDER SECTION 229-A IPC.

(iii) IN CASE, THE APPLICANT MISUSES THE LIBERTY OF BAIL DURING TRIAL AND IN ORDER TO SECURE HIS PRESENCE PROCLAMATION UNDER SECTION 82 CR.P.C., MAY BE ISSUED AND IF APPLICANT FAILS TO APPEAR BEFORE THE COURT ON THE DATE FIXED IN SUCH PROCLAMATION, THEN, THE TRIAL COURT SHALL INITIATE PROCEEDINGS AGAINST HIM, IN ACCORDANCE WITH LAW, UNDER SECTION 174-A IPC.

(iv) THE APPLICANT 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 APPLICANT IS 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 HIM IN ACCORDANCE WITH LAW.

(v) THE TRIAL COURT MAY MAKE ALL POSSIBLE EFFORTS/ENDEAVOUR AND TRY TO CONCLUDE THE TRIAL WITHIN A PERIOD OF ONE YEAR AFTER THE RELEASE OF THE APPLICANT.

37. In case of breach of any of the above conditions, it shall be a ground for cancellation of bail.

38. It is made clear that observations made in granting bail to the applicant shall not in any way affect the learned trial Judge in forming his independent opinion based on the testimony of the witnesses.

39. Since the bail application has been decided under extra-ordinary circumstances, thus in the interest of justice following additional conditions are being imposed just to facilitate the applicant to be

released on bail forthwith. Needless to mention that these additional conditions are imposed to cope with emergent condition-:

1. 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.

2. The party shall file computer generated copy of such order downloaded from the official website of High Court Allahabad.

3. The computer generated copy of such order shall be self attested by the counsel of the party concerned.

4. 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.

40. However, it is made clear that any wilful violation of above conditions by the applicant, shall have serious repercussion on his/her bail so granted by this Court and the trial court is at liberty to cancel the bail, after recording the reasons for doing so, in the given case of any of the condition mentioned above.

(2021)02ILR A910
APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 11.02.2021

BEFORE

THE HON'BLE ATTAU RAHMAN MASOODI, J.

First Appeal From Order No. 230 of 2010
with
First Appeal From Order No. 305 of 2010

Anish ...Appellant
Versus
National Insurance Co. Ltd. Sitapur & Ors. ...Respondents

Counsel for the Appellant:
Ram Lakhan Vishwakarma

Counsel for the Respondents:
Ashok Sahu, S.C. Gulati

A. Civil Law - Motor Vehicles Act, 1988: Section 173 - Insurance and Motor Vehicles – Compensation - The appeals have arisen out of the case of death in the same motor accident between a motorcycle and a tractor. The insurer while disputing the liability to pay had pleaded two distinct grounds against the two vehicles involved in the accident. Firstly, the insurance company contrary to the oral evidence stated that the unregistered trolley was used for a purpose other than agricultural and was thus a transport vehicle used for commercial purpose without a permit, hence there was violation of the insurance cover. (Para 9)

Secondly, the motorcycle, which according to the insurer was duly insured but the same was not driven by a person possessed with a valid licence, therefore, violation of policy was pleaded to dispute the liability to pay. This ground was found favour with by the Tribunal. The legal representatives of the deceased could not prove that the driver of motorcycle possessed a valid driving licence and both the deceased being victims of their own violation, the dependents-claimants were held entitled to a lesser amount of compensation. (Para 10)

For first ground, two conditions laid down by this Court are that at the time of accident, the tractor trolley must not be operated on a public road and that it is not used for commercial purpose. Attachment of a trailer to the tractor when used for commercial purpose on public road, would constitute a statutory defence within the ambit of the provisions of Motor Vehicles Act, 1988. (Para 15, 16)

B. In civil law, the burden to prove a fact lies on the party who has averred and it is that party who has to lead the evidence to prove the alleged fact. The insurer in the present case has failed to lead any evidence in support of the pleas advanced. Therefore, the oral evidence led by the claimants and defendants was relevant and could not be ignored to the advantage of the insurer particularly when he had an opportunity to cross-examine the witnesses.

The facts before this Court insofar as the pleadings are concerned do show that the alleged commercial use of the trolley was pleaded by the insurer without leading any evidence whatsoever. Once a pleading alleging use of trolley for commercial purpose without a valid permit was advanced in the written statements by the insurance company, therefore, it cannot be said that there was no pleading at all. The burden to prove such a fact rested on the insurer but he failed to lead any evidence except the cover note. On the contrary the evidence available on record disproving commercial use of the trolley had amply come on record. The Tribunal in such a situation ought not to have failed to apply mind on the relevant oral evidence of the witnesses, according to which, the trolley was not used for commercial purpose. The load on the trolley was indicative of nothing but an agricultural purpose. The material evidence available on record has thus escaped attention of the Tribunal. (Para 18, 19)

For the reasons recorded above, both the F.A.F.Os. are hereby allowed and the award made by the Tribunal shall be satisfied by National Insurance Company Ltd. (Para 20)

Appeals allowed. (E-3)

Precedent followed:

1. United India Insurance Co. Ltd. Vs Smt. Suman & ors., FAFO No. 611 of 2013, decided on 06.03.2013 (Para 15)

2. Natwar Parikh & Co. Ltd. Vs St. of Karn. & ors., 2006 ACJ (1) (Para 16)

Precedent distinguished:

1. The National Textile Corporation Ltd. Vs Naresh Kumar Badri Kumar Jagad & ors., 2011 (29) LCD 1793 (Para 18)

2. Ram Swaroop Gupta (dead) by LRs Vs Bishun Narain Inter College & ors., AIR 1987 SC 1242 (Para 15)

Present appeals challenge judgments/orders dated 23.11.2006 and 03.02.2007, in F.A.F.O. No. 305 of 2010 and in F.A.F.O. No. 230 of 2010, respectively passed by the Tribunal.

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

1. Heard learned counsel for the appellants and Miss Pooja Arora holding brief of Sri S.C. Gulati, learned counsel for the insurance company.

2. These two appeals filed under Section 173 of Motor Vehicles Act involving a common question of law were heard together and are decided by a common judgement. Both the appeals have arisen out of the case of death in the same motor accident. In FAFO No. 305 of 2010, a compensation of Rs. 80,000/- awarded by the Tribunal is the subject matter of dispute whereas in FAFO No. 230 of 2010, the amount involved is restricted to Rs. 67500/- .

3. In both the cases the liability for payment has been fixed exclusively upon the appellant, although the tractor involved in the accident bearing No. UP34-A-4209 belonged jointly to several other persons as per the registration certificate. Amongst the owners, the appellant alone was chosen to be impleaded as a defendant in the claim petitions. The appellant by means of the present appeals has disputed the liability on the ground that his vehicle i.e. tractor no. UP34-A-4209 was duly insured and was

driven by a person possessed with a valid driving licence. Therefore in absence of any violation of the insurance policy, the liability ought to have been fixed upon the insurance company was the case set up by the appellant.

4. The brief facts of the case are that the claimants in both the claim petitions have averred involvement of two vehicles in the accident and both were insured by one and the same insurance company i.e. New India Assurance Company. There was no mention of a trolley attached to the tractor in so far as the facts set out in the claim petitions are concerned. Likewise the written statements filed by the appellant while disputing the accident did not mention of any trolley attached to the tractor. It was simply pleaded by the owner that the tractor was plied in terms of the insurance policy.

5. The insurance company in the written statements filed at the initial stage also did not clarify the position as regards the attachment of trolley and it is in these circumstances that the claim petitions proceeded for framing of issues and thereafter the evidence was led. During the course of evidence when PW-1 Vijay Prakash was examined and cross-examined, the trolley attached to the tractor surfaced and it was stated that the same was loaded with 'Jhankhar' (dead wood of Arhar).

6. It is during the course of evidence that the New India Assurance Company sought amendment in the written statements which were allowed. Thus, two paragraphs viz. 28A and 28B came to be added in the pleadings which read as under:

"28A. The trolley was attached with the alleged tractor as per version of the alleged claimants and alleged F.I.R. Some persons were also sitting on the tractor although the seating capacity of tractor is only one for driver only. The same was not also used for agriculture purpose at the time of disputed accident and was used for hire and reward. Trolley was also unregistered, uninsured, without permit and fitness u/s 66, 56, 39, 61 and 146 MV Act. The same cannot be used and tractor trolley comes under the definition of goods vehicle. As such driver possessing transport vehicle hence can only drive the same. The driver was also not holding valid and effective driving licence. As such the same was deliberately used contrary to MV Act and terms and condition of policy if any and under no circumstances insurance co.- OP No. 3 is liable to pay any compensation and the same is not maintainable against answering OP.

28B. That as per allegations mentioned in claim petition the alleged Smt. Raj Rani was pillion rider on alleged M/cycle UP32 AL/6706 (gratuitous passenger) for which there is no insurance and no premium been charged for covering the risk of pillion rider. As such the answering opp. party is also not liable to pay any compensation."

7. In the background of pleadings, as aforesaid, the evidence went on to be recorded before the Tribunal. The oral evidence of two persons, namely, Vijay Prakash and Kamlesh Kumar was recorded on behalf of the claimants whereas oral evidence of the owner of the vehicle i.e. the present appellant-Anish (DW-1) and the driver of the vehicle viz Kallan (DW-2) was recorded on behalf of the defendants.

8. A close scrutiny of the oral evidence led by the claimants as well as the deposition of DW-1 and DW-2 clearly

shows that the attached trolley was stated to be loaded with *Jhankhar.* It is also gathered from the above evidence that the tractor-trolley was stated to be used for agricultural purpose.

9. The pleadings of the insurance company contrary to the oral evidence referred to above stated that the unregistered trolley was used for a purpose other than agricultural and was thus a transport vehicle used for commercial purpose without a permit, hence there was violation of the insurance cover. It is on this premise that the judgment/order of the Tribunal is sought to be defended by the insurance company i.e. respondent no. 1.

10. The Tribunal in the backdrop of the pleadings and the evidence aforesaid has dealt with the issues no. 2 and 3 which related to the liability and also as to whether the tractor was operated in terms of the insurance policy or not. It is to be noted that the insurer while disputing the liability to pay had pleaded two distinct grounds against the two vehicles involved in the accident. Insofar as the motorcycle no. UP-32-AL-6706 is concerned, which according to the insurer was duly insured but the same was not driven by a person possessed with a valid licence, therefore, violation of policy was pleaded to dispute the liability to pay. This ground was found favour with by the Tribunal. The legal representatives of the deceased could not prove that the driver of motorcycle possessed a valid driving licence and both the deceased being victim's of their own violation, the dependents-claimants were held entitled to a lesser amount of compensation.

11. The deceased Rajit Ram was riding the motorcycle upon which his wife Raj Rani, who also died in the same accident, was a pillion rider, therefore, legal representatives of the deceased owing to the degree of negligence and violation of policy contributed by the deceased Rajit Ram and the gratuitous pillion rider who was his wife were denied compensation proportionately.

12. The claimants had also approached this Court for enhancement of compensation by filing two appeals i.e. FAFO No. 843 of 2010 and FAFO No. 842 of 2010 which have already been dismissed for want of prosecution by orders dated 30.10.2017 and 8.8.2017 respectively.

13. Now coming to the involvement of the tractor, it is worthwhile to mention that the defence pleaded by the insurer was bound to be analyzed by the Tribunal in the light of the relevant evidence adduced by the parties. It is to be noted that apart from the averments made in the written statement denying the liability, the insurer has not filed any document except paper no. 32-Ga i.e. the insurance policy of the tractor. The cover note of the insurance policy was filed to show that no premium was paid by the owner of the tractor towards the insurance of unregistered trolley of which there was no permit for its commercial use.

14. Learned counsel for the appellant has argued that even if the tractor was attached to the trolley and the trolley was used for agricultural purpose, it would not require a permit, therefore, the insurance cover of the tractor as per the evidence on record ought to have been construed as valid within its fullest scope i.e. inclusive of trailer.

15. In support of the submission put forth, learned counsel for the appellant has placed reliance upon a judgement of this Court rendered in F***AFO No. 611 of 2013***

(United India Insurance Co. Ltd. v. Smt. Suman and others decided on 6.3.2013), which lays down the twin test. The two conditions laid down are that at the time of accident, the tractor trolley must not be operated on a public road and that it is not used for commercial purpose.

16. Miss Pooja Arora, learned counsel appearing for the insurance company citing a judgement of the apex court in the case reported in ***2006 ACJ (1) (Natwar Parikh & Co. Ltd v. State of Karnataka and others)***, has further clarified the position as to when a trailer attached to the tractor would be construed to be a transport vehicle. Attention of this Court is drawn to Para-24 of the said judgement which clearly lays down that attachment of a trailer to the tractor when used for commercial purpose on public road, would constitute a statutory defence within the ambit of the provisions of Motor Vehicle Act, 1988.

17. Learned counsel for the insurance company has further argued that in the present case, the evidence available on record cannot be read beyond the scope of pleadings of the claimants and defendants. According to the learned counsel, neither the claimants nor the owner of the vehicle i.e. the appellant herein pleaded before the Tribunal about the attachment of trolley with the tractor nor there is any mention in the pleadings that the tractor even if the trolley was attached, was used for agricultural purpose. According to her, in absence of such pleadings, the oral evidence of the witnesses to the effect that the trolley attached with the tractor was loaded with *Jhankhar* can not be construed beyond the scope of pleadings to the advantage of the present appellant. The evidence of a party according to the learned counsel cannot be read beyond what was pleaded.

18. The facts before this Court insofar as the pleadings are concerned do show that the alleged commercial use of the trolley was pleaded by the insurer without leading any evidence whatsoever. Once a pleading alleging use of trolley for commercial purpose without a valid permit was advanced in the written statements by the insurance company, therefore, it cannot be said that there was no pleading at all. The burden to prove such a fact rested on the insurer but he failed to lead any evidence except the cover note. On the contrary the evidence available on record disproving commercial use of the trolley had amply come on record. The Tribunal in such a situation ought not to have failed to apply mind on the relevant oral evidence of the witnesses, according to which, the trolley was not used for commercial purpose. The load on the trolley was indicative of nothing but an agricultural purpose. The material evidence available on record has thus escaped attention of the Tribunal. The judgement cited by learned counsel for the insurance company reported in *2011 (29) LCD 1793 (The National Textile Corporation Ltd. v. Naresh Kumar Badri Kumar Jagad and others) with reference to the case reported in AIR 1987 SC 1242 [Ram Swaroop Gupta (dead) by LRs v. Bishun Narain Inter College & others)* is an instance where there was complete absence of pleadings and it is in that situation that evidence could not be read beyond the scope of pleadings. In civil law, the burden to prove a fact lies on the party who has averred and it is that party who has to lead the evidence to prove the alleged fact. The insurer in the present case has failed to lead any evidence in support of the pleas advanced in para 28-A and 28-B

extracted above. Therefore, the oral evidence led by the claimants and defendants was relevant and could not be ignored to the advantage of the insurer particularly when he had an opportunity to cross-examine the witnesses.

19. The insurer in the case at hand had specifically pleaded the involvement of the trolley being used for commercial purpose and having an opportunity of cross-examination of the witnesses produced before the Tribunal, cannot come up in defence and argue that the oral evidence available on record ought not to have been considered by the Tribunal for want of pleadings of the claimants or the owner as such. The proposition of law advanced before the Court, taking support of the decisions cited before this Court, does not help the insurer in the nature of proceeding under the Motor Vehicles Act which is a beneficial legislation. The finding recorded by the Tribunal that the unregistered trolley attached to the tractor required the permit, in my humble consideration, looking to the material available on record, is clearly perverse. The position that the trolley was loaded with *'Jhankar'* and nothing was found otherwise in the cross-examination by the insurance company, was a satisfactory proof to belie the stand adopted in paras 28-A and 28-B. The finding so recorded deserves to be overruled and the liability to pay would thus stand shifted upon the insurer to the extent of compensation as has been allowed by the Tribunal.

20. For the reasons recorded above, both the FAFOs are hereby allowed. The judgement/order dated 23.11.2006 impugned in FAFO No. 305 of 2010 and 3.2.2007 impugned in FAFO No. 230 of 2010 passed by the Tribunal are modified to the extent that the award made by the Tribunal shall be satisfied by National Insurance Company Ltd. and the necessary compliance of the award shall be made within a period of two months from today.

21. The statutory amount or any other amount deposited in compliance of any order passed by this Court is permitted to be withdrawn by the appellant. The interest on the awarded amount in either of the two appeals is restricted to Rs. 25,000/- or 4% whichever is lesser and the judgement/order passed by the Tribunal is also modified to this extent.

22. No order as to cost.

(2021)02ILR A915
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 03.12.2020

BEFORE

THE HON'BLE NAHEED ARA MOONIS, J.
THE HON'BLE VIVEK VARMA, J.

First Appeal Defective No. 300 of 2020

Liaqat Hussain ...Appellant
Versus
Smt. Jainab Parveen & Anr. ...Respondents

Counsel for the Appellant:
Sri Arun K. Singh Deshwal

Counsel for the Opposite Parties:

A. Family Law – Family Courts Act, 1984 - Sections 7(2)(a), 19 - Code of Criminal Procedure - Section 125 - Maintenance - Maintainability of appeal Remedy against the order passed by the Family Court under Section 125 of Chapter IX of Cr.P.C. has been specifically provided under Section 19(4) of the Act, which confers powers on the High Court to examine the

correctness, legality or propriety to the order passed by the Family Court. When the Family Court is dealing with the proceeding under Chapter IX of Cr.P.C. exercisable by the Magistrate of the first class in such contingency criminal revision would be maintainable against both interim as well as final order passed u/s 125 Cr.P.C. (Para 12)

B. An order which substantially affects the rights and decides certain rights of the parties, has been held not to be an interlocutory order so as to bar revision. (Para 13)

In the above conspectus, an application for interim maintenance u/s 125 Cr.P.C. is a separate proceeding to be disposed of while pending final order and any such order of interim maintenance would be intermediate or quasi judicial order, effecting the vital rights of the parties. (Para 14)

The appeal is hereby held as not maintainable u/s 19(1) of the Family Courts Act, 1984 qua proceeding under Chapter IX of the Cr.P.C. (Section 125-128) in view of the mandate of sub-section 2 of S. 19 of the said Act. The issue does not relate to the merits of the case under appeal. However, appellant is given liberty to file a criminal revision u/s 19(4) of the Family Court Act, 1984. (Para 15, 17)

Appeal dismissed. (E-3)

Precedent followed:

1. Manish Aggarwal Vs Seema Aggarwal & ors., FAO No. 288 of 2012, decided on 13.09.2012 (Para 10)

2. Amarnath & ors. Vs St. of Har. & ors., AIR 1977 SC 2185 (Para 13)

Present appeal is against judgment and order dated 28.08.2020, passed by Principal Judge, Family Court, Amroha.

(Delivered by Hon'ble Naheed Ara Moonis, J.
&
Hon'ble Vivek Varma, J.)

1. The instant first appeal has been filed under Section 19 of the Family Courts Act on behalf of the appellant Liaqat Hussain, against the judgement and order dated 28.8.2020 passed by the Principal Judge, Family Court, Amroha in Case No. 173 of 2017 (Smt. Zainab Parveen Vs. Liaqat Hussain) whereby the application moved by the respondent-wife claiming maintenance for herself and her minor daughter under Section 125 of the Code of Criminal Procedure has been allowed and the appellant-husband was directed to pay maintenance at the rate of Rs. 7000/- per month to the wife Smt. Zainab Parveen and Rs. 5000/- per month to the minor daughter Aleema Hussain to be paid by the appellant by the 10th of each month from the date of order.

2. The Stamp Reporter of this Court raised objections in respect of competence of this appeal as not maintainable in view of Section 19 of the Family Courts Act, 1984.

3. The question which arises in the present appeal is whether an appeal would lie under Section 19 of the Family Courts Act, 1984 against an order passed by the Family Court in a proceeding filed under Chapter IX of the Code of Criminal Procedure (Section 125 to 128).

4. Before adverting to the maintainability of the appeal, the factual background of the case is that the appellant was married with the respondent-Zainab according to Muslim custom and rites on 31.3.2013 and out of their wedlock a female child was born, but on account of matrimonial bickering, the respondent-wife left the house of her husband and started living in her parental house under compelling circumstances and as she could

not maintain herself and her minor daughter aged 3 years, she moved an application under Section 125 Cr.P.C. before the Family Court, Amroha on 01.9.2017 claiming maintenance from the appellant. After considering the facts of the case, the learned Family Judge passed an order on 28.8.2020 granting maintenance at the rate of Rs. 7,000/- to the wife and Rs. 5000/- to the child per month from the date of order. Being aggrieved by the order dated 28.8.2020, the appellant has come up before this Court by filing the present appeal under Section 19 of the Family Courts Act, 1984.

5. The Family Courts Act, 1984 was enacted to promote speedy settlement of dispute relating to marriage and family affairs. Section 7 of the Act deals with the jurisdiction of the Family Court. By virtue of Section 7(2)(a) of the Act, the proceeding under Chapter IX Section 125 Cr.P.C. shall lie before the Family Court. It would be apposite to reproduce section 7(2)(a) of the Act.

Section 7(2) Subject to the other provisions of this Act, a Family Court shall also have and exercise-

(a) the jurisdiction exercisable by a Magistrate of the First Class under Chapter IX (relating to order for maintenance of wife, children and parents) of the Code of Criminal Procedure, 1973 (2 of 1974);

Section 19 of the Act deals with the appeals and revisions, which falls under Chapter V of the said Act, which is quoted herein below:

Chapter V- Appeals and Revisions

19. Appeal-. (1) Save as provided in sub-section (2) and notwithstanding anything contained in the Code of Civil Procedure, 1908 (5 of 1908), or in the Code of Criminal Procedure, 1973 (2 of 1974), or in any other law, an appeal shall lie from every judgement or order, not being an interlocutory order of a Family Court to the High Court both on facts and law.

(2) No appeal shall lie from a decree or order passed by the Family Court with the consent of the parties or from an order passed under Chapter IX of the Code of Criminal Procedure, 1973 (2 of 1974):

Provided that nothing in this sub-section shall apply to any appeal pending before a High Court or any order passed under Chapter IX of the Code of Criminal Procedure 1973 (2 of 1974) before the commencement of the Family Courts (Amendment) Act, 1991.

(3) Every appeal under this section shall be preferred within a period of thirty days from the date of the judgment or order of a Family Court.

(4) The High Court may, of its own motion or otherwise, call for and examine the record of any proceeding in which the Family Court situate within its jurisdiction passed an order under Chapter IX of the Code of Criminal Procedure, 1973 (2 of 1974) for the purpose of satisfying itself as to the correctness, legality or propriety of the order, not being an interlocutory order, and, as to the regularity of such proceeding.

(5) Except as aforesaid, no appeal or revision shall lie to any court from any judgment, order or decree of a Family Court.

(6) An appeal preferred under sub-section (1) shall be heard by a Bench consisting of two or more Judges."

6. It is relevant to state that Chapter V of the Act contains only one section with the heading appeals and revisions, but Section 19 per se does not use expression revision.

7. A bare reading of Section 19 of the said Act elucidates that under sub-section (1) save as provided in sub-section (2), an appeal lies from every judgement or order of the Family Court to the High Court, both

on facts and on law. This right of appeal comes with one limitation that it does not lie against an interlocutory order. Sub-section (2) of Section 19 of the said Act specifically prohibits any appeal from an order passed under Chapter IX of the Code of Criminal Procedure. Thus, a conjoint reading of sub-section (1) and sub-section (2) of Section 19 of the Act makes it clear that the appeal would not be maintainable before this Court from an order under Chapter IX of the Cr.P.C.

8. Chapter IX of Code of Criminal Procedure, 1973 contains four provisions, i.e. Section 125 to 128 Cr.P.C., which are related to the order for maintenance of wife, children and parents. For the sake of brevity, the provisions relating to maintenance under Section 125 Cr.P.C. reads as under:

"125. Order for maintenance of wives, children and parents.

(1)If any person having sufficient means neglects or refuses to maintain-

(a) his wife, unable to maintain herself, or

(b) his legitimate or illegitimate minor child, whether married or not, unable to maintain itself, or

(c) his legitimate or illegitimate child (not being a married daughter) who has attained majority, where such child is, by reason of any physical or mental abnormality or injury unable to maintain itself, or

(d) his father or mother, unable to maintain himself or herself,

A Magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, father or mother, at such monthly rate as such Magistrate thinks fit and to pay the same to such person as the Magistrate may from time to time direct:

Provided that the Magistrate may order the father of a minor female child referred to in clause(b) to make such allowance, until she attains her majority, if the Magistrate is satisfied that the husband of such minor female child, if married, is not possessed of sufficient means.

Provided further that the Magistrate may, during the pendency of the proceeding regarding monthly allowance for the maintenance under this sub-section, order such person to make a monthly allowance for the interim maintenance of his wife or such child, father or mother, and the expenses of such proceeding which the Magistrate considers reasonable, and to pay the same to such person as the Magistrate may from time to time direct:

Provided also that an application for the monthly allowance for the interim maintenance and expenses for proceeding under the second proviso shall, as far as possible, be disposed of within sixty days from the date of the service of notice of the application to such person.

Explanation:- For the purposes of this Chapter,-

(a) " minor" means a person who, under the provisions of the Indian Majority Act, 1875 (9 of 1875); is deemed not to have attained his majority;

(b)" wife" includes a woman who has been divorced by, or has obtained a divorce from, her husband and has not remarried.

(2) Any such allowance for the maintenance or interim maintenance and expenses for proceeding shall be payable from the date of order, or if so ordered, from the date of the application for maintenance or interim maintenance and expenses of proceeding, as the case may be.

(3) If any person so ordered fails without sufficient cause to comply with the order, any such Magistrate may, for every breach of the order, issue a warrant for levying the amount due in the manner provided for levying fines, and may sentence such person, for the whole or any part of each month's (allowances for the maintenance or the interim maintenance and expenses of proceeding, as the case may be) remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to one month or until payment if sooner made:

Provided that no warrant shall be issued for the recovery of any amount due under this section unless application be made to the Court to levy such amount within a period of one year from the date on which it became due:

Provided further that if such person offers to maintain his wife on condition of her living with him, and she refuses to live with him, such Magistrate may consider any grounds of refusal stated by her, and may make an order under this section notwithstanding such offer, if he is satisfied that there is just ground for so doing.

Explanation.- If a husband has contracted marriage with another woman or keeps a mistress, it shall be considered to be just ground for his wife' s refusal to live with him.

(4) No Wife shall be entitled to receive an allowance for the maintenance or the interim maintenance and expenses of proceeding, as the case may be, from her husband under this section if she is living in adultery, or if, without any sufficient reason, she refuses to live with her husband, or if they are living separately by mutual consent.

(5) On proof that any wife in whose favour an order has been made under this section is living in adultery, or that without sufficient reason she refuses to live with her husband, or that they are living separately by mutual consent, the Magistrate shall cancel the order."

9. Upon plain reading of Section 125 Cr.P.C. it is clear that the provision is made to protect the weaker spouse from her vagrancy and merely because the appeal is not maintainable against the order passed under Section 125 Cr.P.C., as mentioned in sub-section 2 of Section 19 of the Family Courts Act. a person is not left as remedy less. The legislature has taken care of such a situation and hence under Section 19(4) of the Act, *it has been provided that High Court may of its own motion or otherwise call for and examine the record of any proceeding in which the Family Court situate within its jurisdiction passed an order under Chapter IX of the Code of Criminal Procedure for the purpose of satisfying itself as to the correctness, legality or propriety of the order, not being an interlocutory order, and, as to the regularity of such proceeding.*

10. The sub-section (2) of Section 19 delineates that *no appeal shall lie from a decree or order passed by the Family Court with the consent of the parties or from an order passed under Chapter IX of the Code of Criminal Procedure. (emphasis laid)*

The scope of Section 19 of the Family Courts Act came up before the Division Bench of Delhi High Court in ***Manish Aggarwal Vs. Seema Aggarwal and others*** *(FAO No. 288 of 2012) decided on 13.09.2012. The Court has also elaborately discussed with respect to three kinds of judgement, viz, final judgement, preliminary judgement and intermediary or interlocutory judgement in the context of filing appeals and revisions.*

11. The Court held thus:

"We, thus, conclude as under:

(i) In respect of orders passed under Sections 24 to 27 of the Hindu Marriage Act appeals would lie under Section 19(1) of the said Act to the Division Bench of this Court in view of the provisions of sub-section (6) of Section 19 of the said Act, such orders being in the nature of intermediate orders. It must be noted that sub-section (6) of Section 19 of the said Act is applicable only in respect of sub-section (1) and not sub-section (4) of Section 19 of the said Act.

(ii) No appeal would lie under Section 19(1) of the said Act qua proceedings under Chapter 9 of the Cr.P.C. (Sections 125 to 128) in view of the mandate of sub-section (2) of Section 19 of the said Act.

(iii) The remedy of criminal revision would be available qua both the interim and final order under Sections 125 to 128 of the Cr.P.C. under sub-section (4) of Section 19 of the said Act. (Emphasis laid)

(iv) As a measure of abundant caution, we clarify that all orders as may be passed by the Family Court in exercise of its jurisdiction under Section 7 of the said Act, which have a character of an intermediate order, and are not merely interlocutory orders, would be amenable to the appellate jurisdiction under sub-section (1) of Section 19 of the said Act."

12. Thus the remedy against the order passed by the Family Court under Section 125 of Chapter IX of Cr.P.C. has been specifically provided under Section 19(4) of the Act, which confers powers on the High Court to examine the correctness, legality or propriety to the order passed by the Family Court. When the Family Court is dealing with the proceeding under Chapter IX of Cr.P.C. exercisable by the Magistrate of the first class in such contingency criminal revision would be maintainable against both interim as well as final order passed under Section 125 Cr.P.C.

13. An order which substantially affects the rights and decides certain rights of the parties, it has been held not to be an interlocutory order so as to bar revision in view of the pronouncement by the Hon'ble Apex Court in **Amarnath and others Vs. State of Haryana and others,** AIR 1977 SC 2185.

14. In the above conspectus, an application for interim maintenance under Section 125 Cr.P.C. is a separate proceeding to be disposed of while pending final order and any such order of interim maintenance would be intermediate or quasi judicial order, effecting the vital rights of the parties.

15. In view of the verbose and prolix discussion, while upholding the objection of the Stamp Reporter, the appeal is hereby held as not maintainable under Section 19(1) of the Family Courts Act, 1984 qua proceeding under Chapter IX of the Cr.P.C. (Section 125-128) in view of the mandate of sub-section 2 of Section 19 of the said Act. The issue determined above, does not relate to the merits of the case under appeal.

16. Accordingly, the instant appeal is dismissed as not maintainable.

17. The appellant is at liberty to file a criminal revision under Section 19(4) of the Family Courts Act, 1984, which shall be reported by the Stamp Reporter of the Court as per the Allahabad High Court Rules, 1952. If the issue of limitation arises, it would be considered by the court concerned.

18. Office is directed to return the certified copy of the impugned order as per

Rules of the Court after retaining the photo copy thereof on record.

(2021)02ILR A921
APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 03.02.2021

BEFORE

THE HON'BLE RAJNISH KUMAR, J.

Second Appeal No. 144 of 2017

Pati Rakhan & Anr. ...Appellants
Versus
Smt. Chandrani Devi ...Respondent

Counsel for the Appellants:
Virendra Mishra

Counsel for the Respondent:
Paltoo Ram Gupta

A. Civil Law – Limitation Act, 1963 - Sections 5, 11, 17 - Limitation Act, 1963 - Article 123 - Limitation – Condonation of delay

The appellants had filed a highly time barred appeal on 22.1.2014 against the judgment and decree dated 18.7.1987 on the ground that the decree was obtained by playing fraud by not impleading the appellants, therefore, they had no knowledge of the judgment and decree. On coming to know about the same on 26.12.2013, when it was filed by the respondent in an appeal u/s 11(2) of the U.P. Consolidation of Holdings Act, the appeal was filed therefore it was within time from the date of knowledge. The learned appellate Court has not considered the plea of fraud raised by the appellants and the application for condonation of delay in filing the appeal has been rejected merely on the ground that after passing of the judgment and decree many cases were contested in various Courts and revenue Court between the parties, but has not considered that the appellants were not party in the said suit and also whether the said judgment and decree was brought before the Court in any proceeding by the respondent prior to 26.12.2013. (Para 12)

Limitation Act, 1963 -Section 17 and Article 123 of the Period of limitation will start to run from the date of knowledge of contents of ex parte decree and not from the date of mere knowledge of ex parte decree. In case of fraud, limitation starts from the date when the fraud is discovered for the first time by the aggrieved person. On discovery of fraud, suppression or omission of fact, the authority is suo moto competent to reopen the proceedings and the period of limitation would start running from the date of such discovery. (Para 15, 16, 17, 20, 24)

In case the decree has been obtained by playing fraud the limitation would start from the date of discovery of the fraud. It is obvious also because unless a party comes to know about the fraud played by the other party he would not have any cause of action to challenge the same. Similarly in the case of ex parte decree unless the concerned party comes to know about the ex-party proceeding and decree passed against him he cannot challenge the same. When a person has not been impleaded in any proceeding it is not expected that he would be knowing about the proceedings unless it is specifically shown by the other party as to how it was in the knowledge of the person who is challenging and when it was known to him. (Para 26)

In the present case Lower Appellate Court, without ascertaining as to whether the appellants had any knowledge about the passing of the decree before 26.12.2013, has rejected the application while there was no specific denial by the other side except that many cases were contested between the parties in regard to the property in question. It has never been disclosed as to whether the impugned judgment and decree was ever brought before the appellants in any such proceedings before 26.12.2013. (Para 27)

B. Limitation Act, 1963 - Section 5 - Unless want of bona fides of such inaction or negligence as would deprive a party of the protection of S. 5 is proved, the

application must not be thrown out or any delay cannot be refused to be condoned. (Para 30, 31)

While considering the application for condonation of delay the Court has to see carefully the explanation given by the aggrieved person and also the objection and if there is some substance in the explanation the delay may be condoned. The period is not very material because sometimes the delay of a very short period may not be condonable, but sometimes the long delay may be condonable if the explanation seems to be justified and sometimes looking to the merit of the case also the delay may be condoned so that the injustice may not be done to a party. (Para 35)

The expression 'sufficient cause' in S. 5 must receive a liberal construction so as to advance substantial justice. If there is negligence, deliberate or gross inaction or lack of bona fides on the part of the party or its counsel there is no reason why the opposite side should be exposed to a time-barred appeal. However, each case will have to be considered on the particularities of its own special facts. (Para 37)

Second appeal partly allowed. (E-3)

Precedent followed:

1. Gauhati University Vs Niharlal Bhattacharjee, (1995) 6 SCC 731 (Para 7, 15)

2.. Yashoda Devi & ors. Vs Special/A.D.J., Pratapgarh & ors., 2008 (26) LCD 1 (Para 7, 16)

3. Ram Autar & ors. Vs Board of Revenue, Alld. & ors., 2016 (34) LCD 2724 (Para 7, 17)

4. Jeet Narain & anr. Vs Govind Prasad & ors., 2010 (110) RD 374 (Para 7, 18)

5. Suresh Giri & ors. Vs Board of Revenue, U.P. at Allahabad through its Registrar & ors., 2010 (109) RD 566 (Para 7, 19)

6. Gama Vs Board of Revenue U.P., Allahabad & ors., 2015 (126) RD 334 (Para 7, 20)

7. Dahari Lal & ors. Vs Deputy Director of Consolidation & ors., 2010 (110) RD 736 (Para 7, 21)

8. Rikhdev & anr.Vs A.D.M. (F), Azamgarh & ors., 2011 (114) 631 (Para 7, 22)

9. S.P. Chengalvaraya Naidu (dead) by LRs. Vs Jagannath (dead) by LRs & ors., (1994) 1 SCC 1 (Para 7, 23)

10. St. of Mah. & anr.Vs Rattan Lal, 1993 All. C.J. 1077 (Supreme Court) (Para 7, 24)

11. United India Insurance Company Ltd. Vs Rajendra Singh & ors., 2000(18) LCD 586 (SC) (Para 7, 25)

12. Manoj Kumar Vs Commissioner, Lucknow Division, Lucknow & anr., 2017 (35) LCD 1778 (Para 7, 32)

13. Dodram Vs Collector, Pilibhit & ors., 2014 (125) RD 333 (Para 7, 33)

14. Ram Niwas Singh & ors. Vs Deputy Director of Consolidation, Gorakhpur & ors., 2016 (5) ADJ 710 (Para 7, 33)

15. Executive Officer, Antiyur Town Panchayat Vs G. Arumugam (D) by LRs, 2015 (128) RD 80 (Para 7, 34)

16. N. Balakrishnan, Appellant Vs M. Krisnamurthy, Respondent, AIR 1998 Supreme Court 3222 (Para 7, 36)

17. G. Ramegowda, Major & ors. Vs Special Land Acquisition Officer, Bangalore, (1988) 2 SCC 142 (Para 9, 37)

18. Shakuntala Devi Jain Vs Kuntal Kumari; AIR 1969 SC 575 (Para 31)

Precedent distinguished:

1. In the matter of: Begum Shanti Tufail Ahmad Khan, 2005 (Suppl.) RD 214 (Para 9, 38)

Present second appeal is against judgment and decree dated 07.12.2016, passed by Additional District Judge, Sitapur, by means of which the application

of Condonation of delay in filing appeal has been rejected upholding the judgement and decree dated 18.07.1987, passed by the Additional District Judge, Sitapur.

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

1. Heard, Shri Virendra Mishra, learned counsel for the appellants and Shri Paltoo Ram Gupta, learned counsel for the respondents.

2. The instant Second Appeal has been filed against the judgment and decree dated 07.12.2016 passed by the Additional District Judge, Court no.9, Sitapur in Misc. Civil Case No.08 of 2014; Pati Rakhan Versus Smt. Chandrani by means of which the application for condonation of delay in filing appeal has been rejected and the judgment and decree dated 18.07.1987 passed by the learned Additional Civil Judge, Sitapur in R.S.No.40 of 1983;Smt.Chandrani Devi Versus Raj Rani and others.

3. The brief facts of the case for adjudication of the present Second Appeal, as borne out from the pleadings, are that one Brij Mohan had only two daughters, namely, Raj Rani wife of Anirudh Prasad and Ram Lali wife of Swami Dayal @ Dhondhey. Both the daughters had half share each in the property of Brij Mohan after his death. The respondent has claimed half of the property on the basis of sale deed executed on 18.04.1978 by Raj Rani. Rajeshwari @ Raj Rani had filed a suit for cancellation of the said sale deed vide R.S.No.229 of 1978. The Suit was decreed ex parte on 26.03.1980. The respondent had filed an application under Order 9 Rule 13 of the Civil Procedure Code, which was rejected on 02.12.1981. Thereafter the Misc. Appeal filed by the respondent was also dismissed on 20.01.1983. Consequently the respondent had filed Regular Suit No.40 of 1983 for cancellation of ex-parte decree dated 26.03.1980 and permanent injunction. The injunction was sought for whole of the property of late Brij Mohan on the ground that one of his daughter Raj Rani had executed a sale deed of the half portion and in regard to the remaining half portion the second daughter Ram Lali had executed a Will deed in favour of the respondent. The suit was decreed by means of judgment and decree dated 18.07.1987. The appellants filed a First Appeal on 22.01.2014 alongwith an application for condonation of delay vide Misc. Case No.8 of 2014 as injunction of the whole property was sought and granted on the ground that the injunction of property of Ram Lali has been obtained fraudulently without impleading the appellants and no Will was executed by late Ram Lali. After inviting objections and hearing the application for condonation of delay has been rejected. Consequently the appeal stands dismissed. Hence the instant Second Appeal has been filed.

4. This second appeal was admitted on the following substantial questions of law:-

(i) Whether the impugned judgment and decree passed by the learned First Appellate Court ignoring the provisions made in Section 17 and Article 123 of the Limitation Act can be allowed to sustain?

(ii) Whether in absence of specific and clear denial on the part of respondent against the categorical pleading that the appellants for the first time came to know about the judgment and decree dated 18.07.1987 on 26.12.2013 the learned first appellate court has not committed grave

error in rejecting the application for condonation of delay and closing the door of appellant for all times to come?

(iii) Whether the learned First Appellate Court has not committed serious illegality while passing the impugned order ignoring the law laid down by the Hon'ble Apex Court to the effect that a judgment and decree obtained by fraud is nullify and its invalidity can be set up at any stage even in collateral proceedings and before any Court whether inferior or superior?

5. Submission of learned counsel for the appellants was that the appellants, who are the sons of Ram Lali wife of Swami Dayal @ Dhondhey, were not impleaded in the Regular Suit No.40 of 1983 filed by the respondents despite the fact that injunction in regard to the property of Ram Lali was also sought. Therefore, the appellants could not know about the proceedings and judgment and order passed by the trial court. The appellants came to know about the judgment and decree dated 18.07.1987 when a copy of the same was filed by the respondent on 26.12.2013 in an appeal filed by the respondent Chandrani Versus Pati Rakhan and others under Section 11(2) of the U.P. Consolidation of Holdings Act 1953 before the Settlement Officer Consolidation, Sitapur. After coming to know about the order, the appellants applied for the certified copy of the order dated 18.07.1987 on 03.01.2014 and obtained the same. Thereafter applied for copies of all other documents on 09.01.2014 and 13.01.2014 to file the appeal and after receipt of the same the appeal was got prepared from 17.01.2014 to 19.01.2014 and thereafter filed the same on 22.01.2014 with an application for condonation of delay. But without considering the grounds raised by the appellants and that the Regular Suit was filed and the judgment and decree dated 18.07.1987 was obtained by playing fraud without impleading the appellants, who are legal heirs of Ram Lali the application for condonation of delay has been rejected merely on the ground that after passing of the judgment and decree dated 18.07.1087 in Regular Suit No.40 of 1983 many cases, relating to it, were contested by the parties of the said suit in various courts and revenue courts. While the appellants were admittedly not a party in the said suit. It was also submitted that the respondent herself had got filed an application for impleadment by some one impersonating as their mother Ram Lali, which was rejected, therefore, the appellants had no knowledge of it also.

6. He further submitted that in view of Section 17 read with Article 123 of the Limitation Act 1963, limitation to set-aside ex-parte decree and the decree obtained by fraud will start from the date of the knowledge and discovery of the fraud, but it has not been considered by the appellate court. He also submitted that the respondent, while filing the suit for setting aside the decree, had not disclosed the earlier proceedings of application under Order 9 Rule 13 of the CPC and the appeal filed by the respondent in regard to the judgment and decree in question. He also submitted that it is settled proposition of law that the judgment and decree obtained by fraud is nullity in the eyes of law and it can be challenged at any time and its invalidity can be set up at any time even in collateral proceedings.

7. On the basis of above learned counsel for the appellants submitted that the judgment and order passed by the appellate court is liable to be set aside and the appeal is liable to be allowed. Learned

counsel for the petitioner has relied on **Gauhati University Versus Niharlal Bhattacharjee; (1995) 6 SCC 731, Yashoda Devi and others Versus Special/Additional District Judge, Paratapgarh and others; 2008 (26) LCD 1, Ram Autar and others Versus Board of Revenue, Allahabad and others; 2016 (34) LCD 2724, Jeet Narain and another Versus Govind Prasad and others; 2010 (110) RD 374, Suresh Giri and others versus Board of Revenue, U.P. at Allahabad through its Registrar and others; 2010 (109) RD 566, Gama versus Board of Revenue U.P, Allahabad and others; 2015 (126) RD 334, Dahari Lal and others Versus Deputy Director of Consolidation and others; 2010 (110) RD 736, Rikhdev and another Versus A.D.M.(F), Azamgarh and others; 2011 (114) RD 631, S.P.Chengalvaraya Naidu (dead) by LRs. Versus Jagannath (dead) by LRs and others; (1994) 1 SCC 1, State of Maharashtra and another Versus Rattan Lal; 1993 All.C.J.1077 (SC), United India Insurance Company Ltd. Versus Rajendra Singh and others; 2000(18) LCD 586 (SC), Manoj Kumar Versus Commissioner, Luckow Division, Lucknow and another; 2017 (35) LCD 1778, Dodram Versus Collector, Pilibhit and others; 2014 (125) RD 333, Ram Niwas Singh and others Versus Deputy Director of Consolidation, Gorakhpur and others; 2016 (5) ADJ 710, Executive Officer, Antiyur Town Panchayat Versus G.Arumugam (D) by LRs; 2015 (128) RD 80 and N.Balakrishnan, Appellant Versus M.Krisnamurthy, Respondent; AIR 1998 Supreme Court 3222.**

8. Per contra, learned counsel for the respondent does not dispute that Brij Mohan had two daughters, namely Raj Rani and Ram Lali. But he submitted that Raj Rani had executed a sale deed of her half portion in favour of the respondent and Ram Lali had executed a Will deed of her half portion in favour of respondent. He further submitted that since Ram Lali had already died, which was mentioned in the plaint, therefore, there was no occasion to implead her or her legal heirs. He further submitted that though the marriage of Ram Lali was settled but the groom had died on the date of marriage so she had not married and she died unmarried. The appellants were the sons of Kokila who was impleaded and not of Ram Lali. Kokila had also filed an application for impleadment by impersonating her as Ram Lali in R.S.No.40 of 1983, but her application was dismissed in default on 07.03.1984 as she did not appear to give evidence. Kokila, the mother of the appellants was impleaded as Kokila was the wife of Dhondhey and the appellants are the sons of Dhondhey, which is apparent from the entries made in the electoral roll of 1975, a copy of which has been filed alongwith the objection. He further submitted that the name of the respondent was mutated in place of Smt. Raj Rani and Ram Lali on 14.03.1981.

9. On the basis of above, learned counsel for the respondent had submitted that no fraud was played by the respondent by not impleading the appellants and in fact the fraud has been played by the appellants; firstly by trying to get Ram Lali impleaded in the suit by impersonation and secondly by filing highly time barred appeal showing them as the sons of Ram Lali while she had died unmarried on 05.07.1978. He had also submitted that the appellants had also filed an application for mutation and they were granted time to produce evidence but they did not appear so the same was rejected. Therefore, the application for condonation of delay has rightly been rejected by the

concerned court and this appeal is misconceived and is devoid of any merit and is liable to be dismissed. Learned counsel for the respondents has relied on **G. Ramegowda, Major and others Versus Special Land Acquisition Officer, Bangalore; (1988) 2 SCC 142 and In the matter of: Begum Shanti**

Tufail Ahmad Khan; 2005 (Suppl.) RD 214.

10. I have considered the submissions of learned counsels of the parties and perused the records.

11. The undisputed facts are that one Brij Mohan had two daughters, namely Raj Rani and Ram Lali and after his death both had half share each in the said property. Raj Rani had executed a sale deed in favour of the respondent, which was set aside by means of the exparte judgment and decree dated 26.03.1980 passed in Regular Suit No.229 of 1978;Smt.Rajeshwari Versus Smt.Chandrani Devi. Hence after dismissal of the application under Order 9 Rule 13 of CPC and the appeal, Regular Suit No.40 of 1983 was filed for setting aside the judgment and decree dated 26.03.1980 and for permanent injunction in regard to whole of the property of Raj Rani and Ram Lali. Ram Lali or her heirs were not impleaded in the said suit and it was mentioned that Ram Lali had died on 05.07.1978. Claim for injunction in regard to the property of Ram Lali was set up on the basis of the alleged Will executed by her. The suit was decreed by means of the judgment and decree dated 18.07.1987. This second appeal is in regard to the property of Ram Lali only.

12. The appellants had filed a highly time barred appeal on 22.01.2014 against the judgment and decree dated 18.07.1987 on the ground that the decree was obtained by playing fraud by not impleading the appellants, who are the legal heirs of Ram Lali, therefore, they had no knowledge of the judgment and decree. On coming to know about the same on 26.12.2013, when it was filed by the respondent in an appeal under Section 11(2) of the U.P. Consolidation of Holdings Act, the appeal was filed therefore it was within time from the date of knowledge. The learned appellate court has not considered the plea of fraud raised by the appellants and the application for condonation of delay in filing the appeal has been rejected merely on the ground that after passing of the judgment and decree many cases were contested in various courts and revenue court between the parties of Regular Suit No.40 of 1983, but has not considered that the appellants were not party in the said suit and also whether the said judgment and decree was brought before the court in any proceeding by the respondent prior to 26.12.2013.

13. Section 17 of the Indian Limitation Act provides the effect of fraud or mistake, which is reproduced below:-

"17. Effect of fraud or mistake.--(1) Where, in the case of any suit or application for which a period of limitation is prescribed by this Act,--

(a) the suit or application is based upon the fraud of the defendant or respondent or his agent; or

(b) the knowledge of the right or title on which a suit or application is founded is concealed by the fraud of any such person as aforesaid; or

(c) the suit or application is for relief from the consequences of a mistake; or

(d) where any document necessary to establish the right of the plaintiff or applicant has been fraudulently concealed from him;

the period of limitation shall not begin to run until the plaintiff or applicant has discovered the fraud or the mistake or could, with reasonable diligence, have discovered it; or in the case of a concealed document, until the plaintiff or the applicant first had the means of producing the concealed document or compelling its production:

Provided that nothing in this section shall enable any suit to be instituted or application to be made to recover or enforce any charge against, or set aside any transaction affecting, any property which--

(i) in the case of fraud, has been purchased for valuable consideration by a person who was not a party to the fraud and did not at the time of the purchase know, or have reason to believe, that any fraud had been committed, or

(ii) in the case of mistake, has been purchased for valuable consideration subsequently to the transaction in which the mistake was made, by a person who did not know, or have reason to believe, that the mistake had been made, or

(iii) in the case of a concealed document, has been purchased for valuable consideration by a person who was not a party to the concealment and, did not at the time of purchase know, or have reason to believe, that the document had been concealed.

(2) Where a judgment-debtor has, by fraud or force, prevented the execution of a decree or order within the period of limitation, the court may, on the application of the judgment-creditor made after the expiry of the said period extend the period for execution of the decree or order:

Provided that such application is made within one year from the date of the discovery of the fraud or the cessation of force, as the case may be."

In view of aforesaid Section the period of limitation shall not begin to run until the fraud is discovered by the person who is aggrieved.

14. Article 123 of the Limitation Act provides the limitation in the case where the summons or notice was not duly served, which is 30 days from the date of knowledge of the ex-parte decree. Article 123 is reproduced below:-

123.	To set aside a decree passed ex parte or to rehear an appeal decreed or heard ex parte. Explanation.- For the purpose of this article, substituted service under Rule 20 of Order V of the Code of Civil Procedure, 1908 shall not be deemed to be due service.	Thirty days.	The date of the decree or where the summons or notice was not duly served, when the applicant had knowledge of the decree.

15. The Hon'ble Apex Court considered the Article 123 in the case of **Gauhati University Versus Niharlal**

Bhattacharjee (Supra) and held that the limitation begins to run only when the appellant had knowledge of ex parte decree.

16. This court, in the case of **Yashoda Devi and others Versus Special/Additional District Judge, Pratapgarh and others (Supra)**, has held that the period of limitation will start to run from the date of knowledge of contents of exparte decree and not from the date of mere knowledge of exparte decree.

17. This court, in the case of **Ramautar and others Versus Board of Revenue, Allahabad and others (Supra),** after considering the effect of Article 123 of the Limitation Act held that limitation of 90 days has been provided from the date of the decree where summons or notice was duly served and when summons or notice was not duly served then 90 days from the date of knowledge of exparte decree and held that the application under Order 9 Rule 13 CPC filed on 01.08.2013 for setting aside the order dated 31.01.1981 was within time from the date of knowledge of the decree and ignored the delay of 30-32 years.

18. The Hon'ble Apex Court, in the case of **Jeet Narain and another Versus Govind Prasad and others (Supra),** held that it is now well settled that fraud unravels everything and observed that the courts below have rejected the claim of the appellant therein only on the ground of limitation and they have not considered the dispute on merit. Therefore while considering the application for condonation of delay the merit of the case is also liable to be seen.

19. This Court, in the case of **Suresh Giri and others Versus Board of Revenue, U.P. at Allahabad through its Registrar and others (Supra)**, has held that the fraud vitiates every solemn act and an act of fraud is always to be viewed seriously. The relevant paragraph 19 is extracted below:-

"19. It is well known that fraud vitiates every solemn act and an act of fraud is always to be viewed seriously. The observation of Lord Justice Denning in Lazarus Estates Ltd. Vs. Beasley (1956) 1 All E.R. 341 which is quoted below works as a lighthouse even today for those dispensing justice. "No court in this land will allow a person to keep an advantage which he has obtained by fraud. No judgment of a court, no order of a Minister, can be allowed to stand, if it has been obtained by fraud. Fraud unravels everything." In view of the above, there is no room to doubt that an order of allotment of land, if obtained by collusion or fraud cannot be allowed to stand and the court would not intervene in such matters so as to permit squandering of the property of the State which vests in the Gaon Sabha. Protection of the State property from such fraud by initiation of action for cancellation of allotment/lease would however, be independent of the power of cancellation of such allotment envisaged under Section 198(4) of the Act for the reason that Section 198(4) comes into play in the limited sphere where the allotment is found to be irregular and not otherwise. Accordingly, in my considered opinion cancellation of allotment/lease on account of fraud is altogether an separate exercise which can be undertaken by the authorities concerned irrespective of Section 198(4) of the Act. However, proceedings for cancellation of allotment of land/lease on the ground of fraud has to be exercised with great care & caution and not blindly or on unilateral version. It is only when the

concerned authority on the basis of relevant material has a reason to believe that the allotment is based upon fraud it may proceed in the matter. In so determining the stand, a distinction has to be made between fraud played by the beneficiary or the fraud committed by the officers or the authorities. Where the authority is of the opinion that the allottee is responsible for the alleged fraud it can initiate proceedings for cancellation of the allotment/lease and after giving opportunity of hearing to him may cancel the same. In the event the authority feels otherwise and the involvement of the allottee is not found and the needle of suspension is upon some employee/officer action it must take appropriate action first against such employee/officer and simultaneously if considered proper for cancellation of allotment/lease."

20. This court, in the case of **Gama Versus Board of Revenue U.P. Allahabad and others (Supra)**, has held that in case of fraud limitation starts from the date when the fraud is discovered for the first time by the aggrieved person under Section 17 of the Limitation Act. The relevant paragraph 8 is extracted below:-

"8. So far as the issue relating to limitation is concerned, in case of fraud limitation starts from the date when the fraud is discovered for the first time by the aggrieved person under section 17 of the Limitation Act as held in Ram Pal Vs. State of U.P., , Sub-Divisional Officer has categorically held that order dated 25.3.1994 was secured by committing fraud. The order, being without jurisdiction and has passed ignoring statutory provisions, has been rightly recalled."

In view of above in case of plea of fraud it was required to be considered as to when the alleged fraud was discovered by the appellants because the limitation would start from that date only.

21. This Court, in the case of **Dahari Lal and others Versus Deputy Director of Consolidation and others (Supra),** has held that where an order is obtained by playing fraud, embargo of limitation does not come in the way.

22. This Court, in the case of **Rikhdev and another Versus A.D.M.(F), Azamgarh and others (Supra),** has held that it is well settled principle of law that any judgment or order obtained by fraud is nullity and *non est* in the eye of law and can be challenged in any court, at any time, in appeal, revision, writ or even in collateral proceedings. The relevant paragraphs 26, 27 and 39 are extracted below:-

"26. It is well settled principle of law that any judgment or order obtained by fraud, its validity can be challenged in any proceeding. Before three centuries, Chief Justice Edward Coke proclaimed;

"Fraud avoids all judicial acts, ecclesiastical or temporal".

27. It is settled proposition of law that a judgment, decree or order obtained by playing fraud on the Court, Tribunal or Authority is a nullity and non est in the eye of law. Such a judgment, decree or order by the first Court or by the final Court has to be treated as nullity by every Court, superior or inferior. It can be challenged in any Court, at any time, in appeal, revision, writ or even in collateral proceedings.

39. In para-39 of the judgment of A.V. Papayya Sastry (supra), it has been laid down that it is established that when an order was obtained by a successful party by practising or playing fraud, it is vitiated. Such order cannot be held legal, valid or in

consonance with law. It is non-existent and non est and cannot be allowed to stand. This is the fundamental principle of law and needs no further elaboration. Therefore, it has been said that a judgment, decree or order obtained by fraud has to be treated as nullity, whether by the court of first instance or by the final court. And it has to be treated as non est by every Court, superior or inferior."

23. The Hon'ble Apex Court, in the case of **S.P.Chengalvaraya Naidu (Dead) By LRs Versus Joganath (Dead) by LRs and others (Supra)**, about fraud and the effect of decree obtained by fraud has held as under in paragraph 1:-

"1. Fraud avoids all judicial acts, ecclesiastical or temporal" observed Chief Justice Edward Coke of England about three centuries ago. It is the settled proposition of law that a judgment or decree obtained by playing fraud on the court is a nullity and non est in the eyes of law. Such a judgment/decree by the first court or by the highest court has to be treated as a nullity by every court, whether superior or inferior. It can be challenged in any court even in collateral proceedings."

24. The Hon'ble Apex Court, in the case of **State of Maharashtra and another Versus Rattan Lal (Supra),** has held that on discovery of fraud, suppression or omission of fact, the authority is suo moto competent to reopen the proceedings and the period of limitation would start running from the date of such discovery.

25. The Hon'ble Apex Court, in the case of **United India Insurance Company Ltd. Versus Rajendra Singh and Others (Supra),** has held that it is unrealistic to expect the appellant to resist a claim at the first instance on the basis of fraud because he had at that stage no knowledge about the fraud allegedly played by the claimants. The relevant paragraphs 15 and 16 are extracted below:-

"15. It is unrealistic to expect the appellant company to resist a claim at the first instance on the basis of the fraud because appellant company had at that stage no knowledge about the fraud allegedly played by the claimants. If the Insurance Company comes to know of any dubious concoction having been made with the sinister object of extracting a claim for compensation, and if by that time the award was already passed, it would not be possible for the company to file a statutory appeal against the award. Not only because of bar of limitation to file the appeal but the consideration of the appeal even if the delay could be condoned, would be limited to the issues formulated from the pleadings made till then.

16. Therefore, we have no doubt that the remedy to move for recalling the order on the basis of the newly discovered facts amounting to fraud of high degree, cannot be foreclosed in such a situation. No court or tribunal can be regarded as powerless to recall its own order if it is convinced that the order was wangled through fraud or misrepresentation of such a dimension as would affect the very basis of the claim."

26. In view of above in case the decree has been obtained by playing fraud the limitation would start from the date of discovery of the fraud. It is obvious also because unless a party comes to know about the fraud played by the other party he would not have any cause of action to challenge the same. Similarly in the case of ex-parte decree unless the concerned party

comes to know about the ex-party proceeding and decree passed against him he cannot challenge the same. When a person has not been imleaded in any proceeding it is not expected that he would be knowing about the proceedings unless it is specifically shown by the other party as to how it was in the knowledge of the person who is challenging and when it was known to him.

27. In the present case Lower Appellate Court, without ascertaining as to whether the appellants had any knowledge about the passing of the decree before 26.12.2013, has rejected the application while there was no specific denial by the other side except that many cases were contested between the parties in regard to the property in question. It has never been disclosed as to whether the impugned jugement and decree was ever brought before the appellants in any such proceedings before 26.12.2013.

28. A plea was taken by the opposite party that Ram Lali had executed the alleged Will. The objection was filed before the lower appellate court against the application for condonation of delay with a plea that Smt. Ram Lali had no issue and she had died many years ago, but it is not mentioned that she was unmarried. The objection was mainly filed on the ground that the appellants were not party before the trial court, therefore, they have no right to file an appeal. It has also been alleged that in the original suit Smt. Kokila, the defendant in the suit, had tried to get impleaded impersonating as Smt. Ram Lali but the application was dismissed in default as she did not appear to give evidence whereas the application was rejected by means of the order dated 07.03.1984 with a finding that there is dispute in regard to the death of Smt. Ram Lali and the defendants may get her examined as a witness so there is no justification of her impleadment. In this view of the matter admittedly the appellants were not party in the original suit, therefore, the application could not have been dismissed merely on the ground that many cases have been contested between the parties of Regular Suit No.40 of 1983 in many courts and revenue court.

29. It was mentioned in paragraph 15 of the Suit that the defendant nos.1 and 2 are the real sisters whereas in the suit itself, a copy of which is available in the lower court record, it was mentioned in paragraph 3 and 7 that Smt. Rajeshwari and Ram Lali were real sisters and daughters of late Brij Mohan. Even then Smt. Raj Rani and Smt. Rajeshwari were impleaded, as defendant nos.1 and 2, both showing the wife of late Anirudh Prasad. Therefore, the submission of learned counsel for the appellants seems to be correct that Smt.Raj Rani and Rajeshwari were one and the same lady and both the names were of Smt. Raj Rani and the other sister was Ram Lali. Subsequently the name of Smt. Rajeshwari was got deleted also from the suit. It smacks of some mischief, which is required to be considered.

30. The application for condonation of delay in filing appeal cannot be rejected merely on the ground that there is great delay because the law of limitation is not meant to take away the right of appeal and the length of delay is not very much material if there is some substance in ground and on merit also.

31. The Hon'ble Apex Court, in the case of **Shakuntala Devi Jain Versus Kuntal Kumari; AIR 1969 SC 575,** has held that unless want of bonafides of such

inaction or negligence as would deprive a party of the protection of section 5 is proved, the application must not be thrown out or any delay cannot be refused to be condoned.

32. This court, in the case of **Manoj Kumar Versus Commissioner, Lucknow Division, Lucknow and another (Supra),** after considering several judgments of the Hon'ble Apex court, has held in paragraph 14 as under:-

"14- In view of the decision of the Apex Court it is abundantly clear that while considering the delay condonation application the court has to see the merit of the case also as the law of limitation is not meant to take away the right of Appeal. The courts are meant for imparting justice and not to scuttle the justice on technicalities. The length of delay is also not very much material if there is a substance on merit."

33. Similar view has been taken by this court in the case of **Dodram Versus Collector, Pilibhit and others (Supra) and Ram Newas Singh and others Versus Deputy Director of Consolidation, Gorakhpur and others (Supra),** relevant paragraph 7 of which is extracted below:-

"7. Otherwise also the law of limitation is not meant to take away the right of appeal. The Hon'ble Apex Court as well as this Court in number of cases, has held that while considering the delay condonation application, the court must be sympathetic and it has to see the merit of the case also as the law of limitation is not meant to take away the right of Appeal. The courts are meant for imparting justice and not to scuttle the justice on technicalities. The length of delay is also not very much material if there is a substance on merit. It has also been held that if there has been some slackness on the part of applicant and that has caused inconvenience to the other side that can be compensated in terms of money instead of closing the door of justice for ever."

34. The Hon'ble Apex Court has also taken similar view in the case of **Executive Officer, Antiyur Town Panchayat Versus G.Arumugam (D) by LRs (Supra)**. However the same may not be applicable on the present case because in that case the Hon'ble Court has held that in case there is an attempt on the part of the Government officials or public servants to defeat justice by causing delay, the court, in view of the larger public interest, should take a lenient view and condone the delay.

35. In view of above, the Rules of limitation are not meant to destroy the right of the parties, rather they are meant to see that the parties do not resort to dilatory tactices to seek their remedy promptly. Therefore while considering the application for condonation of delay the court has to see carefully the explanation given by the aggrieved person and also the objection and if there is some substance in the explanation the delay may be condoned. The period is not very material because some times the delay of a very short period may not be condonable, but sometimes the long delay may be condonable if the explanation seems to be justified and sometimes looking to the merit of the case also the delay may be condoned so that the injustice may not be done to a party. In case of fraud, the limitation will not come in the way if it is within time from the date of discovery of fraud or further delay has been sufficiently explained which is to be seen by the concerned court.

36. This view is fortified by the law laid down by the Hon'ble Apex Court in the

case of **N.Balakrishnan, Versus M.Krishnamurthy (Supra)**, the relevant paragraphs 8 to 13 are extracted below:-

"8. Appellant's conduct does not on the whole warrant to castigate him as an irresponsible litigant. What he did in defending the suit was not very much far from what a litigant would broadly do. Of course, it may be said that he should have been more vigilant by visiting his advocate at short intervals to check up the progress of the litigation. But during these days when everybody is fully occupied with his own avocation of life an omission to adopt such extra vigilance need not be used as a ground to depict him as a litigant not aware of his responsibilities, and to visit him with drastic consequences.

9. It is axiomatic that condonation of delay is a matter of discretion of the court Section 5 of the Limitation Act does not say that such discretion can be exercised only if the delay is within a certain limit. Length of delay is no matter, acceptability of the explanation is the only criterion. Sometimes delay of the shortest range may be uncondonable due to want of acceptable explanation whereas in certain other cases delay of very long range can be condoned as the explanation thereof is satisfactory. Once the court accepts the explanation as sufficient it is the result of positive exercise of discretion and normally the superior court should not disturb such finding, much less in reversional jurisdiction, unless the exercise of discretion was on whole untenable grounds or arbitrary or perverse. But it is a different matter when the first cut refuses to condone the dela. In such cases, the superior cut would be free to consider the cause shown for the delay afresh and it is open to such superior court to come to its own finding even untrammeled by the conclusion of the lower court.

10. The reason for such a different stance is thus: The primary function of a court is to adjudicate the dispute between the parties and to advance substantial justice. Time limit fixed for approaching the court in different situations in not because on the expiry of such time a bad cause would transform into a good cause.

11. Rule of limitation are not meant to destroy the right of parties. They are meant to see that parties do not resort to dilatory tactics, but seek their remedy promptly. the object of providing a legal remedy is to repair the damage caused by reason of legal injury. Law of limitation fixes a life-span for such legal remedy for the redress of the legal injury so suffered. Time is precious and the wasted time would never revisit. During efflux of time newer causes would sprout up necessitating newer persons to seek legal remedy by approaching the courts. So a life span must be fixed for each remedy. Unending period for launching the remedy may lead to unending uncertainty and consequential anarchy. Law of limitation is thus founded on public policy. It is enshrined in the maxim Interest reipublicae up sit finis litium (it is for the general welfare that a period be putt to litigation). Rules of limitation are not meant to destroy the right of the parties. They are meant to see that parties do not resort to dilatory tactics but seek their remedy promptly. The idea is that every legal remedy must be kept alive for a legislatively fixed period of time.

12 A court knows that refusal to condone delay would result foreclosing a suitor from putting forth his cause. There is no presumption that delay in approaching

the court is always deliberate. This Court has held that the words "sufficient cause" under Section 5 of the Limitation Act should receive a liberal construction so as to advance substantial justice vide Shakuntala Devi Jain Vs. Kuntal Kumari [AIR 1969 SC 575] and State of West Bengal Vs. The Administrator, Howrah Municipality [AIR 1972 SC 749].

13. It must be remembered that in every case of delay there can be some lapse on the part of the litigant concerned. That alone is not enough to turn down his plea and to shut the door against him. If the explanation does not smack of mala fides or it is not put forth as part of a dilatory strategy the court must show utmost consideration to the suitor. But when there is reasonable ground to think that the delay was occasioned by the party deliberately to gain time then the court should lean against acceptance of the explanation. While condoning delay the Could should not forget the opposite party altogether. It must be borne in mind that he is a looser and he too would have incurred quiet a large litigation expenses. It would be a salutary guideline that when courts condone the delay due to laches on the part of the applicant the court shall compensate the opposite party for his loss."

37. The Hon'ble Apex Court, in the case of **G.Ramegowda, Major and others Versus Special Land Acquisition Officer, Bangalore (Supra),** has held that if there is negligence, deliberate or gross inaction or lack of bona fides on the part of the party or its counsel there is no reason why the opposite side should be exposed to a time-barred appeal. However, each case will have to be considered on the particularities of its own special facts and the expression 'sufficient cause' in Section 5 must receive a liberal construction so as to advance substantial justice. The relevant paragraph 14 is extracted below:-

"14. The contours of the area of discretion of the Courts in the matter of condonation of delays in filing appeals are set out in a number of pronouncements of this Court. See: Ramlal, Motilal and Chhotelal v. Rewa Coalfield Ltd., [1962] 2 SCR 762; Shakuntala Devi Jain v.Kuntal Kumari, [1969] 1 SCR 1006; Concord of India Insurance Co. Ltd. v. Nirmala Devi and ors., [1979] 3 SCR 694; Lala Mata Din v. A. Narayanan, [1970] 2 SCR 90 and Collector, Land Acquisition v. Katiji, [1987] 2 SCC 107 etc. There is, it is true, no general principle saving the party from all mistakes of its counsel. If there is negligence, deliberate or gross inaction or lack of bona fides on the part of the party or its counsel there is no reason why the opposite side should be exposed to a time-barred appeal. Each case will have to be considered on the particularities of its own special facts. However, the expression 'sufficient cause' in Section 5 must receive a liberal construction so as to advance substantial justice and generally delays in preferring appeals are required to be condoned in the interest of justice where no gross negligence or deliberate inaction or lack of bona fides is imputable to the party seeking condonation of the delay. In Katiji's case, (supra), this Court said:

When substantial justice and technical considerations are A pitted against each other, cause of substantial justice deserves to be preferred for the other side cannot claim to have vested right in injustice being done because of a non deliberate delay."

It must be grasped that judiciary is respected not on account of its power to legalise injustice on technical grounds but

because it is capable of removing injustice and is expected to do so."

38. In the case of **In the matter of: Begum Shanti Tufail Ahmad Khan; 2005 (Suppl.) RD 214,** relied by learned counsel for respondent, a Coordinate Bench of this court has held that the law of limitation is a law of repose based on rules of estoppel. It serves an important purpose of bringing finality to state of affairs which have prevailed in the knowledge of parties for sufficiently long period of time. This court refused to grant probate and dismissed the case as the laches were not adequately explained on record. However, it is not applicable on the facts and circumstances of present case.

39. In view of above, this court is of the considered opinion that the First Appellate court has failed to consider the grounds raised by the appellants for condonation of delay in filing the first appeal and the law applicable on it and has rejected the application without recording any finding in regard to the pleas raised by the appellants and the date of knowledge as to when they came to know about the judgment and decree impugned in the appeal. Therefore, the judgment and decree passed by the Lower Appellate Court is not sustainable in the eye of law and is liable to be set aside. The substantial questions of law are decided accordingly.

40. The second appeal is **partly allowed.** The judgment and decree dated 07.12.2016 passed in Misc. Civil Case No.08 of 2014;Pati Rakhan Versus Smt. Chandrani by the Additional District Judge, Court no.9, Sitapur is hereby set aside. The lower appellate court is directed to reconsider and decide the case afresh in accordance with law and the observations made here-in-above in this judgment.

41. No orders as to costs.

(2021)02ILR A935
APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 25.02.2021

BEFORE

THE HON'BLE RAJNISH KUMAR, J.

Second Appeal No. 13 of 2014

Shiv Darshan Yadav ...Appellant
Versus
Executive Engineer Electricity Distribution Div.-I, Faizabad ...Respondent

Counsel for the Appellant:
Mohd. Aslam Khan

Counsel for the Respondent:
B.N. Mishra

A. Civil Law – Service on the basis of fraudulent adoption – Limitation/Estoppel – Code of Civil Procedure: Order 7 Rule 11; Limitation Act: Section 17 - "continuing wrong" refers to a single wrongful act which causes a continuing injury and in such case relief can be granted even if there is a long delay.

Appellant submitted that the suit filed by the respondent was barred by limitation because the adoption deed was executed on 11.8.1995 and the suit was filed on 25.11.2011 whereas on the basis of the said registered adoption deed the appellant was appointed in dying in harness in the year 1996 without raising any objection. Therefore, the suit should have been dismissed being barred by limitation under Order 7 Rule 11. The learned trial Court, despite a specific plea by the appellant in regard to limitation, failed to make any issue in regard to limitation. He had further submitted that the suit was not maintainable on the principle of estoppel also because once the appellant was appointed treating the same adoption deed as correct, the respondent could not have challenged validity of the same. (Para 6)

Section 17 of the Limitation Act provides that the period of limitation shall not begin to run until the plaintiff or applicant has discovered the fraud. It is not disputed that the respondent was not a party to the deed. Therefore it cannot be said that the fact entitling to plaintiff to have the instrument rescinded was become known to respondent/plaintiff prior to the complaint made questioning the adoption deed only because the appellant was appointed on the basis of the alleged adoption deed treating it as correct because it was registered. The fact entitling the respondent to have the instrument cancelled or set-aside first become known to the respondent only on or after 27.5.2011, when the complaint was made it was found fraudulently registered and the suit was filed on 28.11.2011, therefore the suit was filed well within time and it was not barred by limitation. In the present case the appellant was appointed on the basis of fraudulent deed and continuing and getting salary regularly, therefore also the suit for cancellation of the fraudulent deed cannot be barred by limitation. (Para 16)

There is no illegality or error in the finding recorded by the trial Court in regard to limitation and it has not committed any illegality or error in not framing a separate issue in regard to limitation and trial Court has rightly discharged the responsibility. (Para 17)

B. Hindu Adoption and Maintenance Act, 1956 - Section 16 - Registration Act - Section 47 - Specific Relief Act, 1963 - Section 31 - Can presumption u/s 16 be disregarded? - In view of S. 16 it is open for a party to attempt to disprove the deed of adoption by initiating independent proceedings.

In view of S. 16, whenever any document registered under any law is produced before any Court purporting to record an adoption made and the same is signed by the persons mentioned therein, the Court shall presume that the said adoption has been made in compliance with the provisions of the Act, until and unless such presumption is disproved. (Para 20)

In view of above the respondent has rightly filed the suit for cancellation of deed of adoption in accordance with law u/s 31 of Specific Relief Act, 1963 after coming to know that it was fraudulently got registered because the respondent department has to pay the salary to the appellant from the public exchequer on account of appointment in dying in harness on the basis of said fraudulent deed. Therefore, the admission that the appellant was appointed on the basis of the said deed being a registered document does not debar it from challenging the deed because it may cause serious injury to it. Therefore it is not barred by principle of estoppel also. (Para 21)

Section 47 of the Registration Act provides that the registered document shall operate from the time from which it would have commenced to operate if no registration thereof had been required or made and not from the time of its registration. The alleged adoption has been made in the year 1980, which is after 1977 and in view of Sub-Section (2) of S. 16 by the State amendment in Uttar Pradesh, in case of an adoption after the first day of January 1977, no Court in Uttar Pradesh shall accept in evidence in proof of giving and taking of a child in adoption except document regarding any adoption, made and signed by the person giving and the person taking the child in adoption, and registered under any law for the time being in force. Therefore the **adoption in the present case would not be valid without registered deed of adoption and it cannot operate from a prior date**, so also the appellant does not get any benefit from it because it's contents does not prove valid adoption. (Para 23, 24)

C. Hindu Adoption and Maintenance Act, 1956 - Section 6, 7, 10, 11, 12 - Evidence Act,1872 - Section 106 - Cancellation of registered deed of adoption – A person who seeks to displace the natural succession by alleging an adoption must discharge the burden that lies upon him by proof of the factums of adoption and its validity by the evidence which should be free from all suspicion of fraud. (Para 32)

Section 12 of the HAMA 1956 provides the affects of adoption, according to which an adopted child shall be deemed to be the child of his or her adoptive father or mother for all

purposes with effect from the date of adoption and from such date all the ties of the child in the family of his or her birth shall be deemed to be severed and replaced by those created by adoption in the adoptive family. (Para 34)

As such from the date of adoption the relation of child, who has been adopted, shall be severed from the family from which it has been adopted. As alleged in the present case Kanhaiya Lal has adopted the appellant in the year 1980. Thereafter he should have got his name recorded in the school records but it was not done. The great emphasis was given by the learned counsel for the appellant that in the Pariwar Register, Relation Certificate, Report of the Police Station and the copy of the Khatauni, the name of the appellant has been recorded as an heir of Kanhaiya Lal, therefore, the adoption was valid. But the same has been recorded after execution of registered adoption deed and till the date of registration of adoption deed, the name of the appellant was shown in the family of his natural father Ram Kishore. So the appellant is not entitled for any benefit of the said documents unless and until the adoption is held valid in accordance with law. (Para 34)

Section 11(6) provides that a child adopted must be actually given and adopted by the parents or guardian concerned or under their authority with intent to transfer the child from the family of its birth to the family of its adoption. But the appellant has failed to prove that he was adopted in his childhood. (Para 35)

The question arises as to whether the adoption deed was validly registered or not. S. 7 provides that any male Hindu, who is of sound mind and is not a minor, has the capacity to take a son or a daughter in adoption. It could not be proved that Kanhaiya lal was in fit condition to give free consent and execute the deed and both i.e. adoptive father and natural father did not even know the contents of the deed so it has wrongly been mentioned in the deed that this adoption deed has been written after hearing and understanding. Therefore, **the appellant is not entitled for presumption available to registered deed of adoption.** (Para 36)

D. Civil Procedure Code, 1908 - Order 41 Rule 31 – It is well-settled that the first appellate Court shall state the points for determination, the decision thereon and the reasons for decision. However, it is equally well-settled that mere omission to frame point/points for determination does not vitiate the judgment of the first appellate Court. (Para 38)

The judgment of the appellate Court must reflect its conscious application of mind and record findings supported by reasons on all the issues arising alongwith the contentions put forth, and pressed by the parties for decision of the appellate Court. The appellate Court agreeing with the view of the trial Court need not restate the effect of the evidence or reiterate the reasons given by the trial Court; expression of general agreement with reasons given by the Court, decision of which is under appeal, would ordinarily suffice. (Para 40, 43)

The judgment of the first appellate Court should be in conformity with the Order-41 Rule-31 of C.P.C. and reflect the conscious application of mind on the issues involved in the case but the same cannot be vitiated merely because the point of determinations have not been specifically stated. (Para 48)

Thus this Court is of the considered opinion that there is no illegality or error in the judgment and order passed by the appellate Court by which the judgment of trial Court has been confirmed and it does not vitiate merely because the points of determination have not been stated though it has disclosed the issues considered by it as discussed above. The findings recorded by the Courts below and the conclusion that the alleged adoption deed dated 11.8.1995 is not valid and the respondent is able to get it cancelled, does not suffer from any illegality or error. Learned counsel for the appellant has also failed to demonstrate in any manner that the judgment and decree passed by the appellate Court is not sustainable on merit therefore merely on technical grounds, although that also does not subsist as discussed above, it cannot be reversed or remanded in view of S. 99 of C.P.C. (Para 49)

Second appeal dismissed.(E-3)

Precedent cited:

1. U. Manjunath Rao Vs Chandrashekhar & anr., 2017 SCC Online SC 865 (Para 10, 42)

2. Kanailal & ors. Vs Ram Chandra Singh & ors. , 2017 SCC Online SC 1009 (Para 10, 39)

3. C. Venkata Swamy Vs H.N. Shivanna (D) by Lrs. & anr., (2018) 1 SCC 604 (Para 10, 43)

4. Laliteshwar Prasad Singh & ors. Vs S.P. Srivastava (D) through Lrs., (2017) 2 SCC 415 (Para 10)

5. Malluru Mallappa (D) through LRs. Vs Kuruvathappa & ors., (2020) 4 SCC 313 (Para 10, 13, 40)

6. Santosh Hazari Vs Purushottam Tiwari (D) by Lrs., (2001) 3 SCC 179 (Para 10)

7. Shashidhar & ors. Vs Ashwani Uma Mathad & anr., (2015) 11 SCC 269 (Para 10)

8. Shiv Singh Rana Vs Deputy Registrar & ors. 2000 (18) LCD 1211 (Para 10)

9. Committee of Management Vs Deputy Director of Education, 2006 (24) LCD 1328 (Para 10)

10. Vinod Kumar Vs Gangadhar, (2015) 1 SCC 391 (Para 10)

11. Gram Sabha Kaunai Vs Deputy Director of Consolidation, 2009 (27) LCD 1118 (Para 10)

12. Ayodhya Prasad Tewari Vs Ramesh Chandra & ors. , 2012 (30) LCD 575 (Para 10)

13. Amar Singh Vs Tej Ram & anr., AIR 1982 Punj. & Har. 282 (Para 10)

14. Sushil Chandra Vs Smt. Bhoop Kunwar & ors. , AIR 1977 Allahabad 441 (Para 10)

15. Md. Aftabuddin Khan & ors. Vs Smt. Chandan Bilasini & anr., AIR 1977 Orissa 69 (Para 10, 32)

16. Gurrella Durga Vara Prasad Rao Vs Indukuri Ram Raju, 2002 (Supp. 2) ALD 757 (Para 13, 45)

17. U.O.I. & ors. Vs Tarsem Singh, 2008 (8) SCC 648 (Para 13, 16)

18. Mst. Deu & ors. Vs Laxmi Narayan & ors., (1998) 8 SCC 701 (Para 20)

19. Laxmibai (Dead) through LRs. & anr. Vs Bhagwantbuva (Dead) through LRs. & ors. , (2013) 4 SCC 97; 2013 (31) LCD 540 (Para 10, 13, 25)

20. State of Chhatisgarh & ors. Vs Dhirjo Kumar Sengar, (2009) 13 SCC 600 (Para 31)

21. Madhusudan Das Vs Smt. Narayani Bai & ors. , AIR 1983 SC 114; (1983) 1 SCC 35 (Para 32)

22. Kannai Lal & ors. Vs Ram Chandra Singh & ors. , 2017 SCC Online SC 1009 (Para 39)

23. Madhukar & ors. Vs Sangram & ors. , (2001) 4 SCC 756 (Para 42)

24. Nopani Investment (P) Ltd. Vs Santokh Singh (HUF), (2008) 2 SCC 728 (Para 44)

25. G. Amalorpavam Vs R.C. Diocese of Madurai, (2006) 3 SCC 224 (Para 47)

26. Dalla Vs Nanhu, 2018 SCC Online All 5845 (Para 50)

Precedent distinguished:

1. Ayodhya Prasad Vs Durga Prasad & ors., (2017) 35 LCD 3236 (Para 10, 48)

2. Ram Narain Vs Raj Narain, 2017 (35) LCD 2771 (Para 10, 48)

3. Kuldeep Saxena Vs Smt. Archana Saxena & 6 ors., 2017 (Suppl) ADJ 740 (Para 10, 48)

4. Narayan Bhagwantrao Gosavi Balajiwale Vs Gopal Vinayak Gosavi & ors., AIR 1960 SC 100 (Para 10, 21)

5. Union of India Vs Ibrahim Uddin & anr., 2012 (30) LCD 1635 (Para 10, 21)

6. Ram Dayal & ors. Vs Firm Hanoman Prasad Manohar Lal & ors., 1985 (3) LCD 262 (Para 6, 17)

Present second appeal has been filed against the judgment and decree dates 19.12.2013 and judgment and decree dated 31.07.2013 passed by trial court.

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

1. This second appeal under Section 100 of the Code of Civil Procedure has been filed against the judgment and decree dated 19.12.2013 passed in Civil Appeal No.198 of 2013 (Shiv Darshan Yadav Vs. Adhishashi Abhiyanta) and judgment and decree dated 31.07.2013 passed by the trial court in Original Suit No.842 of 2011 (Adhishashi Abhiyanta Vs. Shiv Darshan Yadav).

2. The brief facts of the case for adjudication of the instant second appeal are that the appellant Shiv Darshan Yadav was appointed under dying in harness as junior clerk in place of his alleged adoptive father namely Kanhaiya Lal on the basis of an alleged adoption deed dated 11.08.1995. A complaint was made by one Mukesh Kumar Srivastava, a social worker on 27.05.2011 to the District Magistrate, Faizabad alleging that the appellant has obtained the service on the basis of a fraudulent adoption deed and requested for a magisterial enquiry. In pursuance thereof an enquiry was conducted by the City Magistrate, Faizabad. On the basis of the Enquiry Report, submitted after recording statement of the appellant, the District Magistrate, Faizabad written letters dated 20.06.2011 and 21.06.2011 to the officers of the Electricity Department to take action against the appellant. In pursuance thereof the appellant was suspended vide order dated 30.12.2011 and the Original Suit No.842 of 2011 was filed by the respondent before the Additional Civil Judge, Junior Division-IV, Faizabad for cancellation of Adoption Deed dated 11.08.1995.

3. The appellant challenged the suspension order before this Court in Writ Petition No.952 (S/S) of 2012. The writ petition was dismissed on 02.02.2012 with direction to the opposite parties to conclude the enquiry within a period of four months. After submission of Enquiry Report, the appellant was reinstated vide order dated 10.04.2012 subject to judgment in Original Suit No.842 of 2011 pending in the Court of Civil Judge, (Jr. Division) Sadar, Faizabad. The suit was decreed after evidence and opportunity of hearing by means of the judgment and decree dated 31.07.2013. Being aggrieved the civil appeal No.198 of 2013 was filed by the appellant which was also dismissed vide judgment and decree dated 19.12.2013. Hence, the instant second appeal.

4. The instant second appeal was admitted on the following substantial questions of law:-

"(1) Whether the suit filed by the respondent was not barred by limitation as in view of the specific admission of PW-1 that on the basis of the registered deed of adoption, the appellant was appointed on compassionate ground under Dying in Harness Rules after the death of Kanhaiya Lal Yadav and the learned courts below were justified in law in holding that the suit was within limitation, while decreeing the suit?

(2) Whether the presumption available to a registered deed of adoption under Section-16 of the Hindu Adoption & Maintenance Act, 1956 coupled with the provisions of section 47 of the registration Act could be discarded merely on surmises and conjectures, ignoring the admissions made by PW-1?

(3) Whether the appellant, who after execution of the registered deed of adoption had completely severed relations with his natural father and mother and on the death of adoptive father, Kanhaiya Lal Yadav, his name was recorded in revenue records being an adopted son. The learned courts below were justified in law in cancelling the registered deed of adoption merely on technicalities, ignoring the law propounded by the apex to the effect that there is a presumption about the registered deed of adoption, unless proved otherwise by leading cogent evidence on record?

(4) Whether in view of of the well settled proposition of law that the plaintiff has to prove his case by leading positive evidence on record and could not derive any benefit from the weakness of defence and the learned courts below were justified in law while decreeing the suit?"

Subsequently, during course of arguments learned counsel for the appellant contended that the appellate court has decided the appeal without complying the provisions of Order-41, Rule-31 of the Civil Procedure Code, therefore the following substantial question of law was also framed:-

" (5) Whether judgment passed by the Lower Appellate court is not sustainable due to non compliance of Order 41 Rule 31 of Civil Procedure Code as point of determination has not been stated and whether the said provision is mandatory and failure to comply the same vitiates the judgment?"

5. Heard, Shri Mohd. Arif Khan, learned Senior Advocate assisted by Shri Mohd. Aslam Khan, learned counsel for the appellant and Shri B.N. Mishra, learned counsel for the respondent.

6. Submission of learned counsel for the appellant was that the suit filed by the respondent was barred by limitation because the adoption deed was executed on 11.08.1995 and the suit was filed on 25.11.2011 whereas on the basis of the said registered adoption deed the appellant was appointed in dying in harness in the year 1996 without raising any objection. Therefore, the suit should have been dismissed being barred by limitation under Order 7 Rule 11. The learned trial court, despite a specific plea by the appellant in regard to limitation, failed to make any issue in regard to limitation. He, relying on a judgment of this Court in the case of ***Ram Dayal and Others Vs. Firm Hanoman Prasad Manohar Lal and Others; 1985 (3) LCD 262***, submitted that it is the responsibility of the court to frame the proper issues which arise in the case. He had further submitted that the suit was not maintainable on the principle of estoppel also because once the appellant was appointed treating the same adoption deed as correct, the respondent could not have challenged validity of the same.

7. Learned counsel for the appellant had further submitted that the presumption available to a registered deed of adoption under Section-16 of the Hindu Adoption and Maintenance Act, 1956 (here-in-after referred as HAMA 1956) can not be discarded merely on the basis of a complaint and it can not be challenged by the department. The court also could not have discarded the same merely on surmises and conjunctures ignoring the admission by PW1 that the department had appointed the appellant founding the adoption deed to be correct. He further submitted that the name of the appellant was recorded in Pariwar Register and Revenue Records after the death of late Kanhaiya Lal on whose place the appellant was appointed under dying in harness rules.

But the said documents have wrongly been discarded by the trial court on the ground that they are subsequent to the adoption deed and not considered by the appellate court. Therefore both the judgments passed by the courts below are vitiated and not sustainable in the eyes of law.

8. Learned counsel for the appellant had further submitted that the respondent had to prove his case by leading positive evidence and could not derive any benefit from the weakness of the defence but the learned courts below failed to consider it. The respondent had failed to prove his case and disprove the registered adoption deed, ignoring the same the suit has been allowed and appeal has been dismissed on the ground that the appellant has not been able to discharge his burden.

9. Learned counsel for the appellant had also submitted that the first appellate court has decided the appeal without following the mandatory provisions of Order-41, Rule-31 of the Civil Procedure Code as points of determination have not been stated. The first appellate court had also failed to consider all the evidence and material on record. Therefore, the judgment and decree passed by the first appellate court is not sustainable on this ground alone and is liable to be set-aside.

10. The learned counsel for the appellant has relied on *Kuldeep Saxena Vs. Smt. Archana Saxena and 6 Others; 2017 (Suppl) ADJ 740, U. Manjunath Rao Vs. Chandrashekar and Another; 2017 SCC Online SC 865, Kanailal and Others Vs. Ram Chandra Singh and Others; 2017 SCC Online SC 1009, C. Venkata Swamy Vs. H.N. Shivanna (D) by Lrs. and Another; (2018) 1 SCC 604, Laliteshwar Prasad Singh and Others Vs. S.P. Srivastava (D) through Lrs; (2017) 2 SCC 415, Ayodhya Prasad Vs. Durga Prasad and Others; 2017(35) LCD 3236, Ram Narain Vs. Raj Narain; 2017 (35) LCD 2771, Malluru Mallappa (D) through Lrs. Vs. Kuruvathappa and Others; (2020) 4 SCC 313, Madhukar and Others Vs. Sangram and Others; (2001) 4 SCC 756, Santosh Hazari Vs. Purushottam Tiwari (D) by Lrs.; (2001) 3 SCC 179, Shashidhar and Others Vs. Ashwani Uma Mathad and Another; (2015) 11 SCC 269, Shiv Singh Rana Vs. Deputy Registrar and Others; 2000 (18) LCD 1211, Committee of Management Vs. Deputy Director of Education; 2006 (24) LCD 1328, Union of India Vs. Ibrahim Uddin and Another; 2012 (30) LCD 1635, Vinod Kumar Vs. Gangadhar; (2015) 1SCC 391, Gram Sabha Kaunai, Vs. Deputy Director of Consolidation; 2009 (27) LCD 1118, Ayodhya Prasad Tewari Vs. Ramesh Chandra and Others; 2012 (30) LCD 575, Laxmibai (D) and another Vs. Bhagwantbuva (D) and Others; 2013 (31) LCD 540, Amar Singh Vs. Tej Ram and Another; AIR 1982 Punjab and Haryana 282, Sushil Chandra Vs. Smt. Bhoop Kunwar and Others; AIR 1977 Allahabad 441, Md. Aftabuddin Khan and Others Vs. Smt. Chandan Bilasini and Another; AIR 1977 Orissa 69 and Narayan Bhagwantrao Gosavi Balajiwale Vs. Gopal Vinayak Gosavi and Others; AIR 1960 SC 100.*

11. Submission of learned counsel for the appellant was refuted by the learned counsel for the respondent. He had submitted that the suit was filed within time from the date of knowledge of execution of adoption deed fraudulently, when a complaint was made on 27.05.2011 to the District Magistrate, Faizabad and enquiry was conducted and letters were written to the higher officers of respondent department on 20.06.2011 and 21.06.2011.

He further submitted that it was a case of obtaining service under dying in harness on the basis of a fraudulent adoption deed in which the respondent was not a party. Therefore, it was rightly filed by the department within the time from the date of knowledge being fraudulent and it was not barred by Principle of Estoppel also. The plea of limitation raised by the appellant has been considered by the trial court and rejected. He relied on Sl. No.59 of the Schedule of the Limitation Act, 1963.

12. Learned counsel for the respondent had further submitted that the case of the respondent was proved by the PW-1 and PW-2 and disproved the adoption deed executed in favour of the appellant. The appellant could not extract anything in cross-examination which may disbelieve the evidence. He further submitted that DW-1 i.e. the appellant and DW-2, who is the natural father of the appellant gave contradictory evidence which is not believable. The appellant could not prove the adoption and execution of deed validly. It is the admitted case of the appellant that Kanhaiya Lal, who had executed the adoption deed, was suffering from paralysis and he was not in a position to speak and walk and his hands and legs were also not working so it was falsely mentioned in the adoption deed that the same has been executed with his sweet will after he heard and understood. There is also no proper explanation for putting thumb impression on the adoption deed while Kanhaiya Lal, the alleged adoptive father of the appellant used to sign. A finding was also recorded by the City Magistrate that the thumb impression does not tally with the thumb impression on service book of Kanhaiya Lal, even then the appellant did not try to prove the same. Therefore it is apparent that the adoption deed was also got executed and registered fraudulently by some other person in place of late Kanhaiya Lal.

13. Learned counsel for the respondent had also vehemently opposed the submission of learned counsel for the appellant regarding violation of order-41, rule 31 of C.P.C. and submitted that there is no illegality or infirmity in the order passed by the first appellate court. Learned counsel for the respondent relied on ***Gurrella Durga Vara Prasad Rao Vs. Indukuri Rama Raju; 2002 (Supp.2) ALD 757, Malluru Mallappa (D) through LRs. Vs. Kuruvathappa and Others; (2020) 4 SCC 313, Laxmibai (D) and Another Vs. Bhagwantbuva (D) and Others; 2013 (31) LCD 540 and Union of India and Others Vs. Tarsem Singh; 2008 (8) SCC 648.***

14. I have considered the submissions of learned counsel for the parties and perused the records.

15. The so called registered adoption deed was executed on 11.08.1995, on the basis of which the appellant was appointed under dying in harness rules on 17.08.1996 on the post of Clerk with the respondent. A complaint was made by one Mukesh Kumar Srivastava, a social worker, on 27.05.2011 to the District Magistrate for Magisterial Enquiry in regard to obtaining service by the appellant on the basis of forged document etc. In pursuance there of an enquiry was conducted by the City Magistrate, in which the adoption deed was found to have been got executed in a fraudulent manner and a report was submitted by him on 20.06.2011. In pursuance thereof the District Magistrate had written letters dated 20.06.2011 and 21.06.2011 to the department of the appellant i.e. the respondent. Thereafter, the

suit for cancellation of registered adoption deed dated 11.08.1995 was filed by the respondent on 28.11.2011. Sl. No.59 of the Schedule of The Limitation Act, relevant for the purpose, is extracted below:-

Sl. No.	Description of Suit	Period of Limitation	Time from which period begins to run
59.	To cancel or set aside an instrument or decree or for the rescission of a contract.	Three years	When the facts entitling the plaintiff to have the instrument or decree cancelled or set aside or the contract rescinded first become known to him.

16. In view of above, the period of limitation to set-aside the registered adoption deed, on the basis of which the appellant was appointed in service, is three years from the date of knowledge of the fact entitling to respondent i.e. the plaintiff to have the instrument cancelled. Section 17 of the Limitation Act provides that the period of limitation shall not begin to run until the plaintiff or applicant has discovered the fraud. It is not disputed that the respondent was not a party to the deed. Therefore it can not be said that the fact entitling to plaintiff to have the instrument rescinded was become known to respondent/plaintiff prior to the complaint made questioning the adoption deed only because the appellant was appointed on the basis of the alleged adoption deed treating it as correct because it was registered. The fact entitling the respondent to have the instrument cancelled or set-aside first become known to the respondent only on or after 27.05.2011, when the complaint was made it was found fraudulently registered and the suit was filed on 28.11.2011, therefore the suit was filed well within time and it was not barred by limitation. The Hon'ble Apex Court, in the case of **Union of India and Others Vs. Tarsem Singh (Supra)**, has held that a "continuing wrong" refers to a single wrongful act which causes a continuing injury and in such case relief can be granted even if there is a long delay. In the present case the appellant was appointed on the basis of fraudulent deed and continuing and getting salary regularly, therefore also the suit for cancellation of the fraudulent deed can not be barred by limitation.

17. Now the question arises, as to whether the trial court had failed in discharging its responsibility of framing the issue of limitation when a plea was raised. The trial court had framed issue no.6 "Whether the suit was barred by provisions of Order-7, Rule-11, C.P.C." Order-7, Rule-11 of C.P.C. provides the grounds on which a plaint can be rejected. Sub-rule (d) of Rule-11 provides "Where the suit appears from the statement in the plaint to be barred by any law." Therefore the plea of barred by law of limitation could have been considered in the said issue. This Court, in the case of ***Ram Dayal and Other Vs. Firm***

Hanoman Prasad Manohar Lal and Others (Supra), has held that it is true that on the date of framing of the issues the parties made statement that no other issue is pressed but that does not absolve the responsibility of the court in not framing proper issues which arise in the case. Since an issue was framed, in which the plea of barred by law of limitation raised by the appellant could have been considered and was considered by the trial court and found the suit within limitation, therefore there was no need of framing a separate issue of limitation. This court is of the considered opinion that there is no illegality or error in the finding recorded by the trial court in regard to limitation and it has not committed any illegality or error in not framing a separate issue in regard to limitation and trial court has rightly discharged the responsibility. The aforesaid case law relied by learned counsel for the appellant is of no assistance to him.

18. The next submission of learned counsel for the appellant was regarding presumption available to the registered adoption deed under Section-16 of the HAMA 1956 and it can not be challenged by the department. Section-16 of the Hindu Adoption and Maintenance Act is extracted below:-

*"**16. Presumption as to registered documents relating to adoption:-** Whenever any document registered under any law for the time being in force is produced before any court purporting to record an adoption made and is signed by the person giving and the person taking the child in adoption, the court shall presume that the adoption has been made in compliance with the provisions of this Act unless and until it is disproved."*

The aforesaid Section-16 has been renumbered as Sub-section 1 and Sub-section 2 has been added by the State Amendment by the State of Uttar Pradesh by means of Act No. 57 of 1956 w.e.f. 01.01.1997, which is extracted below:-

"State Amendment Uttar Pradesh Section 16 renumbered as sub-section(1) thereof and after sub-section (1) as so renumbered, the following sub-section (2) shall be inserted, namely:--

"(2) In case of an adoption made on or after the 1st day of January, 1977 no court in Uttar Pradesh shall accept any evidence in proof of the giving and taking of the child in adoption, except a document recording an adoption, made and signed by the person giving and the person taking the child in adoption, and registered under any law for the time being in force: Provided that secondary evidence of such document shall be admissible in the circumstances and the manner laid down in the Indian Evidence Act, 1872."

(i) Whenever any document registered under any law for the time being in force is produced before any court purporting to record an adoption made and is signed by the person giving and the person taking the child in adoption, the court shall presume that the adoption has been made in compliance with the provisions of this Act. The proof of giving and taking of child is not necessary; Pathivada Rama Swami v. Karoda Surya Prakasa Rao, AIR 1993 AP 336.

(ii) If the adoption is disputed, it is for the plaintiff to prove that ceremony of giving and taking has not taken place; Devgonda Raygonda Patil v. Shamgonda Raygonda Patil, AIR 1992 Bom 189"

19. In view of above, in case a registered document relating to adoption is produced, the court shall presume that the

adoption has been made in compliance with the provisions of the Act unless and until it is disproved. It has been provided by State amendment of Uttar Pradesh that on or after 1st day of January, 1977 the court shall not accept any evidence of adoption, except a document recording an adoption, made and signed by the person giving and person taking the child in adoption, and registered under any law for the time being in force. Thus the presumption is available only until it is disproved. Therefore it is always open to the person challenging it to disprove the same in accordance with law. Therefore, the validity of the adoption deed could have been examined by the court when the question regarding it's validity was raised.

20. The Hon'ble Apex Court, in the case of ***Mst. Deu and Others Vs. Laxmi Narayan and Others; (1998) 8 SCC 701***, has held that in view of Section 16, whenever any document registered under any law is produced before any court purporting to record an adoption made and the same is signed by the persons mentioned therein, the court shall presume that the said adoption has been made in compliance with the provisions of he Act, until and unless such presumption is disproved. It was further held that in view of Section 16 it is open for a party to attempt to disprove the deed of adoption by initiating independent proceedings.

21. In view of above the respondent has rightly filed the suit for cancellation of deed of adoption in accordance with law under Section 31 of Specific Relief Act, 1963 after coming to know that it was fraudulently got registered because the respondent department has to pay the salary to the appellant from the public exchequer on account of appointment in dying in harness on the basis of said fraudulent deed. Therefore, the admission that the appellant was appointed on the basis of the said deed being a registered document does not debar it from challenging the deed because it may cause serious injury to it. Therefore it is not barred by principle of estoppel also. The judgment of the Hon'ble Apex Court, in the case of ***Narayan Bhagwantrao Gosavi Balajiwale Vs. Gopal Vinayak Gosavi and Others (Supra),*** is of no assistance to the appellant because it provides that an admission is best evidence, though not conclusive but decisive unless successfully withdrawn or proved erroneous. The same view has been reiterated in the ***Union of India Vs. Ibrahim Uddin and Another (Supra).*** It can be proved only in appropriate proceeding therefore it can not be said that the suit could not have been filed.

22. The certified copy of the adoption deed on record shows that the same has been executed by Kanhaiya Lal, the adoptive father of the appellant and the natural parents of the appellant i.e. Ram Kishore and Devraji. It is mentioned in the deed that wife of Kanhaiya Lal has died some times ago. It has further been stated that he had adopted the son of the second party Shiv Darshan in his childhood according to Hindu rituals but it was not in writing. Therefore, it is apparent that the appellant was not adopted when the deed was being registered and the registered deed was executed in regard to the alleged adoption made earlier. But the details i.e. no date, time and place of adoption and any witness of the alleged adoption has been given in the adoption deed. Therefore the adoption deed does not itself prove that the alleged adoption is in accordance with law.

23. The question arises as to whether in case of registration of an adoption deed of an earlier oral adoption it would operate from the date of oral adoption or from the

date of registration. Section-47 of the Registration Act provides that the registered document shall operate from the time from which it would have commenced to operate if no registration thereof had been required or made and not from the time of its registration. Section-47 is extracted below:-

"47. Time from which registered document operates- *A registered document shall operate from the time from which it would have commenced to operate if no registration thereof had been required or made, and not from the time of its registration."*

24. The alleged adoption has been made in the year 1980, which is after 1977 and in view of Sub-Section (2) of Section-16 by the State amendment in Uttar Pradesh, in case of an adoption after the first day of January 1977, no court in Uttar Pradesh shall accept in evidence in proof of giving and taking of a child in adoption except document regarding any adoption, made and signed by the person giving and the person taking the child in adoption, and registered under any law for the time being in force. Therefore the adoption in the present case would not be valid without registered deed of adoption and it can not operate from a prior date, so also the appellant does not get any benefit from it because it's contents does not prove valid adoption.

25. The Hon'ble Apex Court, in the case of ***Laxmibai (Dead) through LRs. and Another Vs. Bhagwantbuva (Dead) through LRs. and Others; (2013) 4 SCC 97***, has held that the Court while construing a document, is under an obligation to examine the true purport of the document and draw an inference with respect to the actual intention of the parties. The Hon'ble Apex Court found in the said case that the complete details were given in the registered adoption deed. Relevant paragraph 16 is extracted below:-

"16. Undoubtedly, the court while construing a document, is under an obligation to examine the true purport of the document and draw an inference with respect to the actual intention of the parties. The adoption deed was registered on 11.5.1971, and the same provided complete details stating that the adopted child was 8 years of age, and that the adoptive mother was an old lady of 70 years of age. The adoptive child was related to Smt. Laxmibai. Her husband had expired in 1951 and it had been his desire to adopt a son in order to perpetuate the family line and his name. The natural parents of the adoptive child had agreed to give their child in adoption, and for the purpose of the same, the requisite ceremony for a valid adoption was conducted, wherein the natural parents, Vasant Bhagwant Pandav and Smt. Sushilabai Vasantrao Pandav, placed the adoptive child in the lap of the adoptive mother, in the presence of a large number of persons, including several relatives. A religious ceremony called "Dutta Homam", involving vedic rites was performed by a pandit, and photographs of the said occasion were also taken. Registration of the adoption deed was done on the same day, immediately after its execution, before the concerned Registrar. The adoptive mother put her thumb impression on the deed, and it was also signed by the natural parents of the child. Additionally, the deed was signed by 7 witnesses, and all the parties have been identified. The registered document when read as a whole, makes it evident that Vasant Bhagwant Pandav and Smt.

Sushilabai, the natural parents of the adoptive child, have signed the same as attesting witnesses, and not as executing parties."

26. The question arises as to whether the adoption was made in accordance with law or not. Chapter II of the Hindu Adoption and Maintenance Act, 1956 deals with the adoption. The relevant provisions are discussed/extracted first for better appreciation of the rival contentions in the case in hand. Section 5 provides that no adoption shall be made after the commencement of the Act by or to a Hindu except in accordance with the provisions contained in this chapter and any adoption made in contravention of the said provisions shall be void. An adoption which is void shall not create any rights in the adoptive family. The requisites of a valid adoption has been provided in Section 6, which is extracted below:-

"6. Requisites of a valid adoption- No adoption shall be valid unless- (i) the person adopting has the capacity, and also the right, to take in adoption;

(ii) the person giving in adoption has the capacity to do so;
(iii) the person adopted is capable of being taken in adoption; and (iv) the adoption is made in compliance with the other conditions mentioned in this Chapter."

27. Section 7 provides the capacity of a male Hindu to take in adoption, which is extracted below:-

"7. Capacity of a male Hindu to take in adoption- Any male Hindu who is of sound mind and is not a minor has the capacity to take a son or a daughter in adoption. Provided that, if he has a wife living, he shall not adopt except with the consent of his wife unless the wife has completely and finally renounced the world or has ceased to be a Hindu or has been declared by a court of competent jurisdiction to be of unsound mind. Explanation-If a person has more than one wife living at the time of adoption, the consent of all the wives is necessary unless the consent of any one of them is unnecessary for any of the reasons specified in the preceding proviso."

28. Section 10 of the HAMA 1956 provides the person who may be adopted. The relevant Section 10 (IV) for the purpose of this case is extracted below:-

*"**10.(iv)** he or she has not completed the age of fifteen years, unless there is a custom or usage applicable to the parties which permits persons who have completed the age of fifteen years being taken in adoption."*

29. The other conditions for a valid adoption have been given in Section-11 of the HAMA 1956 which are extracted below:-

*"**11. Other conditions for a valid adoption-** In every adoption, the following conditions must be complied with:*
(i) if any adoption is of a son, the adoptive father or mother by whom the adoption is made must not have a Hindu son, son's son or son's son's son (whether by legitimate blood relationship or by adoption) living at the time of adoption;

(ii) if the adoption is of a daughter the adoptive father or mother by whom the adoption is made must not have a Hindu daughter or son's daughter (whether by legitimate blood relationship or by adoption) living at the time of adoption;

(iii) if the adoption is by a male and the person to be adopted is a female, the adoptive father is at least twenty-one years older than the person to be adopted;

(iv) if the adoption is by a female and the person to be adopted is a male, the adoptive mother is at least twenty-one years older than the person to be adopted;

(v) the same child may not be adopted simultaneously by two or more persons;

(vi) the child to be adopted must be actually given and taken in adoption by the parents or guardian concerned or under their authority with intent to transfer the child from the family of its birth or in the case of an abandoned child or a child whose parentage is not known, from the place or family where it has been brought up to the family of its adoption.

Provided that the performance of datta homan, shall not be essential to the validity of an adoption."

30. In view of aforesaid provisions the adoption made after commencement of the Act of 1956 is valid only if it has been made in accordance with the provisions contained in chapter II and if it is in contravention of the said provisions, it shall be void. Therefore, it is required to be proved even if there is deed of adoption. In the present case the so called adoption deed was got registered on 11.08.1995 stating therein that the appellant was adopted in his childhood. Therefore, if the adoption is in accordance with the Act, only then, it is valid otherwise it is void. In view of S.106 of Evidence Act, the burden was on appellant because of special knowledge of the alleged adoption.

31. The Hon'ble Apex Court, in the case of ***State of Chhatisgarh and others Vs. Dhirjo Kumar Sengar; (2009) 13 SCC 600,*** has held that in terms of Section 106 of the Evidence Act, the respondent having special knowledge in regard thereto, the burden of proving the fact that he was adopted, was on him.

32. The Hon'ble Apex Court in the case of ***Madhusudan Das Vs. Smt. Narayani Bai and Others; AIR 1983 SC 114 / (1983) 1 SCC 35***, has held that a person who seeks to displace the natural succession by alleging an adoption must discharge the burden that lies upon him by proof of the factums of adoption and its validity by the evidence which should be free from all suspicion of fraud. The relevant paragraph- 19 is extracted below:-

"19. It is well settled that a person who seeks to displace the natural succession to property by alleging an adoption must discharge the burden that lies upon him by proof of the factum of adoption and its validity. (see A. Raghavamma and Anr. v. A. Chanchamma). It is also true that the evidence in proof of the adoption should be free from all suspicion of fraud and so consistent and probable as to give no occasion for doubting its truth. (see Kishori Lal v. Chaltibai). Nonetheless the fact of adoption must be proved in the same way as any other fact."

The same view has been taken in ***Md. Aftabuddin Khan and Others Vs. Smt. Chandan Bilasini and another*** relied by the learned counsel for the appellant.

33. The first requisite of a valid adoption, as per Section 6(1) is that the person adopting has the capacity, and also the right, to take in adoption. As per Section 7 any male Hindu of sound mind and not a minor has the capacity to take a son or daughter in adoption. Provided if he

has a wife living, he shall not adopt except with the consent of his wife unless the wife was incapable of giving consent for the reasons stated under the proviso. In the present case it has not been disclosed as to when wife of the adoptive father had died and if she was alive at the time of alleged adoption as to whether the adoption was made with her consent or she was incapable of giving consent. It has also not been disclosed as to whether the appellant was unmarried or married at the time of adoption. It has been mentioned in the alleged adoption deed that the appellant is of 11 years of age at the time of adoption deed while the appellant was of 25 years of age as admitted by him in his evidence. Whereas in view of sections 10 (iv) and 11, besides other, the person who is being adopted should not have been married and not completed the age of 15 years unless there is a custom of usage applicable to the parties. Therefore, it appears that the age was mentioned to bring it within the purview of the HAMA 1956. DW-2/ the natural father of the appellant has stated in his evidence by way of affidavit prepared in court compound on 02.02.2013 since the age was not mentioned therefore the Sub-Registrar had scolded to the scribe therefore he had written it in haste. But in cross-examination on 13.02.2013 he stated that he has not filed any document by his signature in this case and he had come to this court before 1-2 year. The DW-3 has firstly stated that Sub-Registrar had scolded to the scribe and subsequently he stated in his cross-examination that he does not know as to whether the Sub-Registrar or his Clerk had scolded to the scribe or not and then stated that the writer was not scolded by the Sub-Registrar or his Clerk before him and he was not scolded before Kanhaiya Lal Yadav or Ram Kishore also. Therefore they have given contradictory evidence so their evidence is not reliable.

34. Section-12 of the HAMA 1956 provides the affects of adoption, according to which an adopted child shall be deemed to be the child of his or her adoptive father or mother for all purposes with effect from the date of adoption and from such date all the ties of the child in the family of his or her birth shall be deemed to be severed and replaced by those created by adoption in the adoptive family. As such from the date of adoption the relation of child, who has been adopted, shall be severed from the family from which it has been adopted. As alleged in the present case Kanhaiya Lal has adopted the appellant in the year 1980. Thereafter he should have got his name recorded in the school records but it was not done. However a plea has taken that the teacher had refused to write on the ground that everybody has come to know it and there is no requirement of it and if it is required, he will do so but it is not believable. The appellant as DW-1, admitted in his cross-examination that he had studied up to B.A. but he had not given any written application to the Principal of the college for writing the name of Kanhaiya Lal. The DW-2 has also stated that he does not know as to whether the parentage was changed in the school records or not. Therefore, it is apparent that the name of the natural father of the appellant continued in the official records. The great emphasis was given by the learned counsel for the appellant that in the Pariwar Register, Relation Certificate, Report of the Police Station and the copy of the Khatauni, the name of the appellant has been recorded as an heir of Kanhaiya Lal, therefore, the adoption was valid. But the same has been recorded after execution of registered adoption deed and till the date of registration of adoption deed, the name of the appellant was shown in the family of his natural father Ram Kishore. So the appellant is not entitled for any benefit of

the said documents unless and until the adoption is held valid in accordance with law.

35. Section-11 (6) provides that a child adopted must be actually given and adopted by the parents or guardian concerned or under their authority with intent to transfer the child from the family of its birth to the family of its adoption. But no date, time and place has been given on which late Kanhaiya Lal had adopted to the appellant. Though, it has been stated by the appellant in the written statement that he was adopted on Saptami Tithi Chaitmaas Navrat of 1980 after calling his parents, villagers and relatives and according to Hindu rituals but the appellant has failed to prove the same by adducing any cogent evidence. The DW-1 i.e. the appellant himself and the other two witnesses- DW-2 i.e. the natural father of the appellant and DW-3 i.e. the attesting witness of the deed could not disclose the name of the priest who had got performed the rituals of adoption and the name of any of the villagers or relatives present at that time. Therefore, the appellant has failed to prove that he was adopted in his childhood.

36. In view of above, the question arises as to whether the adoption deed was validly registered or not. Section-7 provides that any male Hindu, who is of sound mind and is not a minor, has the capacity to take a son or a daughter in adoption. The adoptive father of the appellant late Kanhaiya Lal Yadav had paralysis attack on 04.07.1995 when he was hospitalized in Civil Hospital, Faizabad from where he was discharged on 10.07.1995. Thereafter his condition deteriorated so he was referred to K.G.M.C. Lucknow where also he remained hospitalized for sometime and after discharge he had executed the adoption deed on 11.08.1995 and he died on 19.08.1995. As per evidence of DW-2 he had informed to the appellant that adoption deed is going to be registered but it was not informed by the Kanhaiya Lal; the adoptive father because he was not in a position to speak. Kanhaiya Lal had put his signatures on the adoption deed without reading or getting it read by anyone therefore it is apparent that he did not know the contents of the adoption deed at the time of signing the deed while the deed was not signed. There is thumb impression on the alleged deed. It has also been stated that the paralysis was in whole body because of which his hands and legs were not working and he was also not able to speak though he was able to recognize. The DW-2 also stated that after execution of the deed, he took Kanhaiya Lal to Lucknow Medical College where he remained admitted for 10-12 days. Subsequently, he said that he took him after 8-10 days of execution of adoption deed to Lucknow while he had died after 7 days on 17.08.1995. He also stated that he had not heard the contents of the deed and only made the signatures. Therefore it could not be proved that Kanhaiya lal was in fit condition to give free consent and execute the deed and both i.e. adoptive father and natural father did not even know the contents of the deed so it has wrongly been mentioned in the deed that this adoption deed has been written after hearing and understanding. Therefore, the appellant is not entitled for presumption available to registered deed of adoption.

37. Adverting to the plea of violation of Order-41, Rule-31 C.P.C. of the learned counsel for the appellant, this court found that in the judgment and order passed by the appellate court it has been recorded " I find that the genuineness of the adoption deed has been challenged by the respondent

/ plaintiff, which fact has been proved by the plaintiff and as against it, the defendant has not been able to prove the genuineness of the adoption deed. The physical and mental condition of the alleged executant Kanhiayalal on the date of execution of the adoption deed, who was suffering from paralysis from before one month of the execution of the adoption deed, the contradiction in the statement of D.W.2, the brother of Kanhaiyalal aged about 70 years about physical disability of Kanhaiyalal at relevant time, from written statement that matter of adoption was discussed by Kanhaiyalal with his Advocate one day before the execution of adoption deed, no details about adoption ceremony allegedly held in the year 1980, non production of any witness/ documentary evidence about the said adoption of 1980, wrong statement of fact in the adoption deed about age of the appellant as 11 years, non production of scribe on the date and other important evidence leads to but one inference that the deed was not a genuine document, but was based on fraud and was executed with a view to obtain employment in U.P.P.C.L., Faizabad on compassionate ground in place of Kanhaiya Lal." The appellate court also considered the documents relied by appellant and held that the same can not help the defendant in view of discussion. Thus the appellate court on the basis of facts, evidence and circumstances of the case was of the view that respondent/plaintiff has proved their case to the hilt as against it the appellant/defendant has not been able to discharge their burden and thus the impugned judgment and order is perfectly valid and in accordance with law. Therefore, in fact the appellate court has disclosed the issues considered by it.

38. The Hon'ble Apex Court, in the case of ***Laliteshwar Prasad Singh & Others Vs. S.P. Srivastava (D) through Legal Representatives; (2017) 2 SCC 415,*** held in paragraph-12 that it is well settled that the first appellate court shall state the points for determination, the decision thereon and the reasons for decision. However, it is equally well settled that mere omission to frame point/points for determination does not vitiate the judgment of the first appellate court. The relevant paragraph-12 is extracted below:-

"12. As per Order XLI Rule 31 CPC, the judgment of the first appellate court must explicitly set out the points for determination, record its reasons thereon and to give its reasonings based on evidence. Order XLI Rule 31 CPC 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 therein."

It is well settled that the first appellate court shall state the points for determination, the decision thereon and the reasons for decision. However, it is equally well settled that mere omission to frame point/points for determination does not vitiate the judgment of the first appellate court provided that the first appellate court records its reasons based on evidence adduced by both the parties."

39. The Hon'ble Apex Court, in the case of ***Kannai Lal and Others Vs. Ram Chandra Singh and Others; 2017 SCC Online SC 1009,*** has held that while

deciding the second appeal, it is clear from bare 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 and 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.

40. The Hon'ble Apex Court, in the case of ***Malluru Mallappa (D) through legal representatives Vs. Kuruvathappa and Others; (2020) 4 SCC 313,*** has held that no doubt when the appellate court agrees with the views of the trial court on evidence it need not reinstate affect of evidence or reiterate reasons given by the trial court and expression of a general agreement with reasons given by the trial court would ordinarily suffice. The relevant paragraph-18 is extracted below:-

"18. It is clear from the above provisions and the decisions of this Court that the judgment of the first appellate court has to set out points for determination, record the decision thereon and give its own reasons. Even when the first appellate court affirms the judgment of the trial court, it is required to comply (2015) 11 SCC 269 with the requirement of Order XLI Rule 31 and non-observance of this requirement leads to infirmity in the judgment of the first appellate court. No doubt, when the appellate court agrees with the views of the trial court on evidence, it need not restate effect of evidence or reiterate reasons given by trial court. Expression of a general agreement with the reasons given by the trial court would ordinarily suffice."

41. The Hon'ble Apex Court, in the case of ***Shasidhar & Others Vs. Ashwini Uma Mathod & Another; (2015) 11 SCC 269*** has held that it is the duty of the first appellate court to decide the first appeal keeping in view the scope and powers conferred under section 96 read with Order 41, Rule-31 of C.P.C.

42. In the case of ***U. Manjunath Rao Vs. Chandrashekar and Another (Supra)*** the Hon'ble Apex Court held that while agreeing with the general approval of reasons to support the conclusion of the judgment in appeal, the High Court has to keep in view Order-41 Rule-31 C.P.C. and the view expressed in Satosh Hazari Vs. Purshuttam Tiwari. The Hon'ble Apex Court, in the case of ***C.Venkata Swamy Vs. H.N. Shivanna (D) By Lrs. & Other; (2018) 1 SCC 604 and Madhukar and Others Vs. Sangram and Others; (2001) 4 SCC 756*** also, has relied the case of ***Santosh Hazari Vs. Purshuttam Tiwari (Supra).***

43. The Hon'ble Apex Court in the case of ***Santosh Hazari Vs. Purshuttam Tiwari (Dead) by Lrs; (2001) 3 SCC 179,*** held that the judgment of the appellate court must reflect its conscious application of mind and record findings supported by reasons on all the issues arising along with the contentions put forth, and pressed by the parties for decision of the appellate Court. The appellate court agreeing with the view of the trial Court need not restate the effect of the evidence or reiterate the reasons given by the trial Court; expression of general agreement with reasons given by the Court, decision of which is under appeal, would ordinarily suffice. The above view has been followed in the case of ***Madhukar and Others Vs. Sangram and Others; (2001) 4 SCC 756.*** The judgment

of ***Santosh Hazari Vs. Purshuttam Tiwari (Supra),*** has been relied in the case of ***C.Venkata Swamy Vs. H.N. Shivanna (D) By Lrs. & Other; (2018) 1 SCC 604.***

44. The Hon'ble Apex Court in the case of ***Nopani Investment (P) Ltd Vs. Santokh Singh, (HUF); (2008) 2 SCC 728***, while considering the Order-41, Rule-31 C.P.C., held that it is well settled that in the case of reversal, the first appellate court ought to give some reason for reversing the findings of the trial court whereas in the case of affirmation, the first appellate court accepts the reasons and findings of the trial court. It has also been observed that it has to be kept in mind that the decisions of this court in ***Madhukar and Others (supra) and Santosh Hazari's case (supra),*** were considering the reversal of the findings of fact of the trial court.

45. A Division Bench of this Court, in the case of ***Shiv Singh Rana Vs. Deputy Registrar Sahkari Society, U.P. Agra Division, Agra and Other; 2000 (18) LCD 1211,*** has held that no doubt the appellate court need not go into details and give a detailed judgment like that of a court of law but it must give at least in brief its reasons showing application of mind. Similarly a Division Bench of Andhra Pradesh High Court, in the case of ***Gurrella Durga Vara Prasad Rao Vs. Indukuri Rama Raju (Supra)*** has held that if the court finds from reading of judgment of first appellate court that the grounds urged in the memorandum of appeal have been considered and a decision with reasons thereon has been given, it would be in conformity with Order-41, Rule-31.

46. In the case of ***Vinod Kumar Vs. Gangadhar; (2015) 1 SCC 391,*** the Hon'ble Apex Court has held that being first appellate court it was the duty of the High Court to have decided the first appeal keeping in view the scope and powers conferred on it under Section-96 readwith Order-41 Rule-31 C.P.C.

47. The Hon'ble Apex Court in the case of ***G. Amalorpavam Vs. R.C. Diocese of Madurai, (2006) 3 SCC 224*** has held that non-compliance with the provisions may not vitiate the judgment and make it wholly void, and may be ignored if there has been substantial compliance with it and the second appellate court is in a position to ascertain the findings of the lower appellate court.

48. In view of above, the judgment of the first appellate court should be in conformity with the Order-41 Rule-31 of C.P.C. and reflect the conscious application of mind on the issues involved in the case but the same can not be vitiated merely because the point of determinations have not been specifically stated. Therefore the judgment of this Court in the case of ***Kuldeep Saxena Vs. Smt. Archana Saxena and 6 Others; Second Appeal No.309 of 2016, Ram Narain Vs. Raj Narain; 2017 (35) LCD 2771 and Ayodhya Prasad Vs. Durga Prasad and Others; (2017) 35 LCD 323***6 passed by a coordinate bench of this Court, relied by learned counsel for the appellant are not of any assistance to the case of the appellant.

49. Thus this court is of the considered opinion that there is no illegality or error in the judgment and order passed by the appellate court by which the judgment of trial court has been confirmed and it does not vitiate merely because the points of determination have not been stated though it has disclosed the issues considered by it as discussed above. The

findings recorded by the courts below and the conclusion that the alleged adoption deed dated 11.08.1995 is not valid and the respondent is able to get it cancelled, does not suffer from any illegality or error. Learned counsel for the appellant has also failed to demonstrate in any manner that the judgment and decree passed by the appellate court is not sustainable on merit therefore merely on technical grounds, although that also does not subsist as discussed above, it can not be reversed or remanded in view of Section 99 of C.P.C., which is extracted below:-

Section 99. No decree to be reversed or modified for error or irregularity not affecting merits or jurisdiction.- *No decree shall be reversed or substantially varied, nor shall any case be remanded, in appeal on account of any misjoinder [or non-joinder] of parties or causes of action or any error, defect or irregularity in any proceedings in the suit, not affecting the merits of the case or the jurisdiction of the Court :*

[Provided that nothing in this section shall apply to non-joinder of a necessary party.]

50. A coordinate bench of this Court after considering the provisions of Order-41, Rule-31 and S.99 of C.P.C., in the case of ***Dalla Vs. Nanhu; 2018 SCC Online All 5845*** has held as under:-

"32. In order to successfully canvass the point of non-compliance of Order XLI Rule 31 CPC, it is not mere non framing of points of determination alone, but consequent failure of justice must also be established occasioned to a party."

51. In view of above, this court is of the considered opinion that all the issues raised by the appellant have failed and there is no illegality or error in the judgment and decree passed by the courts below. The substantial questions of law framed by this Court are decided, accordingly, against the appellant. The appeal is misconceived and devoid of merit.

52. The second appeal is, accordingly, **dismissed** with cost. The lower court record shall be remitted back to the concerned court.

(2021)02ILR A954
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.10.2017

BEFORE

THE HON'BLE BAHARATI SAPRU, J.
THE HON'BLE SIDDHARTH, J.

Writ C No. 46425 of 2017

M/s Kanika Swami ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Ratnesh Kumar Srivastava

Counsel for the Respondents:
C.S.C., Sri Sanjay Singh

A. Civil Law – Cash Credit Facility – Possession and Recovery - Secularization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 Section 13(2), 13(4)

SARFAESI Act, 2002 - Section 17(1) - Constitution of India: Article 226 – Alternative remedy – The remedy of the petitioner against the proceedings u/s 13(4) of the SARFAESI Act, 2002 lies before Debts Recovery Tribunal u/s 17. (Para 13)

The power of issuing writs shall not be exercised unless substantial injustice has been caused or likely to be caused and in other cases the parties must be relegated to the course of appeal or revision to set right mere errors of law which do not occasion injustice in a broad and general sense. (Para 14)

When an alternative and equally efficacious remedy is open to a litigant, he should be required to pursue that remedy and not invoke the special jurisdiction of the High Court to issue a prerogative writ. The Apex Court held that existence of another remedy does not affects the jurisdiction of the High Court to issue a writ, but the existence of an adequate legal remedy is a thing to be taken into consideration before grant of writs, where the statutory remedy has not been exhausted. (Para 15, 18)

The Supreme Court while considering the provision of appeal u/s 20 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 held that the special act has been enacted with a view to provide a special procedure for recovery of debts due to the banks and the financial institutions and it cannot be derailed by taking recourse to proceedings under Articles 226 and 227 of the Constitution and the High Court should refrain from exercising its jurisdiction. (Para 17)

B. SARFAESI Act, 2002 - Section 13 - Security Interest (Enforcement) Rules, 2002 - Rule 4, 6, Rule 8 Sub Clauses (i) (ii) (iii) (iv) & (v) - **Beneficial for borrower - The inquiry into the correctness and manner of classification of the account of borrower as NPA by the secured creditor by going through the operation of the account of the borrower cannot be done under Article 226/227 of the Constitution of the India by the High Court.** It requires scrutiny of the manner of operation of account by the borrower and compliance of prudential norms of RBI by the secured creditor is classifying it as N.P.A. (Para 22)

Scope of Section 17 of the SARFAESI Act, 2002 is akin to a court of appeal competent to go into the questions of facts and law, both, for the first time, at the behest of the borrower, or the guarantor, against the action taken by the secured creditor. (Para 20)

A perusal of the provisions of the SARFAESI Act, 2002 and the Security Interest (Enforcement) Rules, 2002 clearly prove that the sufficient checks have been imposed upon the secured creditor while proceeding with the possession and sale of the secured assets of the borrower. When the action of the secured creditor is challenged by the borrower u/s 17 (1) of the SARFAESI Act, 2002, the secured creditor is required to prove the compliance of all the mandatory provisions of the Act and the Rule before the Debt Recovery Tribunal. If any of the requirements of Act and the Rule is not found to be complied by the Debt Recovery Tribunal, the action of the secured creditor fails against the borrower. (Para 29)

The remedy u/s 17 of the SARFAESI Act, 2002 before the DRT is a broad remedy available to the borrower/guarantor vis-à-vis the jurisdiction of the High Court under Articles 226 and 227 and he has further opportunity to file further appeal u/s 18 of the DRAT against the order of DRT in case he fails to get any relief u/s 17 of the SARFAESI Act, 2002 from the DRT. The remedy of appeal u/s 18 of the SARFAESI Act, 2002 also eludes a borrower who approaches the High Court under Article 226/227 of the Constitution of India directly against the proceedings under SARFAESI Act, 2002 where the scope of inquiry regarding the action of the secured creditor is very limited. The remedy under Article 226/227 of the Constitution is still available to the borrower after exhaustion of remedies under the SARFAESI Act, 2002. (Para 31)

In the present case, the petitioner has not made any representation u/s 13 (13-A) of the SARFAESI Act, 2002 before the bank and has approached this Court by-passing statutory mechanism which has been disapproved by the Supreme Court. (Para 34)

Writ petition dimsissed. (E-3)

Precedent followed:

1. United Bank of India Vs Satyawati Tandon & ors., (2010) 8 SCC 110 (Para 13)

2. Marida Chemical Ltd. Vs U.O.I., (2004) 4 SCC 311 (Para 13)

3. K.S. Rashid & Sons Vs Income Tax Investigation Commission, AIR 1954 SC 207 (Para 14)

4. Sangram Singh Vs Election Tribunal, Kotah, AIR 1955 SC 425 (Para 14)

5. U.O.I. Vs T.R. Varma, AIR 1957 SC 882 (Para 15)

6. Thansingh Nathmal & ors. Vs A. Mazid Superintendent of Taxes, AIR 1964 SC 1419 (Para 16)

7. Punjab National Bank Vs O.C. Krishnan, AIR 2001 SC 3208 (Para 17)

8. Rajasthan State industrial and Investment Corporation & anr. Vs Diamond and Gem Development Corporation Ltd., AIR 2003 SC 1241 (Para 18)

9. Mathew Varghese Vs M. Amritha Kumar & ors., (2014) 5 SCC 610 (Para 32)

10. J. Rajiv Subramaniyan & anr. Vs Pandiyas & ors., (2014) 5 SCC 651 (Para 32)

11. Oasis Dealcom Pvt. Ltd. Vs Khazana Dealcom Pvt. Ltd., (2016) 10 SCC 214 (Para 32)

12. Devi Ispat Limited & anr. Vs S.B.I. & ors., (2014) 5 SCC 762 (Para 34)

Present petition prays for the quashing of the possession notice dated 26.09.2017 issued u/s 13(4) SARFAESI Act, 2002.

(Delivered by Hon'ble Siddharth, J.)

1. Heard Shri Ratnesh Kumar Srivastava, learned counsel for the petitioner, learned Standing counsel for the respondent No.1 and Shri Sanjai Singh, learned counsel for the respondent Nos. 2 and 3.

2. The above noted writ petition has been filed by the petitioner praying for quashing of the possession notice dated 26.9.2017 issued under Section 13(4) of the Secularization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as 'SARFAESI Act, 2002').

3. The brief facts of the present petition are that the petitioner availed cash credit facility from the respondent No. 2 for setting up the business of trading of LED Bulb through a firm in the name and style of " M/s Kanika Swami" situated at Swami Pada Aggrawal Complex, Chandan Bhawan, Meerut.

4. The petitioner has stated that the above noted credit facility was accorded to her by the bank on 30.9.2016 for a limit of Rs.93,00,000/-. Due to demonetization goods purchased by her could not be sold out and after the enforcement of Goods and Service Tax (GST), her business further suffered losses and her account with the respondent No. 2 became irregular.

5. The respondent No.2, bank issued a notice under Section 13 (2) dated 05.07.2017 under SARFAESI Act, 2002 for payment of the outstanding dues of Rs.96,35,,532.00 and then the impugned possession notice dated 26.9.2017 has been issued by the bank under Section 13 (4) of the SARFAESI Act, 2002 read with Rule 8 of the Security Interest (Enforcement) Rules, 2002 (hereinafter referred to as "Rules" only).

6. The petitioner has stated that she is willing to deposit Rs.3,50,000/- but the bank is not accepting the same and she is willing to pay the balance amount for regularization of her account in the respondent-bank.

7. The learned counsel for the respondent No.2, Sri Sanjai Singh, has argued that against the possession notice dated 26.9.2017 issued by the bank under Section 13(4) of the SARFAESI Act, 2002, the petitioner has efficacious and alternative remedy under Section 17(1) of the SARFAESI Act, 2002 and this Hon'ble

Court should not interfere with the proceedings of recovery initiated by the bank against the petitioner. He has further submitted that after the notice dated 05.7.2017 issued by the bank, under Section 13 (2) of the SARFAESI Act, 2002, the petitioner did not turn up to clear her liability and, therefore, after the expiry of period of 60 days given in the notice, the bank has proceeded to take possession of the property under Section 13, Sub Clause (4) of the SARFAESI Act, 2002 and the petitioner is unable to point out any illegality in the same. He has further stated that since the account of the petitioner has been declared Non Performing Asset (NPA) by the Bank as per the prudential norms of Reserve Bank of India, therefore, unless outstanding dues are cleared, the account of the petitioner cannot be regularized.

8. We have given thoughtful consideration to the rival submissions made at the bar. Before we examine the submissions made at the bar, a brief look at the purpose of enactment of SARFAESI Act, 2002 may be useful.

9. The accumulation of the "Non-Performing Assets" (NPAs), a glorified terminology used in the banking circles to refer to 'bad loans', has always been an eye sore for the banks. The prudential norms applicable to banking companies stipulate the stage at which an asset should be classified as an NPA. The prudential norms require the banks to categorize NPAs and make provisions accordingly.

10. The enactment of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (RDB Act) is a watershed event. Banks and other lending institutions have had enough in the prolonged litigations before civil courts. Alarming level of NPAs in the country paved way for the establishment of "Debts Recovery Tribunals (DRT). The DRTs offer a simple and speedy recovery mechanism.

11. Despite establishment and decade of operations of DRTs, banks and financial institutions felt the need for direct enforcement mechanism in certain cases without intervention by courts. As per Sections 69 and Section 69-A of the Transfer of Property Act, 1882 only an English Mortgage could be enforced without court intervention. Section 29 of the State Finance Corporation Act, 1951 empowered State Finance Corporations (SFCs) to enforce their security without intervention by courts. Such a measure was considered to be essential for recovering dues from borrowers who are wilful defaulters.

12. The Committees constituted by the Central Government, inter alia, for dealing with Recovery of Debts were unanimous in providing powers to the banks to takeover the securities provided to them and to realize the dues without the intervention of the courts as a means for the reduction of the monies locked up a NPAs. This has resulted in the drafting of the Secularization and Reconstruction of Financial Assets and Enforcement of the Security Interest Bill which was promulgated as an ordinance twice by the President of India before it finally became an Act on 21st day of June, 2002.

13. Adverting to the case in hand, it is clear from the pleadings on record, that the account of the petitioner has been classified as NPA on account of her failure to maintain financial discipline in the operation of her cash credit account with respondent-bank. The respondent-bank has

initiated proceedings for recovery as per the provisions of SARFAESI Act, 2002 against the petitioner in its normal course of business. As per the judgment of the Apex Court in the case of ***United Bank of India Vs. Satyawati Tandon and other (2010) 8 SCC 110*** the remedy of the petitioner against the proceedings under Section 13 (4) of the SARFAESI Act, 2002 lies before Debts Recovery Tribunal under Section 17 of the SARFAESI Act, 2002. Earlier, in the case of ***Mardia Chemical Ltd. Vs. Union of India (2004) 4 SCC 311,*** the Apex Court had already held that the borrower can challenge the action of the secured creditor taken under Section 13 (4) of the SARFAESI Act, 2002 by filing an application under Section 17 (1) of the Act itself.

14. A Constitution Bench of the Apex Court in ***K.S. Rashid & Sons Vs. Income Tax Investigation Commission, AIR 1954 SC 207*** held that Article 226 of the Constitution of India confers on all the High Courts very wide powers in the matter of issuing writs. The said powers are limited. However, the remedy of writ is an absolutely discretionary remedy and the High Court always has the discretion to refuse to grant any writ if it is satisfied that the aggrieved party can have an adequate or suitable relief elsewhere. Similar view has been reiterated by the Apex Court in the case of ***Sangram Singh Vs. Election Tribunal, Kotah, AIR 1955 SC 425*** holding that the power of issuing writs shall not be exercised unless substantial injustice has been caused or likely to be caused and in other cases the parties must be relegated to the course of appeal or revision to set right mere errors of law which do not occasion injustice in a broad and general sense.

15. Again a Constitution Bench of Supreme Court in the case of ***Union of India Vs. T.R. Varma, AIR 1957 SC 882,*** held that when an alternative and equally efficacious remedy is open to a litigant, he should be required to pursue that remedy and not invoke the special jurisdiction of the High Court to issue a prerogative writ. The Apex Court held that existence of another remedy does not affects the jurisdiction of the High Court to issue a writ, but the existence of an adequate legal remedy is a thing to be taken into consideration before grant of writs, where the statutory remedy has not been exhausted.

16. Similar view has been taken in the case of ***Thansingh Nathmal and others Vs. A. Mazid Superintendent of Taxes, AIR 1964 SC 1419.***

17. In ***Panjab National Bank Vs. O.C. Krishnan, AIR 2001 SC 3208,*** the Supreme Court while considering the provision of appeal under Section 20 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 held that the special act has been enacted with a view to provide a special procedure for recovery of debts due to the banks and the financial institutions and it cannot be derailed by taking recourse to proceedings under Articles 226 and 227 of the Constitution and the High Court should refrain from exercising its jurisdiction.

18. It is settled law that writ does not lies merely because it is lawful to do so. A person should exhaust statutory/alternative remedy available to him in law prior to it. ***(Rajasthan State Industrial and Investment Corporation and another Vs. Diamond and Gem Development Corporation Ltd., AIR 2003 SC 1241)***.

19. In view of the above legal position, the writ petition filed by the

petitioner cannot be entertained by this court.

20. It is further notable that the invoking of the jurisdiction of the High Court by the defaulters of the banks and financial institutions against the proceedings under SARFAESI Act, 2002 is not in their larger interest since in most of the cases, the petitioner offers to deposit the amount in installments and in the process, they admit the outstanding liability without any demur before this Court. It is detrimental to the interest of the borrowers and guarantors in the long run since the scope of Section 17 of the SARFAESI Act, 2002 is akin to a court of appeal competent to go into the questions of facts and law, both, for the first time, at the behest of the borrower, or the guarantor, against the action taken by the secured creditor.

21. The SARFAESI Act, 2002 casts a heavy burden on the secured creditor of proceeding with the recovery against the borrower with strict compliance of the provisions of the act. The relevant provisions of Section 13 are as follows:-

"13. Enforcement of security interest.

(2) Where any borrower, who is under a liability to a secured creditor under a security agreement, makes any default in repayment of secured debt or any instalment thereof, and his account in respect of such debt is classified by the secured creditor as non-performing asset, then, the secured creditor may require the borrower by notice in writing to discharge in full his liabilities to the secured creditor within sixty days from the date of notice failing which the secured creditor shall be entitled to exercise all or any of the rights under sub section (4).

[Provided that-

(i) the requirement of classification of secured debt as non-performing asset under this sub-section shall not apply to a borrower who has raised funds through issue of debt securities; and].

(ii) in the event of default, the debenture trustee shall be entitled to enforce security interest in the same manner as provided under this section with such modifications as may be necessary and in accordance with the terms and conditions of security documents executed in favour of the debenture trustees],

(4) In case the borrower fails to discharge his liability in full within the period specified in sub-section (2), the secured creditor may take recourse to one or more of the following measures to recover his secured debt, namely:--

(a) take possession of the secured assets of the borrower including the right to transfer by way of lease, assignment or sale for realising the secured asset;

[(b) take over the management of the business of the borrower including the right to transfer by

way of lease, assignment or sale for realising the secured asset:

Provided that the right to transfer by way of lease, assignment or sale shall be exercised only where the substantial part of the business of the borrower is held as security for the debt:

Provided further that where the management of whole of the business or part of the business is severable, the secured creditor shall take over the management of such business of the borrower which is relatable to the security for the debt;]

(c) appoint any person (hereafter referred to as the manager), to manage the secured assets the possession of which has been taken over by the secured creditor;

(d) require at any time by notice in writing, any person who has acquired any of the secured assets from the borrower and from whom any money is due or may become due to the borrower, to pay the secured creditor, so much of the money as is sufficient to pay the secured debt."

22. A perusal of the above provisions of the Act prove that starting point of the proceedings for recovery under the SARFAESI Act, 2002 is classification of the account of the borrower as NPA as per the prudential norms of the Reserve Bank of India. The inquiry into the correctness and manner of classification of the account of borrower as NPA by the secured creditor by going through the operation of the account of the borrower cannot be done under Article 226/227 of the Constitution of the India by the High Court. It requires scrutiny of the manner of operation of account by the borrower and compliance of prudential norms of RBI by the secured creditor is classifying it as N.P.A.

23. Further perusal of the above provisions of the act shows that the notice under Section 13 Sub Clause (2) of the SARFAESI Act, 2002 is issued by the secured creditor to the borrower after his account gets classified as NPA. The borrower is required to discharge his full liabilities within 60 days from the date of notice failing which the secured creditor becomes entitled to exercise all or any of the rights under Section 13 Sub Clause (4). Therefore, the secured creditor is bound by law to wait for 60 days before exercising any of his right under Section 13, Sub Clause (4) of the SARFAESI Act, 2002.

24. Further Rule 4 of the Security Interest (Enforcement) Rules, 2002 (hereinafter referred to as "Rules") provides that Authorized Officer of the secured creditor is required to take possession of movable property of the borrower in the presence of two witnesses after a panchnama drawn and signed by witnesses as clearly as possible in Appendix I of these rules.

25. Secondly, after taking possession under Rule 4 of the Rules of the movable assets, the authorized officer shall make or caused to be made an inventory of the property as clearly as possible in the form given in Appendix II of these rules and deliver or caused to be delivered a copy of such inventory to the borrower, or to any person entitled to receive on behalf of the borrower.

26. Thirdly, the borrower shall be intimated by a notice enclosing the panchanama drawn in Appendix I and the inventory in Appendix IV.

27. Fourthly, all the notices under these Rules may also be served through electronic mode of service in addition to the modes specified under Rule 3.

28. Fifthly, the authorized officer is required to keep the property taking in possession either in his own custody or in the custody of any person authorized or appointed by him, who shall take as much care of the property as the owner himself. Similarly, detailed procedures have been provided under Rule 8 Sub Clauses (i) (ii) (iii) (iv) & (v) of the Security Interest (Enforcement) Rules, 2002 regarding the immovable secured assets, regarding their possession by the secured creditor. Publication of notices is two leading newspapers intimating the factum of possession and service of notice through electronic mode on the borrower in

addition to the other modes is also provided. Regarding the sale of the movable and immovable secured assets, the provisions have been made in Rules 6 and 8 of the aforesaid Rules which are as under:-

*6. **Sale of movable secured assets.-** (1) The authorised officer may sell the movable secured assets taken possession under sub-rule (1) of rule 4 in one or more lots by adopting any of the following methods to secure maximum sale price for the assets, to be so sold--*

(a) obtaining quotations from parties dealing in the secured assets or otherwise interested in buying such assets; or

(b) inviting tenders from the public ; or

[(c) holding public auction including through e-auction mode; or]

(d) by private treaty.

(2) The authorised officer shall serve to the borrower a notice of thirty days for sale of the movable secured assets, under sub-rule (1):

Provided that if the sale of such secured assets is being effected by either inviting tenders from the public or by holding public auction, the secured creditor shall cause a public notice in two leading newspapers, one in vernacular language, having sufficient circulation in that locality by setting out the terms of sale, which may include,--

(a) details about the borrower and the secured creditor;

(b) description of movable secured assets to be sold with identification marks or numbers, if any, on them;

(c) reserve price, if any, and the time and manner of payment;

(d) time and place of public auction or the time after which sale by any other mode shall be completed;

(e) depositing earnest money as may be stipulated by the secured creditor;

(f) any other thing which the authorised officer considers it material for a purchaser to know in order to judge the nature and value of movable secured assets.

[Provided further that if sale of movable property by any one of the methods specified under sub-rule (1) fails and the sale is required to be conducted again, the authorised officer shall serve, affix and publish notice of sale of not less than fifteen days to the borrower for any subsequent.]

(3) Sale by any methods other than public auction or public tender, shall be on such terms as may be settled [between the secured creditors and the proposed purchaser].

***8. Sale of immovable secured assets-** (1) Where the secured asset is an immovable property, the authorised officer shall take or cause to be taken possession, by delivering a possession notice prepared as nearly as possible in Appendix-IV to these rules, to the borrower and by affixing the possession notice on the outer door or at such conspicuous place of the property.*

(2) The possession notice as referred to in sub-rule (1) shall also be published, as soon as possible but in any case not later than seven days from the date of taking possession, in two leading newspapers, one in vernacular language having sufficient circulation in that locality, by the authorised officer.

[(2A) All notices under these rules may also be served upon the borrower through electronic mode of service, in addition to the modes prescribed under sub-rule (1)and sub-rule (2) of rule 8.]

(3) In the event of possession of immovable property is actually taken by the authorised officer, such property shall be

kept in his own custody or in the custody of any person authorised or appointed by him, who shall take as much care of the property in his custody as an owner of ordinary prudence would, under the similar circumstances, take of such property.

(4) The authorised officer shall take steps for preservation and protection of secured assets and insure them, if necessary, till they are sold or otherwise disposed of.

(5) Before effecting sale of the immovable property referred to in sub-rule (1) of rule 9, the authorised officer shall obtain valuation of the property from an approved valuer and in consultation with the secured creditor, fix the reserve price of the property and may sell the whole or any part of such immovable secured asset by any of the following methods:--

(a) by obtaining quotations from the persons dealing with similar secured assets or otherwise interested in buying the such assets; or

(b) by inviting tenders from the public;

(c) by holding public auction including through e-auction mode; or

(d) by private treaty.

[Provided that in case of sale of immovable property in the State of Jammu and Kashmir, the provisions of Jammu and Kashmir Transfer of Property Act, 1977 shall apply to the person who acquires such property in the State.]

(6) The authorised officer shall serve to the borrower a notice of thirty days for sale of the immovable secured assets, under sub-rule (5):

Provided that if the sale of such secured asset is being effected by either inviting tenders from the public or by holding public auction, the secured creditor shall cause a public notice in two leading newspapers; one in vernacular language having sufficient circulation in the locality by setting out the terms of sale, which shall include,--

(a) the description of the immovable property to be sold, including the details of the encumbrances known to the secured creditor;

(b) the secured debt for recovery of which the property is to be sold;

(c) reserve price, below which the property may not be sold;

(d) time and place of public auction or the time after which sale by any other mode shall be completed;

(e) depositing earnest money as may be stipulated by the secured creditor;

(f) any other thing which the authorised officer considers it material for a purchaser to know in order to judge the nature and value of the property.

(7) Every notice of sale shall be affixed on a conspicuous part of the immovable property and may, if the authorised officer deems it fit, put on the web-site of the secured creditor on the Internet.

(8) Sale by any method other than public auction or public tender, shall be on such terms as may be settled between the parties in writing.

29. A perusal of the above provisions of the SARFAESI Act, 2002 and the Security Interest (Enforcement) Rules, 2002 clearly prove that the sufficient checks have been imposed upon the secured creditor while proceeding with the possession and sale of the secured assets of the borrower. When the action of the secured creditor is challenged by the borrower under Section 17 (1) of the SARFAESI Act, 2002, the secured creditor is required to prove the compliance of all the mandatory provisions of the Act and the Rule before the Debt Recovery Tribunal. If

any of the requirements of Act and the Rule is not found to be complied by the Debt Recovery Tribunal, the action of the secured creditor fails against the borrower.

30. The SARFAESI Act, 2002 is a strict act which requires strict compliance of the provisions provided therein and any deviation in compliance of the provisions renders the action of the secured creditor bad and unsustainable. The Debt Recovery Tribunal is fully empowered to go into the record of the secured creditor regarding the compliance of the provisions of the Act and Rule and the borrower gets an opportunity to see the record of the proceedings initiated and conducted by the bank against him in recovery of debt from him before the Debts Recovery Tribunal.

31. n the writ petitions filed under Article 226 of the constitution before the High Court, the borrower never gets the opportunity to rebut the action taken by the secured creditor against him and by accepting the liability alleged by the secured creditor, he gets estopped from raising any objection against the action of the secured creditor, in future, since he admits the liability and thereby ratifies all the actions done by the secured creditor against the borrower. Therefore, the remedy under Section 17 of the SARFAESI Act, 2002 before the Debts Recovery Tribunal is a broad remedy available to the borrower/guarantor vis-a-vis the jurisdiction of the High Court under Articles 226 and 227 of the Constitution and he has further opportunity to file further appeal under Section 18 of the Debt Recovery Appellate Tribunal against the order of Debts Recovery Tribunal in case he fails to get any relief under Section 17 of the SARFAESI Act, 2002 from the Debts Recovery Tribunal. The remedy of appeal under Section 18 of the SARFAESI Act, 2002 also eludes a borrower who approaches the High Court under Article 226/227 of the Constitution of India directly against the proceedings under SARFAESI Act, 2002 where the scope of inquiry regarding the action of the secured creditor is very limited. The remedy under Article 226/227 of the Constitution is still available to the borrower after exhaustion of remedies under the SARFAESI Act, 2002.

32. The Apex Court has interfered and disapproved the action of the secured creditor in proceeding under the SARFAESI Act, 2002 in the case of ***Mathew Varghese Vs. M. Amritha Kumar and others (2014) 5 SCC 610 ; J. Rajiv Subramaniyan and another Vs. Pandiyas and others (2014) 5 SCC 651.*** In Mathew Varghese (supra), the Supreme Court disapproved the action of the secured creditor of not notifying the borrower afresh of 30 days clear individual notice of the fresh date of sale after the first sale could not take place and held that the subsequent sale was invalid. ***Oasis Dealcom Pvt. Ltd. Vs. Khazana Dealcom Pvt. Ltd., (2016) 10 SCC 214.***

33. In J. Rajiv Subramaniyan and another (supra), the sale of the secured assets conducted by the secured creditor by means of a private treaty as required by Rule 8(8) of Rules, 2002 was set aside being violative of the Rule.

34. In the present case, the petitioner has not made any representation under Section 13 (13-A) of the SARFAESI Act, 2002 before the bank and has approached this Court by-passing statutory mechanism which has been disapproved by the Supreme Court in the case of ***Devi Ispat***

Limited and another Vs. State Bank of India and other (2014) 5 SCC 762.

35. Therefore, in view of the legal position stated above this writ petition is being **dismissed** on the ground of alternative remedy available to the petitioner under Section 17 of the SARFAESI Act, 2002.

36. There shall be no order as to costs.

(2021)02ILR A964
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.01.2021

BEFORE

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

Writ C No. 7616 of 2020

Maulana Mohammad Ali Jauhar Trust, Lko. U.P. & Anr. ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Syed Mohd. Fazal, Sri S.G. Hasnain

Counsel for the Opposite Party:
C.S.C., A.S.G.I., Sri Sanjay Kumar Om.

A. Civil Law – Tax - The Building and Other Construction Workers Welfare Cess Act, 1996 - Section 3, 4, 5, 6, 8, 9, 10, 11 - The Building and Other Construction Workers Welfare Cess Rules, 1998: Rules 6, 7, 13, 14 (Para 49)

Maintainability of writ petition - It must be remembered that a statutory alternative remedy in a fiscal statute ought not to be ignored except in very exceptional circumstances and on reputed principles, which are not found to exist here. Even if the statutory remedy is onerous, in the sense that it involves a condition of pre-deposit, a writ petition ought not to be entertained. (Para 46, 47)

Facts show that no return was filed by the University, leaving the Assessment Officer with no option but to proceed u/s 5(2) of the Cess Act to assess without a return. It is to the above end that the Cess Assessment Collector-cum-Assistant Labour Commissioner, Rampur addressed a memo dated 16.11.2017 to the Assessment Officer, recommending inter alia that a team be got constituted by the Uttar Pradesh Buildings and other Construction Workers' Welfare Board or other competent Authority to assess the cost of the constructions involved. Taking cognizance of the aforesaid recommendation, the Deputy Labour Commissioner/Assessment Officer addressed a memo dated 18.11.2017 to the District Magistrate/Collector, Rampur, requesting him to ensure a valuation of the constructions raised by the University, by Engineers from the Public Works Department or the Rampur Development Authority. The Collector, in turn, constituted a two-member team, including the Executive Engineer of the PWD, Rampur to undertake a valuation of the constructions made after February, 2009, vide an order dated 22.12.2017.

It has been noticed in detail that how a team of valuers demanded copies of drawings, designs, valuation report and other construction related documents, but in vain from the University. There is a rather startling document on record, which is a letter dated 8.2.2018 addressed by the Administrative Officer/PRO of the University to the Executive Engineer of PWD, Rampur, which says that the required building plans and other documents, demanded by the Executive Engineer for the purpose of valuing the cost of constructions, could not be provided for the present, because these were with the Engineer, Building Construction and Maintenance Department, who was not available for sometime past. The record shows that it is replete with letters written by the Executive Engineer, PWD to the University, requiring their assistance to value the constructions for the purpose of assessment under the Cess Act, but all to no avail.

Therefore, it can be said that ample opportunity was afforded to the University, at different

stages of proceedings, culminating in the impugned assessment. (Para 40)

B. Disproportionate and exorbitant demand - It must be remarked that the figures involved do not carry an inherent element of absurdity, given the contemporary value of cost of construction, of which judicial notice may be taken. **In the event, the petitioner wished to substantiate his plea about the assessment, being an arbitrary and exorbitant figure, the carpet area of the varying units, the built up area, the material used, ought to have been placed on record to show that these varying determinations are arbitrary**; else some other factual basis about the estimated cost of construction should have been placed on record by the University, to enable this Court to discern an ex facie absurdity or exaggeration in the assessment made. There is no such material available on record. Therefore, the second limb on which he wants this writ petition is based on, bypassing the statutory alternative remedy, is also untenable. (Para 42, 45)

Writ petition dismissed. (E-3)

Precedent followed:

1. ABL International Ltd. & anr. Vs Export Credit Guarantee Corporation of India & ors., (2004) 3 SCC 553 (Para 23)

2. Raj Kumar Shivhare Vs Assistant Director, Directorate of Enforcement & anr., (2010) 4 SCC 772 (Para 46)

3. Titaghur Paper Mills Co. Ltd. & anr. Vs St. of Orissa & ors., (1983) 2 SCC 433 (Para 48)

Precedent distinguished:

1. Whirlpool Corporation Vs Registrar of Trade Marks, Mumbai & ors., (1998) 8 SCC 1 (Para 22, 41)

2. Govt.of A.P. & ors. Vs P. Laxmi Devi (Smt.), (2008) 4 SCC 720 (Para 24, 43)

3. Smt. Har Devi Asnani Vs St.of Raj. & ors., (2011) 14 SCC 160 (Para 25, 43)

4. Smt. Vijaya Jain Vs St. of U.P. & ors., 2015 (9) Additional District Judge 503 (DB) (Para 26, 43)

Present petition challenges an order dated 28.09.2018, passed by the Cess Assessment Officer, The Building and Other Construction Workers' Welfare Cess Act, 1996, Rampur.

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

1. The Maulana Mohammad Ali Jauhar Trust through its Chairman and Mohammad Ali Jauhar University through its Registrar, together have challenged an order of the Cess Assessment Officer, The Building and Other Construction Workers' Welfare Cess Act, 1996 (for short, "the Cess Act'), Rampur dated 28.09.2018, assessing cess under the Act last mentioned, relating to buildings constructed for the University, detailed in the order. The cess, assessed by the order last mentioned, is a sum of Rs.1,36,37,000/- only, determined on a total cost of construction in the sum of Rs.147.20 crores. The impugned order directs the University to deposit the amount of cess levied within 15 days of service thereof. The order of assessment dated 28.09.2018 is hereinafter referred to as "the impugned order'.

2. Also under challenge is a show cause notice dated 04.01.2019, issued by the Cess Assessment Officer, Rampur (for short, "the Assessment Officer'), directing the University to show cause why for the delay in compliance with the impugned order beyond time indicated to deposit the cess, proceedings to charge interest @ 2% per month of the cess assessed and the imposition of penalty equivalent to the amount of cess, under Sections 8 and 9 of the Cess Act, be not initiated.

3. The University have then questioned a recovery certificate issued by the Assessment Officer dated 15.01.2019, addressed to the Collector, Rampur, under Section 10 of the Cess Act, read with Rule 13 of the Building and Other Construction Workers' Welfare Cess Rules, 1998 (for short, "the Cess Rules'), requiring the Collector to recover, as arrears of land revenue, the sum of assessed cess Rs.1,36,37,000/- and penalty, twice the sum of the cess levied, together with interest @ 2% per month on the sum of cess levied and the penalty imposed.

4. Apart from these orders, a recovery citation dated 20.05.2019, issued by the *Tehsildar,* Sadar, District Rampur, and an attachment memo issued in RC Form 41 by the Deputy Collector, Sadar, Rampur dated 22.01.2020, attaching the Administrative Block of the Mohammad Ali Jauhar University (for short, "the University'), have also been impugned.

5. It must be placed on record here that quite apart from challenge to the assessment of cess under the Cess Act and other levies, the University have challenged an order of the Government of India dated August, 2019, declining the University's request to grant an exemption from the provisions of the Cess Act, invoking powers under Section 6 thereof.

6. Upon the matter being pointed out to the learned Senior Counsel appearing for the University that the two reliefs relate to two different causes of action, so much so that the petition may become multifarious, the learned Senior Counsel for the Univesity has elected not to press the relief seeking quashing of the Central Government Order refusing exemption, with liberty to bring a separate petition for the purpose. The University were permitted to not press relief Clause (iii) *vide* order dated 14.12.2020 passed by this Court, with liberty to bring a fresh petition on the cause of action involved there.

7. Mr. Sanjay Kumar Om, learned Advocate had appeared on behalf of the Union of India and this order was made in his presence. There is also another development, that has taken place *pendente lite.* One of the orders under challenge, that is to say, the order of attachment of the Administrative Block of the University dated 22.01.2020, has come to be withdrawn on the Vice Chancellor's request, *vide* order dated 29.01.2020 passed by the *Tehsildar,* Sadar, and instead, some buildings under construction flanked to the right, and left of the Science Faculty, have been attached. This fact has figured in a short counter affidavit filed on 14.12.2020 by the Assessment Officer, allusion to which in some detail, would be made later in this judgment. However, the result of this development is that the University's grievance about their functioning being hindered by attachment of the command office, no longer survives. The challenge, therefore, to the impugned attachment order dated 22.01.2020 also goes.

8. It must also be recorded that when this petition came up for admission on 10.12.2020, Mr. Manish Goyal, learned Additional Advocate General raised a preliminary objection that this petition is barred, in view of the alternative remedy of appeal available to the University, under Section 11 of the Cess Act. Mr. S.G. Hasnain, learned Senior Advocate assisted by Mr. Syed Mohd. Fazal, learned Counsel for the University, urged that the bar of alternative remedy would not apply, because the impugned order was made in

gross violation of the principles of natural justice. Mr. Goyal, during the course of submissions, in support of his preliminary objection, wanted to refer to certain material to indicate that adequate opportunity was afforded at all stages of the assessment proceedings. The Court, therefore, granted liberty to the learned Additional Advocate General to file a short counter affidavit. Mr. Goyal has, accordingly, come up with a short counter affidavit on behalf of respondent nos.2, 3 and 4, sworn by the Assessment Officer. This Court has, accordingly, proceeded to hear parties on the preliminary objection about the maintainability of this writ petition, given the pleaded bar of an alternative remedy.

9. Heard Mr. Manish Goyal, learned Additional Advocate General, assisted by Mr. A.K. Goyal, learned Additional Chief Standing Counsel in support of his preliminary objection on behalf of respondent nos.2, 3 and 4 and Mr. S.G. Hasnain, learned Senior Advocate assisted by Mr. Syed Mohd. Fazal, learned Counsel for the University, in opposition to that objection, at considerable length.

10. Mr. Manish Goyal, learned Additional Advocate General, has submitted that there has been no violation of the principles of natural justice, so as to exclude the requirement of resort to the statutory alternative remedy. He has pointed out that the course of proceedings show that the University were afforded adequate opportunity of hearing at all stages. In support of the fact that opportunity was indeed afforded to the University, the learned Additional Advocate General has drawn the Court's attention to the short counter affidavit. He has referred to a copy of the notice dated 23rd January, 2015 issued by the Building and Other Construction Workers' Welfare Board to the University, requiring them to furnish information regarding the sixteen buildings and boundary walls already constructed, and twenty-two buildings under construction, costing an estimated worth of Rs.2000/- crores, in the proforma set out at the foot of the notice. The notice clearly indicates that the information is to be furnished for the purpose of assessment under the Cess Act within 15 days of service of that notice, and that in case the requisite information is not supplied, it would be presumed that the estimated cost of the construction is correct.

11. It is pointed out that the University did not submit a reply to the notice within the required time. In those circumstances, the Assessment Officer, in order to pro*vide* further opportunity to the University, issued a show cause notice to them (addressed to the Vice Chancellor of the University) dated 21.08.2017. It is pointed out further by the learned Additional Advocate General that the show cause notice indicates that the University did not furnish any information to the Assessment Officer, in accordance with Section 4 of the Cess Act, read with Rule 6 of the Cess Rules in Form-1, nor any sum of money towards cess was deposited. The notice further indicates that the value of the construction undertaken by the University was assessed by the Cess Coordinator and Consultant Bhawan Nirman Board, Lucknow, who found the estimated cost to be about Rs.2000 crores. It was on that basis that a sum of Rs.20 crores @ 1% of the estimated cost of the construction was required to be deposited by the Building and other Construction Workers' Welfare Board *vide* notice dated 23.01.2015. The notice, thereupon, required the University

to deposit a sum equivalent to 1% of the total cost of construction, so far undertaken by the University, towards cess, within a week, and further, to pro*vide* documents, listed at the foot of the show cause notice dated 21.08.2017. The show cause notice also said that in case of non-deposit of cess, proceedings under Sections 8, 9 and 10 of the Cess Act would be undertaken.

12. It is asserted in paragraph no.7 of the short counter affidavit, as pointed out by the learned Additional Advocate General, that this show cause notice was duly served upon the University, but remained uncomplied with. He has then invited the Court's attention to the fact that *vide* letter dated 09.11.2017, a copy of which is annexed as Annexure no. SCA-3 to the short courter affidavit, the University submitted a reply to the show cause notice dated 21.08.2017, and acknowledged the fact that they have raised construction on the campus, between the years 2010 to 2017. The letter also indicates that the University sought exemption from levy of cess.

13. It is next pointed out that though the Assessment Officer directed the University to deposit the cess by means of his memo dated 16.11.2017, addressed to the Registrar of the University, he also recommended to the Deputy Labour Commissioner, Moradabad Division, Moradabad by his memo dated 16.11.2017, that a team be constituted by the Board or a competent Authority for the purpose of valuing the University's constructions, so that the actual cost of construction could be ascertained. It is pointed out further that the Deputy Labour Commissioner, in turn, addressed a memo dated 18.11.2017 to the District Magistrate, Rampur, requesting the latter to ensure valuation of construction erected by the University, by the Engineers of the Public Works Department or the Rampur Development Authority. Ultimately, the Collector constituted a two-member team, including the Executive Engineer of the PWD, Rampur to undertake a valuation of the construction made after February, 2009 *vide* order dated 22.12.2017.

14. It is pointed out further that the said order authorized the members of the team to demand necessary documents from the University Administration that may be required for doing a proper valuation, alongside the inspection undertaken. The learned Additional Advocate General has drawn the Court's attention to the Executive Engineer's letter dated 29.12.2017, and a reminder dated 18.01.2018, demanding copies of the drawings, designs, valuation reports and other construction related documents from the University. Copies of those letters dated 29.12.2017 and 18.01.2018 are annexed as Annexure no. SCA-7 to the short counter affidavit. It is pointed out further that the University did not furnish the required documents. The Assistant Labour Commissioner, once again, directed the University, by a memo dated 08.02.2018, to cooperate and provide the necessary documents to this valuation team, constituted by the District Magistrate.

15. Mr. Goyal emphasizes at this juncture that acting on the aforesaid letter and also the letter dated 29.12.2017 issued by the Executive Engineer, PWD, Rampur, the Administrative Officer/ PRO of the University addressed a memo to the Executive Engineer, PWD, Rampur, informing him that all documents demanded were with the Engineer, In-charge of the Construction of Buildings and Maintenance. The Engineer was not

available. Therefore, it was not possible to pro*vide* drawings, designs and other documents relating to the constructions to the members of the valuation team.

16. The attention of the Court has been drawn by the learned Additional Advocate General to a copy of the letter dated 08.02.2018, addressed by the Administrative Officer of the University to the Executive Engineer, PWD, Rampur, which is on record as Annexure no. SCA-9 to the short counter affidavit. It is pointed out that two letters dated 12.02.2018 and 16.03.2018 were again issued by the Executive Engineer, PWD, Rampur, for doing a proper valuation of the constructions made and the cost incurred by the University. Copies of those letters are also on record. But, no documents or information were furnished.

17. Mr. Goyal says that when no documents relating to the construction costs were pro*vide*d by the University, the Executive Engineer, by a letter dated 03.07.2018, drafted the services of the Assistant and Junior Engineers of the Tubewell Division Rampur, Jal Nigam Rampur, Rural Engineering Department, Rampur and the Construction & Designs Services (C&DS), Unit 54, Rampur, for the purpose of undertaking a valuation of the construction costs incurred by the University. The Registrar of the University was also informed by the Executive Engineer through a letter dated 02.07.2018 about these twenty five Technical Officers and the Officers of the Labour Department, planning to undertake a survey of their premises for the purpose of valuing construction costs incurred by the University. A copy of the letter dated 02.07.2018 addressed by the Executive Engineer, PWD, Rampur to the Registrar of the University, is on record as Annexure no. SCA-12, through which the Court has been taken.

18. The Executive Engineer, PWD, Rampur submitted his valuation report dated 07.09.2018, estimating the total construction cost at Rs.147.20 crores, and the labour cess at a figure of Rs.147.20 lakhs. The report indicates that according to the report of the C&DS Department and Jal Nigam, an amount of Rs.10.83 lakhs had already been deposited as cess by those Departments, because some part of the construction were undertaken through them. The outstanding liability towards cess, according to the valuation report, was calculated at a figure of Rs.136.37 lakhs. It is next indicated that upon receipt of the aforesaid valuation report dated 07.09.2018, the Assessment Officer proceeded to pass an assessment order dated 28.09.2018, assessing a total cess of Rs.136.37 lakhs, adjusting Rs.10.83 lakhs deposited by the C&DS Department and the Jal Nigam. The assessment order records that the University have not complied with the mandatory provisions of Section 4 of the Cess Act and Rule 6 of the Cess Rules. The University have been directed to deposit the assessed sum of cess within 15 days by means of the impugned assessment order dated 28.09.2018.

19. It is then pointed out that the short counter affidavit indicates that the assessed cess was not deposited, leading to issue of notice dated 26.12.2018, requiring the University to show cause why interest under Section 8 and penalty under Section 9 be not imposed on the delay and non-payment of cess within time specified. The show cause notice dated 26.12.2018 remaining unresponded to, a recovery certificate dated 15.01.2019 has been

issued by the Assessment Officer to the Collector, Rampur, requiring him to recover the assessed amount of cess together with interest, under Section 8 on the delayed payment and penalty under Section 9 (equivalent to 100% of the cess).

20. The learned Additional Advocate General submits that the aforesaid course of proceedings under the Cess Act would show that the Assessment Officer has granted adequate opportunity at every stage of proceedings, leading to the impugned assessment order. He, therefore, submits that it is not a case which can be held to be one of denial of opportunity. It is not a case where principles of natural justice can be said to be violated. Therefore, it is urged on facts e*vide*nced from all the various steps taken during proceedings, that this case cannot be classed as one where the clear statutory alternative remedy of appeal pro*vide*d by the statute may be bypassed.

21. Mr. S.G. Hasnain, learned Senior Advocate has, on facts, submitted that violation of the principles of natural justice, on account of denial of opportunity, is e*vide*nt in the course of proceedings. He has drawn the attention of the Court to the fact that after the Committee appointed by the District Magistrate, on the request of the Assessment Officer, submitted their valuation report dated 07.09.2018, a copy of the same was never supplied to the University. Instead, the impugned assessment order was passed on 28.09.2018, without the Assessment Officer having before him the University's objections to the valuation report. It is, thus, urged that the impugned assessment order has been passed without opportunity of hearing being afforded to the University. It is, in particular, urged that the impugned assessment order is not based on a return furnished under Section 4(1) of the Cess Act read with Rule 6(1) of the Cess Rules. He points out that where the Assessment Officer proceeds on the basis of a return submitted in Form-1, appended to the Cess Rules, no opportunity would, of course, be required. But, that, according to Mr. Hasnain, would be a case where assessment is made under Section 5(1) of the Cess Act read with sub-Rule (1) of Rule 7 of the Cess Rules. However, in a case where the Assessment Officer proceeds to assess under Section 5(2) read with sub Rules (5) and/ or (6) of Rule 7, the inquiry report or other material, that is basis of the estimated cost of construction, has to be pro*vide*d to the assessee. Else, Mr. Hasnain submits, it would be a case of consideration of adverse material behind the assessee's back and, a *fortiori* a violation of the first principle of natural justice.

22. In support of his contention that an order passed in violation of the principles of natural justice can be undone by this Court, under Article 226 of the Constitution, without relegating the assessee to his statutory alternative remedy, the learned Senior Counsel for the University places reliance on the decision of the Supreme Court in **Whirlpool Corporation vs. Registrar of Trade Marks, Mumbai and others1**. He has, particularly, emphasized the holding of their Lordships in **Whirlpool Corporation** in paragraphs 14 and 15 of the report. These read:

"14. The power to issue prerogative writs under Article 226 of the Constitution is plenary in nature and is not limited by any other provision of the Constitution. This power can be exercised by the High Court not only for issuing writs in the nature of habeas corpus, mandamus,

prohibition, quo warranto and certiorari for the enforcement of any of the Fundamental Rights contained in Part III of the Constitution but also for "any other purpose".

15. Under Article 226 of the Constitution, the High Court, having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. But the High Court has imposed upon itself certain restrictions one of which is that if an effective and efficacious remedy is available, the High Court would not normally exercise its jurisdiction. But the alternative remedy has been consistently held by this Court not to operate as a bar in at least three contingencies, namely, where the writ petition has been filed for the enforcement of any of the Fundamental Rights or where there has been a violation of the principle of natural justice or where the order or proceedings are wholly without jurisdiction or the vires of an Act is challenged. There is a plethora of case-law on this point but to cut down this circle of forensic whirlpool, we would rely on some old decisions of the evolutionary era of the constitutional law as they still hold the field."

23. He has next placed reliance on a decision of the Supreme Court in **ABL International Ltd. and another vs. Export Credit Guarantee Corporation of India Ltd. and others2.** Learned Senior Counsel has emphasized that the said decision would clearly show that the principle of alternative remedy is not an absolute bar, and can be ignored in appropriate cases. Learned Senior Counsel has drawn the Court's attention to the observations of their Lordships in **ABL International Ltd.,** where it is held:

"16. A perusal of this judgment though shows that a writ petition involving serious disputed questions of facts which requires consideration of e*vide*nce which is not on record, will not normally be entertained by a court in the exercise of its jurisdiction under Article 226 of the Constitution of India. This decision again, in our opinion, does not lay down an absolute rule that in all cases involving disputed questions of fact the parties should be relegated to a civil suit. In this view of ours, we are supported by a judgment of this Court in the case of *Gunwant Kaur v. Municipal Committee, Bhatinda* [(1969) 3 SCC 769] where dealing with such a situation of disputed questions of fact in a writ petition this Court held: (SCC p. 774, paras 14-16)

"14. The High Court observed that they will not determine disputed question of fact in a writ petition. But what facts were in dispute and what were admitted could only be determined after an affidavit-in-reply was filed by the State. The High Court, however, proceeded to dismiss the petition in limine. The High Court is not deprived of its jurisdiction to entertain a petition under Article 226 merely because in considering the petitioner's right to relief questions of fact may fall to be determined. In a petition under Article 226 the High Court has jurisdiction to try issues both of fact and law. Exercise of the jurisdiction is, it is true, discretionary, but the discretion must be exercised on sound judicial principles. When the petition raises questions of fact of a complex nature, which may for their determination require oral e*vide*nce to be taken, and on that account the High Court is of the view that the dispute may not appropriately be tried in a writ petition, the High Court may decline to try a petition. Rejection of a petition in limine will normally be justified, where the High Court is of the view that the petition is frivolous or because of the nature of the claim made dispute sought to be agitated, or that the

petition against the party against whom relief is claimed is not maintainable or that the dispute raised thereby is such that it would be inappropriate to try it in the writ jurisdiction, or for analogous reasons.

15. From the averments made in the petition filed by the appellants it is clear that in proof of a large number of allegations the appellants relied upon documentary e*vide*nce and the only matter in respect of which conflict of facts may possibly arise related to the due publication of the notification under Section 4 by the Collector.

16. In the present case, in our judgment, the High Court was not justified in dismissing the petition on the ground that it will not determine disputed question of fact. The High Court has jurisdiction to determine questions of fact, even if they are in dispute and the present, in our judgment, is a case in which in the interests of both the parties the High Court should have entertained the petition and called for an affidavit-in-reply from the respondents, and should have proceeded to try the petition instead of relegating the appellants to a separate suit."

19. Therefore, it is clear from the above enunciation of law that merely because one of the parties to the litigation raises a dispute in regard to the facts of the case, the court entertaining such petition under Article 226 of the Constitution is not always bound to relegate the parties to a suit. In the above case of *Gunwant Kaur* [(1969) 3 SCC 769] this Court even went to the extent of holding that in a writ petition, if the facts require, even oral e*vide*nce can be taken. This clearly shows that in an appropriate case, the writ court has the jurisdiction to entertain a writ petition involving disputed questions of fact and there is no absolute bar for entertaining a writ petition even if the same arises out of a contractual obligation and/or involves some disputed questions of fact.

28. However, while entertaining an objection as to the maintainability of a writ petition under Article 226 of the Constitution of India, the court should bear in mind the fact that the power to issue prerogative writs under Article 226 of the Constitution is plenary in nature and is not limited by any other provisions of the Constitution. The High Court having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. The Court has imposed upon itself certain restrictions in the exercise of this power. (*See Whirlpool Corpn. v. Registrar of Trade Marks* [(1998) 8 SCC 1].) And this plenary right of the High Court to issue a prerogative writ will not normally be exercised by the Court to the exclusion of other available remedies unless such action of the State or its instrumentality is arbitrary and unreasonable so as to violate the constitutional mandate of Article 14 or for other valid and legitimate reasons, for which the Court thinks it necessary to exercise the said jurisdiction."

24. In the next limb of his submissions, Mr. Hasnain says that in case of fiscal statutes, there is ample authority to show that in the event of an exorbitant demand based on an arbitrary determination, a writ petition under Article 226 of the Constitution may be an assessee's permissible resort, despite the alternative remedy pro*vide*d under the law. In this connection, the learned Senior Counsel has placed reliance on the decision of the Supreme Court in **Government of Andhra Pradesh and others vs. P. Laxmi Devi (Smt.)3.** In the said decision, on the point made by the learned Senior Counsel for the University, the observations, that are emphasized, read:

"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 India* [(1978) 1 SCC 248: AIR 1978 SC 597]. Hence, the party is not remediless in this situation."

25. Learned Senior Counsel for the University has next called in aid the decision of the Supreme Court in **Smt. Har Devi Asnani vs. State of Rajasthan and Ors.4.** In the said decision, following the earlier decision in Government of **Andhra Pradesh and others vs. Smt. P. Laxmi Devi** *(supra),* it has been held:

"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."

26. Mr. Hasnain submits that on both counts, that he has claimed to be relevant to his obligation to avail the alternative remedy of appeal, the decision of a Division Bench of this Court in **Smt. Vijaya Jain vs. State of U.P. and others5** succinctly lays down the law in the following words:

"10. The law as authoritatively laid down by the Supreme Court in the aforementioned two judgments clearly establishes that a petitioner before the High Court is not liable to be relegated to the alternative remedy as a matter of rule. If in the facts of a particular case it is established that the principles of natural justice have been violated or that the order has been rendered without jurisdiction or if it is disclosed to the Court that grave injustice has been caused to the petitioner and it is found that his relegation to the alternative remedy would perpetuate injustice and cause prejudice, it is always open to this Court to exercise its prerogative constitutional powers and to issue an appropriate writ striking at the offending action. This principle stands extended in light of the abovementioned precedents to a case where the petitioner is foisted with an exorbitant and arbitrary demand in which case his relegation to the alternative remedy would not be justified."

27. On the factual premise for the second limb of his submission, Mr. Hasnain submits that the impugned assessment is one that is arbitrary and raises an exorbitant demand. In order to demonstrate the arbitrariness of the assessment and the resultant exorbitant demand, the learned Senior Counsel has drawn the attention of the Court towards the impugned assessment order, where he points out that under the item detailed at serial no.5 in the tabulated chart, the cost of construction of a One BHK Teachers' Residential Unit, located in the Residential Block-1, has been estimated at a figure of Rupees 0.95 crores. Likewise, the estimated cost of construction for a One BHK Teachers' Residential Unit, located in

Residential Block-2, is a figure of Rupees 2.60 crores. Again, a One BHK Residential Unit in another Residential Block has been estimated to bear a construction cost of Rupees 3.68 crores. A Two BHK Unit in the Non-Teaching Residential Block has been estimated to bear a construction cost of Rupees 0.39 crores. A Two BHK Residential Unit in the Non-Teaching Residential Block-2 has been estimated for a construction cost of Rupees 3.54 crores. The last to be pointed out is a Two BHK Residential Unit in the Teachers' Residential Block, where the estimated cost is a figure of Rupees 2.72 crores.

28. The Learned Senior Counsel submits that these figures about the assessment costs are *ex facie* arbitrary, unreasonable and highly exorbitant. He submits that in case a show cause notice had been served upon the University, after receipt of the inquiry report dated 07.02.2018, they would have objected to this grossly exaggerated/ exorbitant estimation of cost, based on utterly hypothetical standards. He emphasizes that the cess levied on this count, upon a fantastic estimation of cost, is arbitrary and exorbitant. The learned Senior Counsel, therefore, says that it is a case where relying on the principle in **Andhra Pradesh and others vs. Smt. P. Laxmi Devi** *(supra)*, Smt. Har Devi Asnani *(supra)* and Smt. Vijaya Jain *(supra)*, this Court should have no difficulty in overruling the plea of alternative remedy raised on behalf of the respondents.

29. In his rejoinder, Mr. Manish Goyal, learned Additional Advocate General, supports his plea about an equally efficacious alternative remedy being there, that ought to dissuade this Court in entertaining the present writ petition. Mr. Goyal submits that the Cess Act has been enacted to pro*vide* for the levy and collection of a cess on the cost of construction incurred by the employer, with a view to augment the resources of the Building and Other Construction Workers' Welfare Board. It must be remarked here that this reference to the object of the Cess Act by Mr. Goyal, virtually quotes the words of the Preamble. He emphasizes that Section 4 of the Cess Act requires every employer to furnish a return to the Authority specified under the Cess Rules, in such manner and within time as prescribed in those Rules. It is emphasized that sub-Section (2) of Section 4 pro*vide*s that where a person carrying on a building construction or other construction work, who is liable to pay cess under Section 3, fails to furnish a return in accordance with sub-Section (1) of Section 4, the Officer or the Authority is enjoined to serve a notice upon that person, to furnish a return before such date, as may be indicated in the notice. Mr. Goyal points out that Section 3 of the Cess Act is the charging Section. It empowers the Assessment Officer under Section 5(1), before whom a return in accordance with Section 4 has been furnished, to assess the amount of cess, that is payable by the employer. In doing so, the Assessment Officer is empowered to make an inquiry, or causing it to be made in such manner as he may deem fit, for the purpose of satisfying himself that the particulars, detailed in the return, are correct.

30. It is next pointed out on behalf of the State that sub-Section (2) of Section 5 of the Cess Act prescribes that if the return is not furnished, the Assessment Officer is empowered to undertake an inquiry, as he may think fit, and by order, assess the amount of cess payable by the employer. He further points out that Rule 6 of the

Cess Rules requires an employer, within 30 days of the commencement of construction work or payment of cess, as the case may be, to furnish to the Assessment Officer, information in Form-I appended to the Cess Rules. He points out that Section 5(2) of the Cess Act read with sub-Rule (5) of Rule 5 of the Cess Rules empowers the Assessment Officer to make an assessment on the basis of available records and other information incidental thereto, in the event an employer does not furnish a return or information in Form-I. It is argued by the learned Additional Advocate General that the record makes it apparent that the University neither fulfilled its obligations to file a return in accordance with Section 5(1) or furnished information, despite notices and letters sent to it. It is urged, therefore, that there is no violation of principles of natural justice. It is emphasized that there being no violation of principles of natural justice, the alternative remedy of appeal, contemplated under Section 11 of the Cess Act, cannot be given a go by and this petition entertained.

31. This Court has carefully considered the rival submissions on the issue, whether the University here ought to be relegated to their statutory alternative remedy under the Cess Act. It must be borne in mind that the Cess Act is a social welfare legislation, designed to pro*vide* social security to construction workers, who are part of an important but unorganized Sector of workmen. They are hired from the open market, either directly by those undertaking building constructions or through the agency of contractors. They are paid wages that they earn, but their engagement, technically as well as substantially, is no more than a day's commitment. It brings little or no social security. The scheme of the Cess Act, as unfolded in Sections 3, 4 and 5 read with Cess Rules, shows the legislative anxiety of securing almost a spontaneous assessment as the construction work progress; and if not spontaneous, an assessment done with inputs received within a short interval of time. The purpose is to secure the interest of construction workers, who may have a fleeting presence and a short lived contribution of labour in a big project. The figures, on which the assessment is based, if not submitted within a short time of the taxable construction activity, much facts and figures, on which assessment is done, may be lost.

32. Bearing this scheme of the Cess Act and the Cess Rules about assessment in mind, if one were to look at the provisions of Sections 3, 4 and 5 read with Rules 3, 4, 6 and 7, it is e*vide*nt that there is envisaged an opportunity to the assessee, at every stage and short interval. Sections 4 and 5 of the Cess Act are extracted below:

"4. Furnishing of returns.--(1) Every employer shall furnish such return to such officer or authority, in such manner and at such time as may be prescribed.

(2) If any person carrying on the building or other construction work, liable to pay the cess under section 3, fails to furnish any return under sub-section (1), the officer or the authority shall give a notice requiring such person to furnish such return before such date as may be specified in the notice.

5. Assessment of cess.--(1) The officer or authority to whom or to which the return has been furnished under Section 4 shall, after making or causing to be made such inquiry as he or it thinks fit and after satisfying himself or itself that the

particulars stated in the return are correct, by order, assess the amount of cess payable by the employer.

(2) If the return has not been furnished to the officer or authority under sub-section (2) of Section 4, he or it shall, after making or causing to be made such inquiry as he or it thinks fit, by order, assess the amount of cess payable by the employer.

(3) An order of assessment made under sub-section (1) or sub-section (2) shall specify the date within which the cess shall be paid by the employer."

33. It would be noticed that Section 4, which speaks about furnishing of returns, contemplates two distinct situations. First is envisaged under sub-section (1) of Section 4. It mandates that the employer shall furnish a return to the Assessment Officer, in such manner and at such time, as prescribed. Sub-section (2) of Section 4, on the other hand, envisages a situation, where a person, who is causing a building to be erected or other construction work done, fails to furnish a return under sub-section (1). Sub-section (2) requires that if the employer fails to furnish a return as mandated by sub-section (1) of Section 4, the Assessment Officer shall serve a notice on such employer, requiring him to furnish a return before the date indicated in the notice. Section 5 speaks about the assessment. Again, Section 5 caters to the two distinct situations: first, where the employer furnishes a return; and the second, where he does not furnish a return. Sub-section (1) of Section 5 empowers the Assessment Officer, before whom a return is furnished under Section 4, to undertake such inquiry as he thinks fit, and after satisfying himself that the particulars in the return are truthful, proceed to assess the cess payable.

34. Now, the power under Section 5(1) of the Cess Act would be exercisable in situations contemplated, both by sub-section (1) and sub-section (2) of Section 4, but the power under sub-section (1) of Section 5 would be exercisable only where the employer furnishes a return. That return may be furnished by the employer of his own or in response to a notice under sub-section (2) of Section 4. In both the eventualities, the assessment of cess would be done under sub-section (1) of Section 5. Sub-section (2) of Section 5, however, envisages a situation, where the employer does not file a return at all, despite notice under sub-section (2) of Section 4. In that contingency, the Assessment Officer is empowered, after making or causing to be made necessary inquiry as he considers fit, to assess the amount of cess payable by the employer. The present case falls under sub-section (2) of Section 5 of the Cess Act. In this connection, reference may be made to sub-rule (5) of Rule 7 of the Cess Rules. It reads:

"7. Assessment.--(1) The Assessing Officer, on receipt of information in Form I from an employer shall make a scrutiny of such information furnished and, if he is satisfied about the correctness of the particulars so furnished, he shall make an order of assessment within a period not exceeding six months from the date of receipt of such information in Form I, indicating the amount of cess payable by the employer and endorse a copy thereof to the employer, to the Board and to the cess collector and despatch such order within five days of the date on which such order is made.

(2) The order shall inter-alia specify the amount of cess due, cess already paid by the employer or deducted at source and the balance amount payable and

the date, consistent with the provision of rule 4, by which the cess shall be paid to the cess collector.

(3) If on scrutiny of information furnished, the Assessing Officer is of the opinion that employer has under-calculated or miscalculated the cost of construction or has calculated less amount of cess payable, he shall issue notice to the employer for assessment of the cess.

(4) On receipt of such notice the employer shall furnish to the Assessing Officer a reply together with copies of documentary or other e*vide*nce in support of his claim, within fifteen days of the receipt of the notice: Pro*vide*d that the Assessing Officer may, in the course of assessment, afford an opportunity to the assessee to be heard in person, if he so requests to substantiate his claim.

(5) If the employer fails to furnish the reply within the period specified under sub-rule (4), or where an employer fails to furnish information in Form I, the Assessing Officer shall proceed to make the assessment on the basis of available records, and other information incidental thereto.

(6) The Assessing Officer may, at anytime while the work is in progress, authorise such officer to make such enquiry at the work site or from documentary e*vide*nce or in any other manner as he may think fit for the purpose of estimating the cost of construction as accurately as possible." (Emphasis by Court)

35. It would be noticed here that there is little or no cavil about the fact that the University did not furnish a return of their own, under Section 4(1) of the Cess Act. In a situation where the employer does not furnish a return under Section 4(1), Section 4(2) envisages a notice by the Assessment Officer or the Authority requiring the employer to furnish a return. In this case, the record shows that the Building and other Construction Welfare Board served a notice dated 23.01.2015 upon the University, requiring them to furnish necessary information for the purpose of assessment under the Cess Act. A tentative cost of about sixteen buildings already constructed and another twenty-two under construction, besides a completed boundary wall, was indicated in the notice, to be estimated at a figure of Rs.2000/- crores. There was no reply to the notice, or so to speak, a return furnished within the time indicated; or even beyond it. Thereafter, the Cess Collector-cum-Assistant Labour Commissioner issued a show cause notice to the University (addressed to the Vice Chancellor of the University) dated 21.08.2017 in order to pro*vide* further opportunity to them to furnish their return. No information was furnished in answer to the notice dated 21.08.2017, also.

36. This Court must remark that in a case where Rule 6 of the Cess Rules requires information to be furnished by the employer, within thirty days of commencement of work for the payment of cess, as the case may be, in Form I to the Cess Rules, the proceedings for assessment under the Cess Act were taken after sixteen buildings and boundary wall had come up.

37. Now, the most important part of the transaction is that the University responded to the show cause notice, not by filing a return, but through a letter dated 09.11.2017, a copy of which is on record. There, it is acknowledged that they have raised construction between the years 2010 to 2017. Instead of filing a return relating to those constructions in the prescribed form, the University sought exemption from levy of cess.

38. It must be remarked here that there is no case about an exemption under Section 6 of the Cess Act and even if that be so, it is a matter to be dealt with in proceedings under the Cess Act by the Authorities concerned; grant of exemption is no part of the Assessment Officer's jurisdiction or proceedings. This Court does not wish to go into the question of exemption, as the only issue under scrutiny is about the maintainability of this petition for the present, in the face of a statutory alternative remedy. These facts, however, show that no return was filed by the University, leaving the Assessment Officer with no option but to proceed under Section 5(2) of the Cess Act to assess without a return. It is to the above end that the Cess Assessment Collector-cum-Assistant Labour Commissioner, Rampur addressed a memo dated 16.11.2017 to the Assessment Officer, recommending inter alia that a team be got constituted by the Uttar Pradesh Buildings and other Construction Workers' Welfare Board or other competent Authority to assess the cost of the constructions involved. Taking cognizance of the aforesaid recommendation, the Deputy Labour Commissioner/ Assessment Officer addressed a memo dated 18.11.2017 to the District Magistrate/ Collector, Rampur, requesting him to ensure a valuation of the constructions raised by the University, by Engineers from the Public Works Department or the Rampur Development Authority. The Collector, in turn, constituted a two-member team, including the Executive Engineer of the PWD, Rampur to undertake a valuation of the constructions made after February, 2009, *vide* an order dated 22.12.2017.

39. It has been noticed in detail that how a team of valuers demanded copies of drawings, designs, valuation report and other construction related documents, but in vain from the University. There is a rather startling document on record, which is a letter dated 08.02.2018 addressed by the Administrative Officer/ PRO of the University to the Executive Engineer of PWD, Rampur, which says that the required building plans and other documents, demanded by the Executive Engineer for the purpose of valuing the cost of constructions, could not be pro*vide*d for the present, because these were with the Engineer, Building Construction and Maintenance Department, who was not available for sometime past. The record shows that it is replete with letters written by the Executive Engineer, PWD to the University, requiring their assistance to value the constructions for the purpose of assessment under the Cess Act, but all to no avail.

40. These facts *prima facie* show that ample opportunity was afforded to the University, at different stages of proceedings, culminating in the impugned assessment.

41. The submission of Mr. S.G. Hasnain, learned Senior Advocate that the report of the valuation dated 07.09.2018 was not pro*vide*d to the University before the assessment order was passed, bearing in mind the course of proceedings and the nature of assessment, contemplated under the Cess Act, would not place the case in that category of denial of an opportunity of hearing, which may bring it within the relevant exception to the rule of alternative remedy, laid down in **Whirlpool Corporation** *(supra)*.

42. The second limb of Mr. Hasnain's submission to bypass the statutory

alternative remedy is built on the edifice of the assessment, being one involving a disproportionate and exorbitant demand.

43. This Court is of opinion that the principles laid down in this regard by the Supreme Court in **Government of Andhra Pradesh and others vs. P. Laxmi Devi (Smt.)** *(supra),* **Smt. Har Devi Asnani and Smt. Vijaya Jain** *(supra)* also do not come to the University's rescue. The decision in **Government of Andhra Pradesh and others vs. P. Laxmi Devi (Smt.)** and **Smt. Har Devi Asnani** arise in relation to the matters under the Indian Stamp Act, where value of the property in proceedings under Section 47A of the Act, last mentioned, was opined to be an *ex facie* disproportionate and arbitrary determination. The principle there followed in **Smt. Vijaya Jain** is, of course, binding on this Court, but a case of disproportionate and arbitrary demand, based on an equally arbitrary assessment, is a matter to be judged on facts before the principle in those decisions can be invoked to bypass the statutory alternative remedy. The remarks of their Lordships of the Supreme Court in **Smt. Har Devi Asnani** would show that question about the demand being disproportionate or arbitrary, while dealing with an objection regarding availability of an alternative remedy, has to be assessed on the facts of the case. The Court ought to see, whether it is, in fact, a case of disproportionate and arbitrary demand.

44. Mr. Hasnain, for the purpose, has buttressed his contention on facts and figures. He has been emphatic to point out that the estimated cost of construction of One BHK Teachers' Residential Unit, located in the Residential Block-1, has been estimated at a figure of Rupees 0.95 crores, whereas One BHK Teachers' Residential Unit, located in Residential Block-2, has been estimated at a figure of Rupees 2.60 crores. Still again, a One BHK Residential Unit in another Residential Block has been estimated to bear a construction cost of Rupees 3.68 crores. Those details have been elucidated in the earlier part of this judgment.

45. It must be remarked that the figures involved do not carry an inherent element of absurdity, given the contemporary value of cost of construction, of which judicial notice may be taken. In the event, the petitioner wished to substantiate his plea about the assessment, being an arbitrary and exorbitant figure, the carpet area of the varying units, the built up area, the material used, ought to have been placed on record to show that these varying determinations are arbitrary; else some other factual basis about the estimated cost of construction should have been placed on record by the University, to enable this Court to discern an *ex facie* absurdity or exaggeration in the assessment made. There is no such material available on record. Therefore, the second limb of Mr. Hasnain's submission, on which he wants this writ petition to be entertained, bypassing the statutory alternative remedy, is also untenable.

46. Apart from these considerations, it must be remembered that a statutory alternative remedy in a fiscal statute ought not to be ignored except in very exceptional circumstances and on reputed principles, which are not found to exist here. Even if the statutory remedy is onerous, in the sense that it involves a condition of pre-deposit, a writ petition ought not to be entertained. In this connection, reference may be made to the decision of the Supreme Court in **Raj Kumar Shivhare**

vs. Assistant Director, Directorate of Enforcement and another6. In Raj Kumar Shivhare, it was held:

30. The argument that writ jurisdiction of the High Court under Article 226 of the Constitution is a basic feature of the Constitution and cannot be ousted by parliamentary legislation is far too fundamental to be questioned especially after the judgment of the Constitution Bench of this Court in *L. Chandra Kumar v. Union of India* [(1997) 3 SCC 261: 1997 SCC (L&S) 577]. However, that does not answer the question of maintainability of a writ petition which seeks to impugn an order declining dispensation of pre-deposit of penalty by the Appellate Tribunal.

31. When a statutory forum is created by law for redressal of grievance and that too in a fiscal statute, a writ petition should not be entertained ignoring the statutory dispensation. In this case the High Court is a statutory forum of appeal on a question of law. That should not be abdicated and given a go-by by a litigant for invoking the forum of judicial review of the High Court under writ jurisdiction. The High Court, with great respect, fell into a manifest error by not appreciating this aspect of the matter. It has however dismissed the writ petition on the ground of lack of territorial jurisdiction.

32. No reason could be assigned by the appellant's counsel to demonstrate why the appellate jurisdiction of the High Court under Section 35 of FEMA does not pro*vide* an efficacious remedy. In fact there could hardly be any reason since the High Court itself is the appellate forum.

33. Reference may be made to the Constitution Bench decision of this Court rendered in *Thansingh Nathmal v. Supdt. of Taxes* [AIR 1964 SC 1419] , which was also a decision in a fiscal law. Commenting on the exercise of wide jurisdiction of the High Court under Article 226, subject to self-imposed limitation, this Court went on to explain: (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 pro*vide*d 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."* (emphasis added)

The decision in *Thansingh* [AIR 1964 SC 1419] is still holding the field.

34. Again in *Titaghur Paper Mills Co. Ltd. v. State of Orissa* [(1983) 2 SCC 433: 1983 SCC (Tax) 131: AIR 1983 SC 603] in the background of taxation laws, a three-Judge Bench of this Court apart from reiterating the principle of exercise of writ jurisdiction with the time-honoured self imposed limitations, focused on another legal principle on right and remedies. In para 11, at AIR p. 607 of the Report, this Court laid down: (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 pro*vide*d 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* [(1859) 6 CBNS 336: 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: (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 Co. Ltd. [1935 AC 532] and Secy. of State v. Mask and Co. [(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."

35. In this case, liability of the appellant is not created under any common law principle but, it is clearly a statutory liability and for which the statutory remedy is an appeal under Section 35 of FEMA, subject to the limitations contained therein. A writ petition in the facts of this case is therefore clearly not maintainable.

36. Again another Constitution Bench of this Court in *Mafatlal Industries Ltd. v. Union of India* [(1997) 5 SCC 536] speaking through B.P. Jeevan Reddy, J. delivering the majority judgment, and dealing with a case of refund of Central excise duty held: (SCC p. 607e-f, 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."

In the concluding portion of the judgment it was further held: (*Mafatlal Industries Ltd. case* [(1997) 5 SCC 536] , SCC p. 635c, para 108)

"(x) ... The power under Article 226 is conceived to serve the ends of law and not to transgress them."

38. The learned counsel for the respondents relied on a judgment of this Court in Seth Chand Ratan v. Pandit Durga Prasad [(2003) 5 SCC 399]. The learned counsel relied on para 13 of the said judgment which, inter alia, lays down the principle, namely, when a right or liability is created by a statute, which itself prescribes the remedy or procedure for enforcing the right or liability, resort must be had to that particular statutory remedy before seeking the discretionary remedy under Article 226 of the Constitution. However, the aforesaid principle is subject to one exception, namely, where there is a complete lack of jurisdiction of the tribunal to take action or there has been a violation of rules of natural justice or where the tribunal acted under a provision of law which is declared ultra vires. In such cases, notwithstanding the existence of such a tribunal, the High Court can exercise its jurisdiction to grant relief. (Emphasis by Court)

47. It must also be remarked that the particular principle that weighed with their Lordship in **Raj Kumar Shivhare,** to

disapprove of a bypass of an alternative remedy, is also attracted here. That principle is about the right or liability created by a statute as distinct from an existing right or liability under the general law, for which a remedy is pro*vide*d by the statute. In a situation, where the liability arises under a statute, creating the liability with a mechanism for appeal or other remedy, discretion to entertain a writ petition ought not be exercised. The parameters, which serve as exceptions, such as violation of principles of natural justice, are not found to be attracted here on facts.

48. In a much earlier decision of their Lordships of the Supreme Court rendered in the context of challenge to an order of assessment passed under the Orissa Sales Tax Act, 1947, it has been held in **Titaghur Paper Mills Co. Ltd. and another vs. State of Orissa and others7**, thus:

"11. Under the scheme of the Act, there is a hierarchy of authorities before which the petitioners can get adequate redress against the wrongful acts complained of. The petitioners have the right to prefer an appeal before the Prescribed Authority under sub-section (1) of Section 23 of the Act. If the petitioners are dissatisfied with the decision in the appeal, they can prefer a further appeal to the Tribunal under sub-section (3) of Section 23 of the Act, and then ask for a case to be stated upon a question of law for the opinion of the High Court under Section 24 of the Act. The Act pro*vide*s for a complete machinery to challenge an order of assessment, and the impugned orders of assessment can only be challenged by the mode prescribed by the Act and not by a petition under Article 226 of the Constitution. 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 pro*vide*d 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* [(1859) 6 CBNS 336, 356: 28 LJCP 242: 141 ER 486: 7 WR 464] in the following passage:

"There are three classes of cases in which a liability may be established founded upon 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 pro*vide*d 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: 1919 All ER Rep 61: 88 LJKB 282: 120 LT 299] and has been reaffirmed by the Privy Council in *Attorney-General of Trinidad and Tobago v. Gordon Grant & Co. Ltd.* [1935 AC 532: 104 LJ PC 82: 153 LT 441 (PC)] and *Secretary of State v. Mask & Co.* [AIR 1940 PC 105: 67 IA 222: 188 IC 231] 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."

49. In the present case, there is a clear provision of appeal pro*vide*d under the Cess Act from the impugned order, under Section 11. The manner in which an appeal is to be presented to the Appellate Authority, and the other requirements to be

complied with by the employer, are stipulated in Rule 14 of the Cess Rules. There is a complete remedy under the Cess Act available to the petitioner, which is a special and a fiscal statute. That remedy, in the opinion of this Court, ought to be availed by the University, which, it cannot be permitted to bypass, by invoking this Court's jurisdiction, under Article 226 of the Constitution.

50. It is made clear that anything said in this judgment shall not be construed as an expression on the merits of the case, which shall remain ever so open to be determined by the Statutory Appellate Authority, if the University choose to appeal, under the provisions of the Cess Act.

51. In the result, this writ petition is *dismissed* on the ground of alternative remedy. There shall be no order as to costs.

(2021)02ILR A983
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 25.01.2021

BEFORE

THE HON'BLE BACHCHOO LAL, J.
THE HON'BLE SUBHASH CHANDRA SHARMA, J.

Criminal Appeal No. 5629 of 2010

Ashok Kumar & Ors. ...Appellants (In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellants:
Sri Mohammad Farooq, Sri Amit Kumar Srivastava, Sri Ashok Kumar Yadav, Sri Jai Shankar Prasad Tyagi, Sri Lallan Chaubey, Sri Satya Dheer Singh Jadaun, Sri Surendra Kumar, Sri Manish Mishra, Sri Anup Kumar Mishra

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

A. Criminal Law – Code of Criminal Procedure,1873 - Section 161 - Indian Penal Code: Section 302; Arms Act, 1959 - Section 25 - Close relationship of witness with the deceased or victim is no ground to reject his evidence. It is clear that a close relative cannot be characterized as an "interested" witness. He is "natural" witness. His evidence, however, must be scrutinized carefully. If on such scrutiny, his evidence is found to be intrinsically reliable, inherently probable and wholly trustworthy, conviction can be based on the "sole" testimony of such witness. Close relative of the deceased would normally be most reluctant to spare the real culprit and falsely implicate an innocent one. (Para 35)

B. The Evidence Act,1872 - Section 134 – The legal system has laid emphasis on value, weight and quality of evidence rather than on quantity, multiplicity or plurality of witnesses. It is not the number of witnesses but quality of their evidence which is important as there is no requirement under the law of evidence that any particular number of witnesses is to be examined to prove/disprove a fact. The evidence must be weighed and not counted. It is quality and not quantity which determines the adequacy of evidence as has been provided u/s 134 of the Evidence Act. As a general rule the court can and may act on the testimony of a single witness provided as he is wholly reliable. (Para 34, 35)

C. It is settled legal preposition that even if the absence of motive as alleged is accepted, is of no consequence and pales into insignificance when direct evidence establishes the crime. Therefore, in case there is direct trustworthy evidence of witnesses as to commission of an offence, the motive part loses its significance. Therefore, if the genesis of the motive of the occurrence is not proved, the ocular testimony of the witnesses as to the occurrence could not be disregarded only by the reason of the absence of motive, if otherwise the evidence is worthy of reliance. (Para 47)

Appeal dismissed. (E-3)

Precedent followed:

1. St.of Punj. Vs Jugraj Singh & ors., 2002 SCC (Criminal) 630 (Para 33)

2. Amit Vs St. of U.P., 2012 (1) JCRC 703 (Para 33)

3. Sudarshan Reddy & ors. Vs St.of A.P., 2006 (2) CAR SC Page 742 (Para 33)

4. Gangadhar Behra & ors. Vs St. of Orissa, 2003 SCC (Criminal) 32 (Para 33)

5. Bhaskar Rao & ors. Vs St. of Mah., (2018) 6 SCC 591 (Para 33)

6. Lallu Manjhi & ors. Vs State of Jharkhand, Criminal Appeal No. 15 of 2002, decided on 07.01.2003 (Para 34)

7. Veer Singh & ors. Vs St. of U.P., (2014) 1 SCC (Crl.) 846; (2014) 2 SCC 455 (Para 35)

8. Bipin Kumar Mondal Vs St. of W.B., (2010) 12 SCC 91 (Para 47)

Present appeal is against the judgment and order dated 20.08.2010, passed by Additional Sessions Judge, Kaushambi.

(Delivered by Hon'ble Bachchoo Lal, J.)

(माननीय न्यायमूर्ति बच्चू लाल, द्वारा प्रदत्त निर्णय)

1. यह दाण्डिक अपील, अपीलार्थीगण अशोक कुमार, सन्तोष कोरी एवं वीरेन्द्र कुमार चमार की ओर से **सत्र परीक्षण संख्या 84 वर्ष 2006** उत्तर प्रदेश राज्य प्रति अशोक कुमार एवं अन्य तथा **सत्र परीक्षण संख्या 269 वर्ष 2006** उत्तर प्रदेश राज्य प्रति सन्तोष कोरी, मुकदमा अपराध संख्या 74 वर्ष 2005 अन्तर्गत धारा 302 भा0दं0सं0, थाना चरवा, जिला कौशाम्बी एवं **सत्र परीक्षण संख्या 82 वर्ष 2006** उत्तर प्रदेश राज्य प्रति अशोक कुमार मुकदमा अपराध संख्या 132 वर्ष 2005 अन्तर्गत धारा 25 आयुध अधिनियम, थाना चरवा जिला कौशाम्बी में विद्वान अपर सत्र न्यायाधीश/एफ0 टी0 सी0, द्वितीय, कौशाम्बी द्वारा पारित निर्णय एवं आदेश दिनांक 20–8–2010 के विरूद्व योजित की गयी है जिसके द्वारा अपीलार्थीगण को धारा 302 भा0दं0सं0 के अन्तर्गत दोषी पाते हुए आजीवन कारावास एवं पाँच–पाँच हजार रूपये के अर्थदण्ड से तथा अर्थदण्ड अदा न करने की स्थिति में प्रत्येक को एक–एक वर्ष के अतिरिक्त साधारण कारावास तथा अपीलार्थी अशोक कुमार को धारा 25 आयुध अधिनियम के अन्तर्गत तीन वर्ष के साधारण कारावास एवं एक हजार रूपये के अर्थदण्ड से तथा अर्थदण्ड अदा न करने की दशा में तीन माह के अतिरिक्त कारावास से दण्डित किया गया है। यह भी आदेशित किया गया कि अभियुक्तों द्वारा पूर्व में इस मामले में बिताई गई जेल अवधि इस सजा में समायोजित की जायेगी तथा सभी सजायें साथ साथ चलेगी।

2. अपील के निस्तारण हेतु आवश्यक तथ्य संक्षेप में इस प्रकार है कि वादी मुकदमा जग्गी लाल पुत्र स्व0 राम खेलावन कोरी ने एक तहरीर राम बदन पुत्र शिव प्रसाद कोरी से लिखवाकर थाना चरवा जिला कौशाम्बी में इस आशय के साथ दाखिल किया कि उसकी व उसके गाँव के सन्तोष कोरी की जमीन का मुकदमा चल रहा था जिससे सन्तोष कोरी रंजिश मानता है। कल दिनांक 20–6–2005 को उसका भाई हरी लाल उम्र करीब 40 वर्ष व गाँव का मोहनलाल पुत्र रामधनी गाँव में राधेश्याम कोरी के मकान के चबूतरे पर बैठे बातचीत कर रहे थे करीब साढे छः बजे शाम को गाँव के सन्तोष कोरी व उसका भाई अशोक कुमार पुत्रगण रामहित कोरी हाथो ं मे ं तमन्चे लिए तथा वीरेन्द्र कुमार चमार पुत्र प्यारे लाल निवासी रायभान का पुरवा मजरा चरवा थाना चरवा जिला कौशाम्बी चाक ू लिए हुए आये जान से मारने की नियत से इन लोगो ं ने तमन्चो ं से हरी लाल के ऊपर फायर कर दिया। हरी लाल शोर मचाता व चिल्लाता हुआ मेवालाल के घर मे ं घुस गया। ये लोग पीछा करते हुए मेवालाल के घर मे ं घुसकर तमन्चो ं व चाक ू से मारकर गाली देते हुए वापस अपने घर की ओर भाग गये। वह व उसका बडा भाई राम सुमेर शोरगुल सुनकर मौके पर आ गये थे जिन्होने ं घटना देखी। ये लोग भागते समय फायर करते हुए तमंचे लहराते हुए गाली गलौज दे रहे थे जिससे गाँव मे ं भय व दहशत का माहौल पैदा हो गया है। मृतक हरी लाल की लाश मौके पर पडी है। डर की वजह से वह रात मे ं रिपोर्ट लिखाने थाने नही ं आ सका। आज आया हूँ उसकी रिपोर्ट लिखकर कान ूनी कार्यवाही की जाए।

3. वादी की उक्त तहरीर प्रदर्श क–1 के आधार पर थाना पर अपीलार्थीगण के विरूद्व मुकदमा अपराध संख्या 74 वर्ष 2005 धारा 302 भा0

दं0 सं0 के अन्तर्गत मुकदमा पंजीकृत किया गया। चिक प्रथम सूचना रिपोर्ट प्रदर्श क–2 है तथा मुकदमा कायमी से सम्बन्धित जी0 डी0 की प्रति प्रदर्श क–3 है।

4. मामले की विवेचना अभियोजन साक्षी संख्या 9 राम भरोसे कुशवाहा, थानाध्यक्ष के सुपुर्द की गयी। उन्होनें अपने बयान में यह कहा है कि दिनांक 21–6–2005 को वह थाना चरवा में थानाध्यक्ष के पद पर कार्यरत था। उक्त तिथि को मुकदमा अपराध संख्या 74 वर्ष 2005 धारा 302 भा0 दं0 सं0 मृतक हरीलाल की विवेचना उसके द्वारा ग्रहण की गयी। दिनांक 21–6–2005 को इस मुकदमे की नकल चिक, नकल रपट लेकर मय जिल्द पंचायतनामा एवं जरूरी कागजात के साथ मय हमराही घटनास्थल ग्राम बरगदी रवाना हुआ था। थाने पर नकल चिक, नकल रपट करके लेखक एफ0 आई0 आर0 का बयान लिया गया था। घटनास्थल पर मृतक की लाश का पंचायतनामा मुरत्तब किया गया था। लाश को वास्ते पोस्टमार्टम शव विच्छेदन गृह इलाहाबाद भेजी गयी थी। मौके पर वादी का बयान लिया गया था। वादी की निशानदेही पर निरीक्षण घटनास्थल करके नक्शा नजरी तैयार किया गया था। इस साक्षी ने नक्शा नजरी को प्रदर्श क–7 के रूप में साबित किया है। यह भी कहा है कि मौके पर मौजूद ओम प्रकाश व शफीक अहमद का समई साक्ष्य अंकित किया गया। घटनास्थल पर एक कारतूस 315 बोर (खोखा) बरामद हुआ था। मौके से उसने मिट्टी सादी एवं खून आलूद लेकर सर्वमोहर करके नमूना सील तैयार किया था। मौके पर फर्द मुरात्तब की गयी थी। फर्द पर गवाहान राम औतार एवं राम बदन सिंह के हस्ताक्षर कराये थे। इस साक्षी ने फर्द मिट्टी सादी व आलूद खून तथा एक खोखा कारतूस 315 बोर को अपने लेख एवं हस्ताक्षर में बताते हुए प्रदर्श क–8 के रूप में साबित किया है। यह भी कहा है कि उसी दिन उसने जिल्द पंचायतनामा कार्बन कापी से पंचायतनामा की नकल किया था। पंचायतनामा उसने समस्त गवाहान पंचायतनामा जग्गी लाल, राम औतार, राम सिंह यादव, मुलायम सिंह एवं राम बदन सिंह के समक्ष भरा था तथा गवाहों के हस्ताक्षर कराये थे। इस साक्षी ने पंचायतनामा को अपने लेख एवं हस्ताक्षर में बताते हुए प्रदर्श क–9 के रूप में साबित किया है। यह भी कहा है कि दिनांक 22–6–2005 को वह हमराही विवेचना हेतु रवाना हुआ। मुलजिमान नहीं मिले। पंचायतनामा के गवाह राम बदन, मान सिंह, मुलायम सिंह के बयान अंकित किये। दिनांक 23–6–2005 को पुनः विवेचना में रवाना हुआ। थाने पर मृतक के शव विच्छेदन आख्या की कार्बन कापी प्राप्त किया था। शव विच्छेदन कराने वाले का0 शशिकान्त पाण्डेय, का0 मकबूल खाँ के बयान अंकित किये। अभियुक्तगण घर पर नहीं मिले। अभियुक्त सन्तोष व अशोक के पिता रामहित से भी पूछताछ की गयी थी परन्तु अभियुक्तों के बारे में कुछ नहीं बताया। मौके पर फर्द मुरात्तब की गयी। इस साक्षी ने खाना तालाशी व दबिश अभियुक्तों से सम्बन्धित फर्द प्रदर्श क–10 व प्रदर्श क–11 को अपने लेख एवं हस्ताक्षर में होना बताते हुए साबित किया है। यह भी कहा है कि वापस थाने पर आकर अभियुक्तों के अपराधिक इतिहास की जानकारी की गयी तो पता चला कि अभियुक्त संतोष कुमार के विरूद्व गम्भीर अपराध के विभिन्न थानों में कुल 11 मुकदमें दर्ज कराये गये है जिनका विवरण केस डायरी में है। अभियुक्त वीरेन्द्र चमार के विरूद्व गम्भीर प्रकृति के विभिन्न थानों में कुल 12 अपराध पंजीकृत पाये गये। अभियुक्त अशोक कुमार के विरूद्व गम्भीर प्रकृति के विभिन्न थानों में कुल तीन अपराध पंजीकृत पाये गये। अपराधिक इतिहास का उल्लेख केस डायरी में किया गया। इसी दिनांक को पुनः विवेचना में रवाना हुआ। पंचायतनामा के गवाह जग्गी लाल के बयान अंकित किये गये। पुनः अभियुक्तों की तालाश की गयी दस्तयाब नहीं हुए। दिनांक 24–6–2005 को पुनः अभियुक्तों की गिरफतारी में रवाना हुआ था परन्तु वे नहीं मिले। दिनांक 26–6–2005 को विवेचना व सुरागरसी अभिुक्तगण में रवाना हुआ। दबिश दी गयी अभियुक्तगण घरों से फरार थे। गांव में घटना के चश्मदीद गवाह मोहन लाल कोरी व गवाह राम सुमेर कोरी के बयान लिए थे। दिनांक 27–6–2005 को पुनः विवेचना एवं गिरफतारी अभियुक्तगण रवाना हुआ। अभियुक्त के घर एवं रिश्तेदारियों में दबिश दी गयी दस्तयाब नहीं हुए। दिनांक 28–6–2005 को इन अभियुक्तो के खिलाफ वारण्ट एवं उद्वघोषणा प्राप्त करने हेतु न्यायालय रवाना हुआ। न्यायालय से वारण्ट प्राप्त कर वापस थाने आया। मृतक का मूल पंचायतनामा एवं मूल शव विच्छेदन आख्या प्राप्त की गयी तथा शव विच्छेदन आख्या की नकल किता की गयी। दिनांक 29–6–2005 एवं 30–6–2005 को अभियुक्तगण के यहां पुनः दबिश

दी गयी, नही मिले। दिनांक 2–7–2005 को पुनः दबिश दी गयी अभियुक्तगण नहीं मिले। दिनांक 4–7–2005 को न्यायालय में जाकर अभियुक्तों के विरूद्व उद्वघोषणा/कुर्की आदेश प्राप्त करने की याचना न्यायालय से की गयी। न्यायालय से उद्वघोषणा आदेश प्राप्त किया गया। दिनांक 6–7–2005 को धारा 82 दं0 प्र0 सं0 की तामीला की गयी। दिनांक 8–7–2005, 13–7–2005, 20–7–2005, 23–7–2005 एवं 28–7–2005, 31–7–2005, 3–8–2005 को मुझ थानाध्यक्ष मय हमराही कर्मचारीगण के दबिश दी गयी परन्तु मुलजिमान दस्तयाब नहीं हुए। दिनांक 5–8–2005 को उसके प्रार्थना पत्र पर न्यायालय द्वारा धारा 83 दं0 प्र0 सं0 का आदेश पारित किया गया। दिनांक 9–8–2005 को अभियुक्त की कुर्की का आदेश थाने पर प्राप्त हुआ। दिनांक 10–8–2005 को अभियुक्तों के मकानों की कुर्की की गयी। घटनास्थल से मिली मिट्टी सादा एवं खून आलूद तथा मृतक की पोटली जो शव विच्छदेन के पश्चात प्राप्त हुई थी। रसायनिक परीक्षण हेतु विधि विज्ञान प्रयोगशाला भेजी गयी थी। प्राप्त साक्ष्य के आधार पर अभियुक्तों के विरूद्व आरोप पत्र संख्या 78 मफरूरी में दिनांक 10–8–2005 को प्रेषित किया गया था। यह भी कहा कि इस मुकदमें का अभियुक्त अशोक कुमार दिनांक 5–9–2005 को न्यायालय मुख्य न्यायिक मजिस्ट्रेट, कौशाम्बी के समक्ष आत्मसमर्पण किया जिसे न्यायिक अभिरक्षा में लेकर नैनी जेल भेजा गया। दिनांक 6–9–2005 को उसके द्वारा न्यायालय में जाकर अभियुक्त का बयान लेने हेतु अनुरोध किया गया। न्यायालय द्वारा अनुमति प्राप्त हुई। दिनांक 7–9–2005 को जेल नैनी, इलाहाबाद जाकर अभियुक्त अशोक का बयान लिया गया। अशोक अभियुक्त द्वारा जु र्म का इकबाल करके आलाकत्ल तमंचा 315 बोर अपनी निशानदेही पर बरामद करने की बात बतायी थी। न्यायालय द्वारा पुलिस कस्टडी रिमाण्ड में अभियुक्त को लेने हेतु दिनांक 9–9–2005, 12–9–2005, 13–9–2005 को प्रार्थना की गयी। न्यायालय द्वारा पुलिस कस्टडी रिमाण्ड प्रार्थना पत्र स्वीकार किया गया। दिनांक 15–9–2005 को न्यायालय के आदेश पर अभियुक्त अशोक को कारागार नैनी से पुलिस अभिरक्षा में लिया गया। अभियुक्त की निशानदेही पर उसके मकान से एक कपडे में लिपटा एक अदद तमंचा 315 बोर अभियुक्त ने निकालकर दिया था। मौके पर गवाह हरीश चन्द्र व फूलचन्द्र व हमराही कर्मचारीगणों के हस्ताक्षर व निशानी अंगूठा बनवाये गये थे। इस साक्षी ने फर्द बरामदगी आलाकत्ल को अपने लेख एवं हस्ताक्षर में होना बताते हुए प्रदर्श क–13 के रूप में साबित किया है। यह भी कहा है कि बरामदगी स्थल का निरीक्षण कर उसका नक्शा नजरी प्रदर्श क–14 तैयार किया। इस साक्षी ने अपीलार्थी/अभियुक्त अशोक के कब्जे से बरामद तमंचे को वस्तु प्रदर्श–1 के रूप में साबित किया है। यह भी कहा है कि माल व मुलजिम के साथ थाने पर जाकर मुकदमा अपराध संख्या 132 वर्ष 2005 विरूद्व अभियुक्त अन्तर्गत धारा 25 आयुध अधिनियम पंजीकृत कराया था। माल मुलजिम को न्यायालय के समक्ष पेश करके पुनः जेल नैनी इलाहाबाद दाखिल कराया गया। यह भी कहा कि उसके स्थानान्तरण के पश्चात शेष विवेचना की कार्यवाही थानाध्यक्ष श्री सुधीर चन्द्र एवं श्री जे0 पी0 यादव द्वारा की गयी। इस साक्षी ने पंचायतनामा से सम्बन्धित संलग्नक प्रपत्र नक्शा नजरी, (चालान लाश), फोटो नाश, रिपोर्ट सी0 एम0 ओ0, चिट्ठी आर0 आई0, नमूना मोहर, नकल चिक व नकल रपट को अपने लेख एवं हस्ताक्षर में होना बताते हुए प्रदर्श क–15 लगायत प्रदर्श क–21 के रूप में साबित किया है।

5. अभियोजन साक्षी संख्या 10 उपनिरीक्षक, रामलाल चौधरी ने धारा 25 आयुध अधिनियम के अन्तर्गत प्रकरण की विवेचना की थी उन्होंने अपने द्वारा की गयी विवेचना व विवेचना के दौरान तैयार किये गये कागजात, नक्शा नजरी प्रदर्श क–22 तथा आरोप पत्र प्रदर्श क–23 को अपने लेख एवं हस्ताक्षर में होना बताते हुए साबित किया है।

6. अभियोजन साक्षी संख्या 7 डाक्टर राजेश कुमार द्वारा मृतक के शव का शव विच्छेदन किया गया था उन्होने अपने बयान में यह बताया है कि दिनांक 12–6–2005 को वह अपने शव विच्छेदन डियूटी पर इलाहाबाद में शव विच्छेदन गृह में कार्यरत था उसने हरी लाल जिसकी उम्र लगभग 40 वर्ष एवं लिंग पुरूष था का शव विच्छेदन किया था। शव थाना प्रभारी चरवा के द्वारा सीलबंद कपडे में भेजा गया था। सील को उसने नमूना मोहर से मिलान कराने के पश्चात सही पाया। कागजों की संख्या 9 थी। पोस्टमार्टम उसने अपरान्ह 2–30 बजे किया। का0 243 शशिकान्त पाण्डेय एवं का0 139 मकबूल खांन थाना चरवा द्वारा उक्त शव को लाया

गया था। मृत्यु का सम्भावित समय लगभग डेढ दिन पूर्व था।

7. **वाहय परीक्षणः–**

शरीर मध्यम आकार का था। मृत्यु पश्चात अकडन शरीर के हाथों एवं पैरों से गुजर चमडी उधडी (फूलकर), बाल आसानी से खींचने पर निकलने योग्य, छाले फूटे हुए।

8. **मृत्युपूर्व चोटेंः–**

(1) गोली के घुसने का घाव 1.5 सेमी X 1. 5 सेमी X मांसपेशियों तक गहरा। पीठ के ऊपरी हिस्से के बांयी तरफ मध्य लाइन से 3.5 सेमी बाहर की ओर, स्कैपुला हड्डी के निचले कोण से 2.0 सेमी ऊपर।

(2) गोली के घुसने का घाव 1–1/2 X 1–1/2 सेमी X मांसपेशियों तक गहरा। पीठ के ऊपरी हिस्से में मध्य लाइन से 2–1/2 सेमी दांयी तरफ, स्कैपुला हड्डी के निचले कोण से 2–1/2 सेमी ऊपर।

(3) गोली के निकलने का घाव 2.3 सेमी X 2.3 सेमी X मांसपेशियों तक गहरा। सीने पर बांयी तरफ बांये निपिल से 0.5 सेमी अन्दर की तरफ।

(4) गोली के निकलने का घाव 2.3 सेमी X 2.3 सेमी X मांसपेशियों तक गहरा। सीने पर दांयी तरफ दाहिने निपिल से 1.0 सेमी बाहर की तरफ।

(5) कटे हुए घाव धारदार हथियार से पेट के ऊपरी हिस्से में–:

(i) 02 सेमी X 04 सेमी X मांसपेशियों तक गहरा।

(ii) 05 सेमी X 1-5 सेमी X मांसपेशियों तक गहरा।

(iii) 02 सेमी X 1-00 सेमी X मांसपेशियों तक गहरा।

(iv) 2.1 सेमी X 1-00 सेमी X मांसपेशियों तक गहरा।

(v) 3.0 सेमी X 1-00 सेमी X मांसपेशियों तक गहरा।

(vi) 4.0 सेमी X 0.5 सेमी X मांसपेशियों तक गहरा।

(vii) 3.1 सेमी X 4.0 सेमी X मांसपेशियों तक गहरा।

(viii) 1.5 सेमी X 3 सेमी X मांसपेशियों तक गहरा।

(ix) 1.0 सेमी X 1.0 सेमी X मांसपेशियों तक गहरा।

(X) 1.5 सेमी X 3.0 सेमी X मांसपेशियों तक गहरा।

(Xi) 1.5 सेमी X 2.0 सेमी X मांसपेशियों तक गहरा।

9. **सिर एवं गर्दनः–**

कोई कमी नहीं पायी गयी मस्तिष्क की झिल्लियों में भी कोई कमी नहीं पायी गयी। सिर की हड्डी में भी कोई कमी नहीं पायी गयी। मस्तिष्क तरल पदार्थ में परिवर्तित हो चुका था।

10. **सीनाः–**

जैसा कि मृत्युपूर्व चोटों में पूर्व में उल्लिखित है। आठवी एवं नवीं पसली बांयी तरफ पीछे की तरफ टूटी हुई चौथी एवं पांचवी पसली आगे की तरफ टूटी हुई। सातवी आठवी पसली पीछे दांयी तरफ टूटी हुई चौथी पांचवी पसली आगे दांयी तरफ।

11. **प्लूराः–**

फटी हुई लैरिंग्स, ट्रेकिया एवं ब्रोकाई में कोई कमी नहीं पायी गयी।

12. **दांया एवं बांया फेफडाः–**

फटा हुआ हृदय की बाहरी झिल्ली फटी हुई। हृदय फटा हुआ।

13. **बडी रक्त वाहिनी–**: कोई कमी नहीं।

14. **पेटः–**

जैसा कि मृत्युपूर्व चोटों में उपर्युलिखित है।

15. **भित्तियाँः–**

फटी हुई पेरिटोनियम फटा हुआ। पेट की कैविटी में जमा हुआ खून विद्यमान पाया गया।

16. **दांतः–**

16 X 16 दांत, जीभ एवं ग्रसनी में कोई कमी नही खाने की नली (इसोफेगस) में कोई कमी नहीं।

17. **आमाशयः–**

खाने की थैली में 100 मि0 ली0 तरल पदार्थ उपस्थित था।

18. **बडी आंत एवं छोटी आंतः–**

आधी भरी हुई। यकृत एवं पित्ताशय फटे हुए पाचन रस की थैली प्लीहा एवं गुर्दे में कोई कमी नहीं।

19. **मूत्राशयः–**

खाली था कोई कमी नहीं थी।

20. डाक्टर के अनुसार, मृतक की मृत्यु का कारण सदमा एवं रक्तस्राव, मृत्युपूर्व आयी हुई चोटों के कारण था। इस साक्षी ने मृतक की पोस्टमार्टम रिपोर्ट को प्रदर्श क–6 के रूप में साबित किया है। यह भी कहा है कि मृतक के शरीर पर मृत्युपूर्व जो चोटें आयी है वह दिनांक 20–6–2005 को सांय 6–30 बजे की हो सकती है। ये चोटे तमंचा एवं चाकू से कारित किया जाना सम्भावित है।

21. आरोप पत्र प्राप्त होने पर अपीलार्थीगण/अभियुक्तगण के मुकदमें को विचारण हेतु सत्र न्यायालय के सुपुर्द किया गया।

22. विद्वान विचारण न्यायालय ने अपीलार्थीगण अशोक कुमार, वीरेन्द्र कुमार एवं सन्तोष कोरी के विरूद्व धारा 302 भा0 दं0 सं0 के अन्तर्गत अपीलार्थी अशोक कुमार के विरूद्व धारा 25 आयुध अधिनियम के अन्तर्गत आरोप विरचित किये।

23. अभियोजन पक्ष की ओर से अपने कथन के समर्थन में अभियोजन साक्षी संख्या 1 राम सुमेर (मृतक का भाई), अभियोजन साक्षी संख्या 2 मोहन लाल, अभियोजन साक्षी संख्या 3 राम बदन, अभियोजन साक्षी संख्या 4 राम औतार, अभियोजन साक्षी संख्या 5 मान सिंह, अभियोजन साक्षी 6 का0 कृष्ण चन्द्र त्रिपाठी, अभियोजन साक्षी संख्या 7 डाक्टर राजेश कुमार, अभियोजन साक्षी संख्या 8 मुलायम सिंह यादव, अभियोजन साक्षी संख्या 9 राम भरोसे कुशवाहा, थानाध्यक्ष, (विवेचनाधिकारी) एवं अभियोजन साक्षी संख्या 10 उपनिरीक्षक, रामलाल चौधरी (विवेचनाधिकारी) को परीक्षित कराया गया है।

24. अपीलार्थीगण/अभियुक्तगण के बयान अन्तर्गत धारा 313 दं0प्रं0सं0 के अन्तर्गत अंकित किये गये जिसमें उन्होंने झूंठा रंजिशन फसाया जाना बताया है।

25. अपीलार्थीगण/अभियुक्तगण की ओर से अपने बचाव में बचाव साक्षी संख्या 1 के रूप में डाक्टर राजेश कुमार को परीक्षित कराया गया है।

26. विद्वान विचारण न्यायालय ने उभय पक्ष को सुनकर तथा पत्रावली पर उपलब्ध समस्त साक्ष्य एवं अभिलेखों पर सम्यक विचार करने के उपरान्त अपीलार्थीगण को प्रश्नगत अपराध में दोषी पाते हुए उपरोक्तानुसार दण्डित किया है जिससे क्षुब्ध होकर अपीलार्थीगण ने यह अपील इस न्यायालय में योजित की है।

27. अपीलार्थीगण की ओर से उनके विद्वान अधिवक्ता श्री लल्लन चौबे, राज्य की ओर से श्री राजेश मिश्रा, विद्वान अपर शासकीय अधिवक्ता को विस्तारपूर्वक सुना तथा अपीलार्थीगण अशोक कुमार एवं सन्तोष कोरी की ओर से जेल से भेजी गयी लिखित बहस का सम्यक परिशीलन किया एवं पत्रावली प्रश्नगत निर्णय व आदेश का सम्यक परिशीलन किया।

28. अपीलार्थीगण की ओर से मुख्य रूप से यह तर्क प्रस्तुत किया गया कि घटना की प्रथम सूचना रिपोर्ट विलम्ब से है तथा घटना के करीब 12 घण्टें बाद थाने पर दर्ज करायी गयी है। प्रथम सूचना रिपोर्ट के विलम्ब का कोई पर्याप्त स्पष्टीकरण नहीं दिया गया है। अभियोजन साक्षी संख्या 1 राम सुमेर, मृतक का सगा भाई है जो एक हितबद्व साक्षी है। घटना के सम्बंध में किसी स्वतन्त्र एवं निष्पक्ष साक्षी को परीक्षित नहीं कराया गया है। अभियोजन साक्षी संख्या 2 मोहन लाल को घटना का प्रत्यक्षदर्शी साक्षी होना बताया गया है परन्तु उसने अपने बयान में अभियोजन कथानक का समर्थन नहीं किया है। जग्गी लाल (वादी) की मृत्यु हो जाने के कारण उसे साक्ष्य में परीक्षित नहीं कराया जा सका। अभियोजन साक्षी संख्या 3 राम बदन तहरीर लेखक है उसने अपने बयान में तहरीर को दरोगाजी के बोलने पर लिखने का उल्लेख किया है। अभियोजन साक्षी संख्या 4 राम औतार कोरी, अभियोजन साक्षी संख्या 5 मान सिंह जिन्हें पंचायतनामा का साक्षी होना कहा जाता है उन्होनें अपने बयान में अभियोजन कथानक का समर्थन नहीं किया है और उक्त दोनो साक्षी पक्ष द्रोही घोषित हुए है। अभियोजन साक्षी संख्या 8 मुलायम सिंह यादव को भी पंचायतनामा का साक्षी होना बताया जाता है उसने मृतक हरी लाल की लाश मेवा लाल के मकान के पूरब स्थित रास्ते पर पडी होने का उल्लेख किया है तथा जिरह में यह भी उल्लेख किया है कि पंचायतनामा की लिखा पढी उसके सामने नही ं हुई। यह भी कहा कि उसके पहुंचने के पहले लाश सील हो चुकी थी। अपीलार्थी अशोक कुमार की निशानदेही पर बरामद तमंचा के सम्बंध मे ं किसी स्वतन्त्र एवं निष्पक्ष साक्षी को परीक्षित नही ं कराया गया है। बरामदगी के सम्बंध मे ं एक मात्र पुलिस साक्षी अभियोजन साक्षी संख्या 9 राम भरोसे कुशवाहा विवेचनाधिकारी ही है तथा कथित बरामद तमंचे को विधि विज्ञान प्रयोगशाला जा ंच हेतु नही ं भेजा गया है। यह भी तर्क रखा गया कि अपीलार्थी वीरेन्द्र कुमार एक अन्य द ूसरे गा ंव का है और वह अपीलार्थीगण अशोक कुमार एवं सन्तोष कोरी को नही ं जानता है और न ही उसका उनसे कोई सम्बंध एवं सरोकार है। घटना का कोई हेतुक नही ं था। यह साबित नही ं है कि कथित बरामद तमंचा मृतक की हत्या मे ं प्रयोग किया गया हो और न ही इस सम्बंध मे ं विधि विज्ञान प्रयोगशाला की कोई आख्या ही है और न ही कोई बैलेस्टिक रिपोर्ट प्राप्त की गयी है। मृतक का पोस्टमार्टम दिनांक 22–6–2005 समय 2–30 बजे अपरान्ह करने की बात कही गयी है। डाक्टर ने मृतक की मृत्यु का समय लगभग डेढ दिन पूर्व दर्शाया है जो अभियोजन कथानक से मेल नही ं खाता है तथा मृतक की चोट संख्या 5 संदिग्ध है। डाक्टर राजेश कुमार ने मृतक के शव का शव विच्छेदन किया था जिसे अपीलार्थीगण की ओर से अपने बचाव मे ं बचाव साक्षी संख्या 1 के रूप मे ं भी परीक्षित कराया गया है उन्होने ं अपने मुख्य बयान मे ं यह उल्लेख किया है कि मृतक हरीलाल के शव पर मौजूद चोटे ं पंचायतनामा मे ं अ ंकित चोटो ं से भिन्न है। इसी सन्देह पर उसने विवेचक को 13 चिट्ठी प्रेषित किया। यह भी कहा कि उक्त पृष्ठा ंकन के पश्चात पंचायतनामा पर चोट संख्या 5 विवेचक द्वारा बिना नोट अंकित किये हुए कार्बन लगाकर बाद मे ं अ ंकित कर दिया जाना सम्भव है। चिकित्सीय साक्ष्य से अभियोजन कथानक की पुष्टि नही ं होती है। अपीलार्थीगण अशोक कुमार व सन्तोष कोरी की ओर से प्रेषित अपनी लिखित बहस मे ं यह उल्लेख किया गया है कि अभियोजन साक्षी संख्या 7 डाक्टर राजेश कुमार ने अपने बयान मे ं मृतक हरी लाल के शव का शव विच्छेदन दिना ंक 12–6–2005 को करने का उल्लेख किया है जब कि यह घटना दिना ंक 20–6–2005 की बतायी गयी है अर्थात डाक्टर के अनुसार, मृतक की हत्या के 8 दिन पूर्व पोस्टमार्टम किया गया है। अपीलार्थीगण का मृतक से कोई जमीनी विवाद नही ं था और न ही अपीलार्थीगण का कोई कब्जा है। अभियोजन साक्षी संख्या 1 राम सुमेर ने अपने बयान में यह कहा है कि घटना के बारे मे ं दरोगाजी ने उससे नही ं पूछा था उसके भाई जग्गी लाल से पूछा था। यह भी कहा है कि रिपोर्ट के बाद दरोगाजी उसे नही ं मिले इससे यह जाहिर होता है कि विवेचनाधिकारी ने अभियोजन साक्षी संख्या 1 राम सुमेर का बयान अंकित नही ं किया। अपीलार्थीगण सन्तोष कोरी व वीरेन्द्र से किसी आलाकत्ल की बरामदगी नही ं बतायी जाती है। विद्वान विचारण न्यायालय ने अपीलार्थीगण की ओर से प्रस्तुत विधि व्यवस्थाओं का सम्यक परिशीलन नही ं किया है। यह भी तर्क रखा गया कि अपीलार्थीगण को इस प्रकरण मे ं महज झूंठा फसाया गया। मृतक एक दुष्चरित्र प्रवृत्ति का व्यक्ति था, वह बलात्कार के मामले में जेल मे ं भी बंद रहा है। इस घटना को किसी के द्वारा देखा नही ं गया

है। विद्वान विचारण न्यायालय का प्रश्नगत निर्णय एवं आदेश विधि संगत नही है। अभियोजन साक्षी संख्या 1 राम सुमेर की एक मात्र साक्ष्य इस प्रकृति की नही ं है कि उस पर सहजता से विश्वास किया जा सके। ऐसी दशा मे ं विद्वान विचारण न्यायालय का प्रश्नगत निर्णय एवं आदेश निरस्त होने योग्य है।

29. इसके विपरीत विद्वान अपर शासकीय अधिवक्ता द्वारा यह तर्क प्रस्तुत किया गया कि यहघटना सरेआम दिन के साढे छः बजे शाम की है तथा यह घटना ज ून के महीने मे ं घटित हुई। शाम ` साढे छः बजे पर्याप्त रोशनी एवं उजाला रहता है। ऐसी दशा मे ं अभियोजन साक्षी संख्या 1 राम सुमेर द्वारा घटना देखना व अपीलार्थीगण को भली भा ंति पहचानना स्वाभाविक एवं विश्वसनीय है। मृतक की हत्या आग्नेयास्त्र से फायर कर व चाक ू से चोट पहुंचाकर की गयी है। डर व भय के कारण वादी का रात्रि मे ं घटना की प्रथम सूचना रिपोर्ट दर्ज कराने हेतु थाने न जाना स्वाभाविक एवं विश्वसनीय है। घटना की प्रथम सूचना रिपोर्ट मे ं यह उल्लेख किया गया है कि डर की वजह से रात्रि मे ं वह रिपोर्ट लिखाने थाने नही ं आ सका। वादी ने इस घटना की प्रथम सूचना रिपोर्ट दिना ंक 21–6–2005 को सुबह 6–10 बजे थाने पर दर्ज कराया है। विलम्ब का कारण प्रथम सूचना रिपोर्ट मे ं दिया गया है। अभियोजन साक्षी संख्या 1 राम सुमेर घटना का प्रत्यक्षदर्शी साक्षी है जिसने अपने बयान मे ं अभियोजन कथानक का भली भ ंाति समर्थन किया है। इस साक्षी की साक्ष्य मे ं ऐसी कोई विसंगति नही ं आयी है जिससे की उसकी साक्ष्य पर अविश्वास किया जा सके। विद्वान विचारण न्यायालय ने पत्रावली पर उपलब्ध समस्त साक्ष्य एवं अभिलेखो ं पर सम्यक विचार करने के उपरान्त अपीलार्थीगण को प्रश्नगत अपराध मे ं दोषी पाते हुए उपरोक्तानुसार दण्डित किया है जिसमे ं कोई विधिक त्रुटि अथवा अनियमितता नही ं है।

30. उल्लेखनीय है कि यह घटना दिना ंक 20–6–2005 के समय 6–30 बजे शाम की बतायी गयी है और इस घटना की प्रथम सूचना रिपोर्ट मृतक के भाई जग्गी लाल ने थाने पर दिना ंक 21–6–2005 को सुबह 6–10 ए0 एम0 पर दर्ज करायी है। प्रथम सूचना रिपोर्ट मे ं अपीलार्थीगण अशोक कुमार व सन्तोष कोरी के हाथो ं मे ं तमंचा तथा वीरेन्द्र कुमार के हाथ मे ं चाक ू होना दर्शाया गया है। घटना के समय मृतक अपने ही गा ंव 15 के राधेश्याम कोरी के मकान के चबूतरे पर बैठकर मोहन लाल के साथ बातचीत कर रहा था तब अपीलार्थीगण द्वारा तमंचो ं से उसके ऊपर फायर करने की बात कही गयी है। यह भी उल्लेख किया गया है कि मृतक हरीलाल शोर मचाता व चिल्लाता हुआ मेवालाल के घर मे ं घुस गया तो ये लोग पीछा करते हुए मेवा लाल के घर मे ं घुसकर तमंचो ं व चाक ू से मारकर गाली देते हुए वापस अपने घर की ओर भाग गये। वादी ने अपनी प्रथम सूचना रिपोर्ट मे ं यह भी उल्लेख किया है कि वह तथा उसका बडा भाई राम सुमेर शोरगुल सुनकर मौके पर आ गये थे जिन्होने घटना देखा। ये लोग भागते समय फायर करते हुए तमंचे लहराते हुए गाली गलौज दे रहे थे जिससे गा ंव मे ं भय व दहशत का महौल पैदा हो गया। चूँकि मृतक की हत्या वादी व उसके भाई राम सुमेर के समक्ष अपीलार्थीगण द्वारा तमंचे से फायर कर व चाक ू से चोट पहुंचाकर की गयी थी तथा अपीलार्थीगण भागते समय फायर करते हुए तमंचे लहराते हुए गाली गलौज दे रहे थ जिससे गा ंव मे ं भय व दहशत का महौल उत्पन्न होने की बात कही गयी है। उपरोक्त परिस्थितियो ं मे ं वादी व उसके भाई का रात्रि मे ं रिपोर्ट करने न जाना स्वाभाविक एवं विश्वसनीय लगता है। वादी ने अपनी प्रथम सूचना रिपोर्ट मे ं स्वय ं यह उल्लेख किया है कि रात्रि मे ं डर की वजह से रिपोर्ट लिखाने थाने नही ं आ सका। ऐसी दशा मे ं घटना की प्रथम सूचना रिपोर्ट मे ं विलम्ब का कारण दर्शाया गया है। अभियोजन साक्षी संख्या 1 राम सुमेर जो कि इस घटना का प्रत्यक्षदर्शी साक्षी है तथा घटना के समय अपने भाई जग्गी लाल वादी के साथ मौके पर पहुंचा था उसने अपने बयान मे ं यह कहा है कि हम लोग रात्रि मे ं डर की वजह से रपट करने नही ं जा पाये। ऐसी दशा मे ं घटना की प्रथम सूचना रिपोर्ट के विलम्ब के सम्बंध मे ं जो स्पष्टीकरण दिया गया है वह पर्याप्त एवं विश्वसनीय है। इस घटना की प्रथम सूचना रिपोर्ट को सलाह मशविरा के बाद अ ंकित कराया जाना भी नही ं पाया जाता है।

31. अपीलार्थीगण की ओर से एक तर्क यह रखा गया कि वादी जग्गी लाल की मृत्यु हो जाने के कारण वह साक्ष्य में प्रस्तुत नहीं हो सका। अभियोजन साक्षी संख्या 3 राम बदन तहरीर लेखक

है जिन्होनें चिक तहरीर को दरोगाजी के बोलने पर लिखने की बात कही है तो उल्लेखनीय है कि अभियोजन साक्षी संख्या 3 राम बदन को अभियोजन की ओर से पक्ष द्रोही घोषित किया गया है। उक्त साक्षी ने घटना की तहरीर को अपने लेख एवं हस्ताक्षर में होना बताते हुए प्रदर्श क–1 के रूप में साबित किया है। ऐसी दशा में यदि अभियोजन साक्षी संख्या 3 राम बदन तहरीर लेखक ने घटना की तहरीर को दरोगाजी के बोलने पर लिखने की बात कही है तो मात्र उक्त आधार पर घटना की प्रथम सूचना रिपोर्ट के सम्बंध में कोई विपरीत उपधारणा कायम करना न्यायोचित प्रतीत नहीं होता है। ऐसी दशा में हम अपीलार्थीगण की ओर से रखे गये उक्त तर्क में कोई बल नहीं पाते हैं।

32. अपीलार्थीगण की ओर से एक तर्क यह रखा गया कि अभियोजन की ओर से घटना के सम्बंध में एक मात्र अभियोजन साक्षी संख्या 1 राम सुमेर को परीक्षित कराया गया है जो एक हितबद्व साक्षी है तथा उक्त एक मात्र साक्षी की साक्ष्य से अपीलार्थीगण के विरूद्व लगाये गये आरोप की संदेह से परे पुष्टि नहीं होती है। अभियोजन साक्षी संख्या 2 मोहन लाल जिसे घटना का प्रत्यक्षदर्शी साक्षी होना बताया गया है उसने अपने बयान में अभियोजन कथानक का समर्थन नहीं किया है और वह पक्ष द्रोही घोषित हुआ है तो उल्लेखनीय है कि यदि अभियोजन साक्षी संख्या 1 राम सुमेर मृतक का भाई है तो मात्र सम्बंध के आधार पर उसकी साक्ष्य को पूर्णतः गलत एवं अविश्वसनीय मान लेना न्यायोचित प्रतीत नहीं होता है।

33. ***पंजाब राज्य प्रति जुगराज सिंह एवं अन्य 2002 एस0 सी0 सी0 (क्रिमिनल) 630, 2012 (1) जे0 सी0 आर0 सी0 703 अमित बनाम राज्य उत्तर प्रदेश, 2006 (2) सी0 ए0 आर0 सुप्रीम कोर्ट पेज 742 सुदर्शन रेड्डी व अन्य बनाम आन्ध्र प्रदेश तथा 2003 एस0 सी0 सी0 (क्रिमिनल) 32 गंगाधर बेहरा एवं अन्य प्रति राज्य उडीसा*** के मामले में माननीय उच्चतम न्यायालय द्वारा यह मत व्यक्त किया गया है कि किसी भी साक्षी की साक्ष्य को मात्र सम्बंधी होने के आधार पर तिरस्कृत नहीं किया जा सकता है। कोई भी साक्षी केवल सम्बंधी होने मात्र से हितबद्व साक्षी नहीं हो जाता है जब तक साक्षी का झूठा फंसाने में हित सिद्व नहीं किया जाता। यह भी अवधारित किया गया है कि एक सम्बंधी वास्तविक अपराधी को न तो छिपायेगा और न ही किसी निर्दोष व्यक्ति को फंसायेगा। यदि झूठा फंसाये जाने का आधार लिया गया हो ऐसे मामलों में सम्बंधी साक्षियों की साक्ष्य पर सावधानी पूर्वक विचार करने की आवश्यकता होती है। ***(2018) 6 सुप्रीम कोर्ट केसेस 591 भास्कर राव एवं अन्य प्रति राज्य महाराष्ट्र*** के मामले में माननीय उच्चतम न्यायालय द्वारा यह अवधारित किया गया है कि:–

"35. The last case we need to concern ourselves is *Namodeo v. State of Maharashtra*, wherein this Court after observing previsous precedents has summarised the law in the following manner: : (SCC P. N164, Para "**38**. It is clear that a close relative cannot be characterised as an "interested' witness. He is a "natural" witness. His evidence, however, must be scrutinized carefully. If on such scrutiny, his evidence is found to be intrinsically reliable, inherently probable and wholly trustworthy, conviction can be based on the "sole" testimony of such witness. Close relationship of witness with the deceased or victim is no ground to reject his evidence. On the contrary, close relative of the deceased would normally be most reluctant to spare the real culprit and falsely implicate an innocent one."

36....From the study of the aforesaid precedents of this court, we may note that whoever has been a witness before the court of law, having a strong interest in result, if allowed to be weighed in the same scales with those who do not have any interest in the result, would be to open the doors of the court for perverted truth. This sound rule which remains the bulwark of this system, and which determines the value of evidence derived from such sources, needs to be cautiously and carefully obsered and enforced. There is no dispute about the fact that the interest of the witness must affect his testimony is a universal truth. Moreover, under the

influence of bias, a man may not be in a position to judge correctly even if they earnestly desire to do so. Similarly, he may not be in a position to provide evidence in an impartail manner, when it involves his interest. Under such influences, man will, even though not consciously, suppress some facts, soften or modify others, and provide favourable colour. These are most controlling considertions in respect to the credibility of human testimony, and should never be overlooked in applying the rules of evidence and determining its weight in the scale of truth under the facts and circumstances of each case."

34. ***दाण्डिक अपील संख्या 15 वर्ष 2002 लल्लू मांझी एवं अन्य प्रति राज्य झारखंड निर्णीत दिनांक 7 जनवरी, 2003*** के मामले में माननीय उच्चतम न्यायालय द्वारा यह अवधारित किया गया है किः–

"The law of Evidence does not require any particular number of witnesses to be examined in proof of a given fact. However, faced with the testimoney of a single witness, the Court may classify the oral testimoney into three categories, namely (i) wholly reliable, (ii) wholly unreliable, and (iii) neither wholly reliable nor wholly unreliable. In the first two categories there may be no difficulty in accepting or discarding the testimoney of the single witness. The difficulty arises in the third category of cases. The Court has to be circumspect and has to look for corroboration in material particulars by reliable testimoney, direct or circumstantial, before acting upon testimoney of a single witness. { See-Vadivelu Thevan etc. V. State of Madras, AIR 1957 SC 614}."

35. ***(2014) 1 एस0 सी0 सी0 (क्रि0) 846, (2014) 2 एस0 सी0 सी0 455*** वीर सिंह एवं अन्य प्रति राज्य उत्तर प्रदेश के मामले में माननीय उच्चतम न्यायालय द्वारा यह अवधारित किया गया है किः–

"21. The legal system has laid emphasis on value, weight and quality of evidence rather than on quantity, multiplicity or plurality of witnesses. It is not the number of witnesses but quality of their evidence which is important as there is no requirement under the law of evidence that any particular number of witnesses is to be examined to prove/disprove a fact. The evidence must be weighed and not counted. It is quality and not quantity which determines the adequacy of evidence as has been provided under Section 134 of the Evidence Act. As a general rule the court can and may act on the testimony of a single witness provided he is wholly reliable. *(Vide Vadivelu Thevar V. State of Madras3, Kunju V. State of T.N.4, Bipin Kumar Mondal V. State of W.B.5, Mahesh V. State of M.P.6, Prithipal Singh V. State of Punjab7, Kishan Chand V. State of Haryana8 and Gulam Sarbar V. State of Jharkhand9.)"*

36. उल्लेखनीय है कि अभियोजन की ओर से घटना के संदर्भ मे ं अभियोजन साक्षी संख्या 1 राम सुमेर को परीक्षित कराया गया है उसने अपने बयान मे ं यह कहा है कि घटना आज से लगभग दो साल एक महीना की है। यह घटना छः साढे छः बजे शाम की है उसका भाई हरी लाल गा ंव के ही राधेश्याम के दरवाजे बैठा था। मुलजिमान अशोक, सन्तोष जो बरगदी के ही रहने वाले है। हरी लाल के ऊपर फायर किया क्यो ंकि जमीन का मुलजिमानो ं से हरीलाल से मुकदमा चल रहा था जैसे ही फायर की आवाज तथा शोरगुल हुआ तब वह तथा उसका भाई जग्गी लाल तथा गा ंव के बहुत से लोग दौडकर गये। जैसे ही हम लोग वहा ं दौडकर पहुंचे तो मेवा लाल के घर मे ं उसका भाई हरी लाल घुस रहा था उसके पीछे तीनो ं मुलजिमान दौड रहे थे। अशोक व सन्तोष अपने हाथ मे ं तमंचा लिए थे व वीरेन्द्र अपने हाथ मे ं

चाक ू लिए था। मेवालाल के घर मे ं तीनो ं मुलजिमान घुस गये। उनके पीछे वह व उसका भाई जग्गी लाल भी अन्दर घुस गये तो उसने देखा कि संतोष व अशोक उसके भाई के ऊपर फायर कर दिए। जब यह लोग मार चुके तब वीरेन्द्र ने उसके भाई को चाक ू से मारना शुरू किया जब वीरेन्द्र चाक ू मार रहा था तब वह वहा ं खडा था तब उसका भाई डर की वजह से लौटकर पीछे चला आया उसके बाद मुलजिमान गाली गलौज दते हुए अपने घर की ओर चले गये उसने देखा कि ये लोग अपने हाथ मे ं तमंचा नचाते हुए अपने घर की ओर चले गये फिर हम लोग वहा ं से अपने घर चले आये। हम लोग रात मे ं डर की वजह से रपट करने नही ं जा पाये। फिर द ूसरे दिन सुबह 6–7 बजे वह व जग्गी लाल रपट के लिए थाने गये थे फिर कहा कि 6–7 और लोग थाने पहुंच गये थे उसके भाई जग्गी लाल ने घर से गा ंव के राम बदन से घटना की रिपोर्ट उसके सामने लिखवाकर वह व उसके भाई जग्गी लाल ने ले जाकर दिया था उसपर उसके भाई जग्गी लाल ने दरखास्त लिखाने के बाद अ ंगूठा भी लगाया था फिर हम लोग रपट दर्ज करवाकर घर वापस आये। रिपोर्ट दर्ज होने के बाद पुलिस आयी थी। पंचनामा हुआ था। मौके पर ही लाश को देखकर लिखा पढी हुई। उसके बाद लाश को पोस्टमार्टम के लिए भेज दिया। पोस्टमार्टम के समय वह नही ं गया था पोस्टमार्टम के समय उसके भाई जग्गी लाल गये थे। दरोगाजी ने उसका व जग्गी लाल, मोहन लाल के बयान लिए थे। दरोगाजी ने मौके का नक्शा बनाया था उसका भाई जग्गी लाल पुत्र स्व0 राम खेलावन कोरी उसका सगा छोटा भाई था उसने ही घटना की रिपोर्ट थाने पर दर्ज करवायी थी जिसकी हत्या घटना के चार साढे चार महीने के बाद हो गयी थी। जिरह मे ं कहा है कि वह छः सगे भाई है जिनमे ं उसका नाम राम सुमेर (2) पंचम लाल (3) जग्गी लाल (4) हरी लाल (5) बवाली (6) बृजलाल। हम छः भाईयो ं मे ं जिनकी हत्या हुई है उनके नाम जग्गी लाल व हरीलाल है। पंचम लाल पेड से गिर कर मर गया था। बृजलाल की रेल दुर्घटना के कारण मृत्यु हो गयी थी। जीवित भाईयो ं मे ं वह (राम सुमेर) व बवाली मौज ूद है। उसके गा ंव के मेवालाल पुत्र मसुरियादीन कुल तीन भाई है जिनमे ं क्रमशः (1) मेवालाल (2) दशरथ लाल (3) राम सुमेर है। तीनो ं सगे भाई मेवालाल, दशरथ व राम सुमेर अलग अलग रहते है। तीनो ं भाईयो ं का मकान एक द ूसरे से सटे हुए है उसके गा ंव के राधेश्याम पुत्र प्यारे लाल के मकान से उसका मकान दक्षिण पश्चिम कोने पर स्थित है उसके मकान की द ूरी 100 मीटर से अधिक है। उसके मकान व राधेश्याम के मकान के बीच मे ं 25–30 मकान है। वह एक्सीडे ंट के कारण इस समय दाहिने पैर से विकला ंग है। वह अपने भाई हरीलाल की हत्या के 24–25 साल पहले से विकला ंग है। एक्सीडे ंट होने के कारण उसका पैर गा ंठ की ऊपर से काट दिया गया था। उसके गा ंव की आबादी लगभग 1000 या 1500 सौ की है। आराजी संख्या 779 के बाबत उसके व मुलजिमान अशोक व सन्तोष के बीच मुकदमा चल रहा है। आराजी संख्या 779 घटनास्थल से लगभग डेढ बीघा उत्तर की तरफ है। वह व उसका द ूसरा भाई बवाली अलग अलग रहते है लेकिन उठना बैठना साथ साथ होता है। उसका और जग्गी लाल का मकान आगे पीछे साथ मे ं है और तीन भाई हरी लाल, बवाली व पंचम का एक साथ मकान है। यह भी कहा कि आराजी संख्या 779 उसके नाम नही ं है। चारागाह के नाम है इसमे ं सुखलाल, घनश्याम, सुरेश, महेश, कल्ल ू राज ू भज्जर का मकान है। अभियुक्त सन्तोष व अशोक का मकान नही ं है। इस आराजी मे ं सन्तोष, अशोक के मकान बनाने के बाबत मुकदमा चल रहा है। वह मुकदमा एस0 डी0 एम0 व लेखपाल ने दाखिल किया है। हम लोगो ं ने दाखिल नही ं किया है। इस आराजी से मेवालाल का मकान 100 गज द ूरी दक्षिण व पश्चिम कोन लेकर स्थित है। राधेश्याम के मकान से यह आराजी एक डेढ बीघे की द ूरी पर है। दक्षिण स्थित है। घटना वाले दिन उसका भाई मृतक हरीलाल अपने घर से शाम पौने छः बजे निकला था। उस समय वह अपने घर पर ही था। राधेश्याम के दरवाजे पर घटना के दिन मृतक के ऊपर फायर होने के 2–3 मिनट वह मौके पर पहुंचा था। जग्गी लाल मृतक के ऊपर फायर के बाद राधेश्याम के दरवाजे पर पहुंचे थे उसके साथ उसका भाई जग्गी लाल भी घटनास्थल पर पहुंचा था। घटनास्थल राधेश्याम का दरवाजा था जहा ं पर मृतक को गोली लगी थी। उसके साथ उसका भाई जग्गी लाल, मेवा लाल के दरवाजे पर पहुंचा था। वह और उसका भाई राधेश्याम के दरवाजे पर नही ं पहुंचा था। मेवालाल के दरवाजे पर वह पहले नही ं पहुंचा था। उसका भाई पहले पहुंचा था उसके बाद मे ं वह पहुंचा था। तुरन्त ही वह भी पहुंच गया था। हम दोनो भाईयो ं

के पहुंचने पर वहा ं द ूर से लोग चिल्ला रहे थेलाश के पास कोई नही ं खडा था। उसके और जग्गी लाल के अलावा 10–15 कदम की द ूरी पर लोग खडे थे। मेवालाल के घर के अन्दर कोई नही ं गया था। मेवालाल के मकान से लगा हुआ दशरथ का मकान है। दशरथ का मकान पूरब है। मेवालाल के पश्चिम बंजर पडा हुआ है। राम सुमेर का मकान दशरथ के मकान के उत्तर है। मेवालाल के मकान के उत्तर मोहन लाल का मकान है तथा फ ूलचन्द्र की कालोनी है। मो0 शरीफ के मकान का दरवाजा पूरब है। 10–15 कदम की द ूरी पर स्थित है। दशरथ की तीन लडकिया ं है। नाम वह नही ं जानता है। दशरथ की लडकी जगरानी को नही ं जानता है। दशरथ के दो लडके है वह नही ं जानता है। मेवालाल की एक लडकी पुष्पादेवी है, तीन लडके हैं। आगे यह भी कहा कि मेवालाल, दशरथ लाल जीवित है। घटना वाले दिन मेवालाल के घर पर मेवालाल की पत्नी और उनकी बहू थी। घटना के समय मेवालाल व उसका लडका मौज ूद नही ं था। मेवालाल की लडकी पुष्पादेवी घटना के समय नही ं थी। मृतक हरी लाल उसके याददास्त मे ं एक बार जेल गया था। 8–9 महीने जेल मे ं था। दशरथ लाल ने मृतक हरीलाल के खिलाफ बलात्कार की रिपोर्ट लिखा दिया था उसी मे ं जेल गया था। रिपोर्ट उसके भाई जग्गी लाल लिखवाया था। उसे नही ं मालूम कहा ं लिखवाया था। वह और जग्गी लाल थाने रिपोर्ट लिखाने एक ही साइकिल से गया था क्यो ंकि वह साइकिल नही ं चला पाता है। रिपोर्ट लिखाने के बाद आधा पौन घण्टे बाद अपने घर आ गया था। रिपोर्ट लिखाने के बाद वह व दरोगाजी साथ साथ घर पहुंचे थे जब दरोगाजी घटनास्थल पर आये तब वह मौज ूद था। उसका भाई जग्गी लाल भी था। मृतक हरीलाल जब घटना वाले दिन निकला था तब चड्ढी और रूमाल पहना था। मृतक हरीलाल घटना वाले दिन राधेश्याम के दरवाजे पर क्या कर रहा था उसे नही ं मालूम। राधेश्याम के दरवाजे पर मृतक हरीलाल के ऊपर कितने फायर हुए उसे नही ं मालूम क्यो ंकि वह घर पर था। घटना के बारे मे ं दरोगाजी ने उससे नही ं पू ंछा था बल्कि जग्गी लाल से पूंछा था। मृतक हरीलाल के ऊपर फायर मेवालाल के मकान के पश्चिम वाले कमरे मे ं हत्या की गयी थी। उत्तर वाले दरवाजे पर हरीलाल की लाश पडी थी। मेवालाल के हत्या के समय वह और उसका भाई जग्गीलाल दरवाजे पर खडे थे। रिपोर्ट के बाद घटनास्थल पर दरोगाजी घण्टा दो घण्टा थे उसके बाद चले गये। फिर दुबारा दरोगाजी घटनास्थल पर आये कि नही ं उसे नही मालूम। जग्गी लाल को मालूम होगा। रिपोर्ट के बाद दरोगाजी उससे मुलाकात नही ं किये। मृतक हरीलाल के ऊपर मेवालाल के घर के अन्दर 3–4 फायर हुआ था। हरी लाल के ऊपर दो फायर सन्तोष, एक फायर अशोक ने किया था। मृतक हरीलाल के ऊपर फायर करने मे ं 10–15 मिनट का समय लगा था। मेवालाल के घर के बाद एक फायर पंचायत घर के पास हुआ था। उस फायर को किसने किया उसे नही माल ूम आवाज सुना था। उस फायर के समय थोडा बहुत अ ंधेरा था। तहरीर बदन ने लिखा था। आगे यह भी कहा है कि मृतक हरीलाल घर से भोजन करके निकला था या नही वह नही ं जानता है। मृतक घोडा नचाने घटना के एक दिन पहले गया था। घटना के 10–15 मिनट पहले अर्जुन के दरवाजे पर देखा था। मुलजिमान को मेवालाल के घर मे ं घुसते देखा था। मुलजिमान को पश्चिम दिशा से 10 कदम की द ूरी से देखा था। घटना के समय मौके पर दशरथ लाल अपने दरवाजे पर खडे थे। मेवालाल के दरवाजे के पास दशरथ लाल था उनके घर वाले नही ं आये थे, बाद मे ं आये थे। घटना के 10–15 मिनट बाद दशरथ लाल आये। मो0 शफीक मौके पर नही ं आये थे। बाद मे ं सुबह पहर आये थे। चारागाह वाली जमीन पर उसका कोई कब्जा नही ं है जिस समय फायर हुआ था उस समय अ ंधेरा नही ं था। यह कहना गलत है कि मृतक हरीलाल की चाल चलन ठीक नही ं था वह अपराधिक किस्म का आदमी था। यह भी कहना गलत है कि मृतक हरीलाल अ ंधेरे मे ं बदनियती से अपराध व बलात्कार करने की गरज से मेवालाल के घर मे ं घुसा रहा होगा जहा ं पर अ ंधेरे मे ं उसकी हत्या किसी अज्ञात बदमाश व्यक्ति द्वारा कर दी गयी और उस घटना को छिपाने के लिए बाद मे ं राय सलाह करके द ूसरे दिन झूठे तौर पर मुलजिमान के विरूद्व साजिश के तहत मुकदमा कायम करा दिया। यह कहना गलत है कि मृतक हरीलाल की हत्या जिस तरह से होना कहा जाता है उस तरह की कोई घटना नही ं हुई है। बाद मे ं वह और उसके भाई सलाह करके फर्जी मुकदमा करा दिए। इस सुझाव को भी गलत बताया कि हरीलाल की हत्या के समय वह घटनास्थल पर मौज ूद नही ं था न ही उसने कोई घटना देखी। इस सुझाव को भी

गलत बताया कि पुलिस वालो ं से मिलकर मुलजिमान के विरूद्व फर्जी मुकदमा करा दिया।

37. अभियोजन साक्षी संख्या 2 मोहनलाल को घटना का प्रत्यक्षदर्शी साक्षी होना बताया जाता है और यह कहा जाता है कि घटना के समय मृतक इस साक्षी (मोहनलाल) के साथ राधेश्याम के चबूतरे पर बैठे बातचीत कर रहे थे। इस साक्षी ने अपने बयान में यह कहा है कि घटना आज से लगभग दो साल पहले की है। घटना कितने बजे की है वह नहीं बता सकता। घटना में हरीलाल की मृत्यु हुई थी। घटना बरगदी गांव की है किसके घर के पास की घटना है वह नहीं बता सकता। घटना के समय वह बिदनपुर में था। वह मिस्त्रीगीरी का काम करने बिदनपुर गया था। हरी लाल को किसने किसने मारा था वह नहीं बता सकता। घटना उसने अपनी आंखो से नहीं देखा है जब वह बिदनपुर से अपने गांव आया तब गांव वालों से पता चला था। यह साक्षी पक्ष द्रोही घोषित हुआ है।

38. अभियोजन साक्षी संख्या 4 राम औतार कोरी ने अपने बयान में यह कहा है कि मृतक हरीलाल के पंचायतनामा के समय वह मौजूद नहीं था। दरोगाजी ने एक सफेद कागज पर हस्ताक्षर बनवा लिया था उस कागज पर यदि दरोगाजी ने कुछ लिखा हो तो वह नहीं जानता है। इस साक्षी ने पंचायतनामा पर अपना हस्ताक्षर बताते हुए कहा है कि इस कागज पर उसके सामने कोई लिखा पढी नहीं हुई थी।

39. अभियोजन साक्षी संख्या 5 मान सिंह ने अपने बयान मे ं यह कहा है कि आज से लगभग तीन वर्ष पूर्व हरीलाल की मृत्यु हुई थी उसका पंचायतनामा उसके सामने नही ं हुआ था। दरोगाजी ने उसका हस्ताक्षर एक सादे कागज पर कराया था। उसे पंचायतनामा सुनाया नही ं गया था और न ही उसके सामने लिखा गया था और न ही पंचायतनामा के बारे मे ं उसकी राय ली गयी थी। उसने मुलजिमान अशोक कुमार, सन्तोष कुमार व वीरन को मृतक हरीलाल की हत्या करते नही ं देखा था। उसे इस केस के बारे मे ं कोई जानकारी नही ं है। यह साक्षी भी पक्ष द्रोही घोषित हुआ है।

40. अभियोजन साक्षी संख्या 8 मुलायम सिंह यादव ने अपने बयान मे ं यह कहा है कि साढे चार पा ंच साल पूर्व की घटना है। वह अपने खेत बरगदी गा ंव स्थित मूंग की फसल सिचाईं करके घर लौट रहा था तो रास्ते मे ं एक जगह बहुत भीड लगी थी। हरीलाल की लाश का पंचायतनामा हो रहा था। पंचायतनामा के समय वह भी आ गया था उसके अलावा मान सिंह, राम औतार तथा 2–3 अन्य लोग थे। इस साक्षी ने पंचायतनामा पर अपने हस्ताक्षर की पुष्टि करते हुए कहा है कि यह पंचायतनामा उसके सामने भरा गया था।

41. उल्लेखनीय है कि अभियोजन साक्षी संख्या 1 राम सुमेर जो कि मृतक का भाई है उसने अपने बयान मे ं घटना की भली भ ंाति पुष्टि की है। यह बात अवश्य है कि अभियोजन साक्षी संख्या 2 मोहन लाल को भी घटना का प्रत्यक्षदर्शी साक्षी होना बताया गया है परन्तु यह साक्षी पक्ष द्रोही घोषित हुआ है। अभियोजन साक्षी संख्या 4 राम औतार व अभियोजन साक्षी संख्या 5 मान सिंह तथा अभियोजन साक्षी संख्या 8 मुलायम सिंह यादव पंचायतनामा के साक्षी हैं।

42. अभियोजन साक्षी संख्या 1 राम सुमेर ने अपने बयान में अभियोजन कथानक की भली भांति पुष्टि की है। यह बात अवश्य है कि यह साक्षी मृतक का भाई है तथा घटना के सम्बंध में एक मात्र साक्षी है तो जैसा कि ऊपर उल्लेख किया जा चुका है कि सम्बंध के आधार पर किसी साक्षी की साक्ष्य को तिरस्कृत नहीं किया जा सकता है और न ही पूर्णता अविश्वसनीय माना जा सकता है। इस साक्षी की सम्पूर्ण साक्ष्य पर हम सावधानीपूर्वक विचार करने के उपरान्त यह पाते है कि यह साक्षी घटना का प्रत्यक्षदर्शी साक्षी है। घटना की प्रथम सूचना रिपोर्ट में यह उल्लेख है कि मृतक घटना के समय राधेश्याम कोरी के मकान के चबूतरे पर बैठा बातचीत कर रहा था उसी समय अपीलार्थीगण द्वारा मृतक पर फायर किया गया। फायर की आवाज सुनकर अभियोजन साक्षी संख्या 1 राम सुमेर ने स्वयं व उसके भाई जग्गी लाल को मौके पर पहुंचने की बात कही है तथा यह भी कहा है कि जब मृतक हरीलाल, मेवालाल के घर में घुस गया तो अपीलार्थीगण ने वहां पर तमंचे से फायर कर व चाकू से मारकर उसकी हत्या कर दी।

43. अपीलार्थीगण की ओर से एक तर्क यह रखा गया कि इस साक्षी ने अपनी जिरह में यह

स्वीकार किया है कि राधेश्याम के दरवाजे पर मृतक के ऊपर कितने फायर हुए उसे नहीं मालूम क्योंकि वह घर पर था तो उल्लेखनीय है कि इस साक्षी की साक्ष्य में यह आया है जब उसने फायर की आवाज तथा शोरगुल सुना तब वह तथा उसका भाई जग्गी लाल घर से दौडकर आ गये थे और जब वे मौके पर पहुंचे तो उन्होने मृतक हरीलाल को मेवालाल के घर में घुसते हुए देखा था जहां मुलजिमान ने मेवालाल के घर में घुसकर मृतक की तमंचे से गोली मारकर व चाकू से चोटे पहुंचाकर हत्या कर दी। अपीलार्थीगण अशोक कुमार व सन्तोष कोरी के हाथों में तमंचा होना दर्शाया गया है एवं अपीलार्थी वीरेन्द्र कुमार के हाथ में चाकू होना दर्शाया गया है। अभियोजन साक्षी संख्या 7 डाक्टर राजेश कुमार द्वारा मृतक हरीलाल के शव का शव विच्छेदन दिनांक 22–6–2005 को समय 2–30 अपरान्ह पर किया गया था। इस साक्षी ने पोस्टमार्टम के समय मृतक के शरीर पर दो गोली घुसने के घाव तथा दो घाव गोली निकलने के पाये थे तथा चोट संख्या 5 कटे हुए घाव के रूप में पेट के ऊपरी हिस्से में थी। चोट संख्या 5 में पेट पर 11 कटे हुए घाव पाये जाने का उल्लेख है। ऐसी दशा में चिकित्सीय साक्ष्य से भी अभियोजन साक्षी संख्या 1 राम सुमेर की साक्ष्य सम्पुष्ट होती है।

44. अपीलार्थीगण की ओर से एक तर्क यह रखा गया कि अभियोजन साक्षी संख्या 7 डाक्टर राजेश कुमार ने अपने मुख्य बयान में मृतक के शव के शव विच्छेदन की तिथि 12–6–2005 बतायी है तो उल्लेखनीय है कि बयान में समय व तिथि बताने की यह सहवन भूल हो सकती है। इस साक्षी ने पोस्टमार्टम रिपोर्ट को प्रदर्श क–6 के रूप में साबित किया है तथा पोस्टमार्टम रिपोर्ट प्रदर्श क–6 अभिलेख पर उपलब्ध है। पोस्टमार्टम रिपोर्ट में पोस्टमार्टम की तिथि 22–6–2005 समय 2–30 पी0 एम0 होने का उल्लेख है। इससे यह स्पष्ट है कि मृतक के शव का शव विच्छेदन दिनांक 22–6–2005 को 2–30 पी0 एम0 पर किया गया था। यदि डाक्टर ने सहवन अपने बयान में तिथि 12–6–2005 बता दी है तो मात्र उक्त आधार पर मृतक की पोस्टमार्टम रिपोर्ट अथवा उसके शरीर पर पायी गयी चोटों के सम्बंध में व घटना के सम्बंध में संदेह का कोई आधार प्रतीत नहीं होता है।

45. अपीलार्थीगण की ओर से उक्त अभियोजन साक्षी संख्या 7 डाक्टर राजेश कुमार को बचाव साक्षी संख्या 1 के रूप में तलब कर परीक्षित कराया गया है जिसमें उक्त साक्षी डाक्टर राजेश कुमार द्वारा यह कहा गया है कि मृतक हरीलाल के शव का शव विच्छेदन हेतु शव के साथ पंचायतनामा चिट्ठी सी0 एम0 ओ0 प्राप्त करायी गयी थी। मुख्य चिकित्साधिकारी को भेजी गयी चिट्ठी 7क/7 मे उसने दिनांक 21–6–2005 के चिट्ठी के पृष्ठ भाग पर उसने पृष्ठाकंन किया था कि मृतक हरीलाल के शव पर मौजूद चोटें पंचनामा में अंकित चोटों से भिन्न है। इसी संदेह पर उसने विवेचक को चिट्ठी प्रेषित किया। उक्त पृष्ठाकंन के पश्चात पंचनामा पर चोट संख्या 5 विवेचक द्वारा बिना नोट अंकित किये हुए कार्बन लगाकर बाद में अंकित कर दिया जाना सम्भव है। यह भी हो सकता है कि पंचायतनामें में मृतक की चोटें एक लगायत पांच दर्ज रही हो और उसने त्रुटिवश इसे न देखा हो और पृष्ठाकंन कर दिया हो। मृतक हरीलाल के शव का विच्छेदन उसने दिनांक 21–6–2005 को प्राप्त हो जाने के बावजूद दिनांक 22–6–2005 को किया है। ज्यादा सम्भावना इस बात की है कि विवेचक आकर पृष्ठाकंन के बाद पंचनामा में चोट नम्बर पांच को बढाया है लेकिन इसका नोट करना हमारा फार्मासिस्ट भूल गया। इस तरह यह स्पष्ट है कि मृतक के शव का शव विच्छेदन इस साक्षी द्वारा दिनांक 22–6–2005 को किया गया था। हमने पत्रावली पर उपलब्ध पंचायतनामा प्रदर्श क–9 का भी सम्यक परिशीलन किया। पंचायतनामा के मुख्य पृष्ठ पर मृत्यु का कारण तमंचे के फायर व चाकू की चोटो से मारकर हत्या करने का उल्लेख है तथा चोट संख्या 5 पेट मे जगह जगह चोट खून आलूद व पेट की आंत बाहर निकली है के रूप मे अंकित है। पंचायतनामा के अवलोकन से चोट संख्या 5 को बाद मे बढाया जाना प्रतीत नही होता है। फिर यदि पंचायतनामा मे मृतक की कोई चोट उल्लिखित करना रह भी गयी हो तो मात्र उक्त आधार पर घटना की कहानी के सम्बंध मे संदेह का कोई आधार प्रतीत नही होता है। इस सम्बंध मे विद्वान विचारण न्यायालय द्वारा स्वय विचार किया गया है। ऐसी दशा मे उक्त सम्बंध मे उठाये गये तर्क मे हम कोई बल नही पाते हैं।

46. अपीलार्थीगण की ओर से एक तर्क यह रखा गया कि अभियोजन साक्षी संख्या 1 राम सुमेर ने अपनी जिरह मे यह स्वीकार किया है कि मृतक के ऊपर दशरथ लाल की लडकी के साथ बलात्कार करने के

सम्बंध मे ं दशरथलाल द्वारा बलात्कार का मुकदमा दर्ज कराया गया था जिसमे ं वह जेल मे ं बंद रहा था तो उल्लेखनीय है कि पत्रावली पर ऐसी कोई परिस्थिति व साक्ष्य उपलब्ध नही ं है जिससे यह स्वीकार किया जा सके कि मृतक हरीलाल की हत्या अपीलार्थीगण से भिन्न किन्ही अज्ञात बदमाशो ं द्वारा की गयी हो। यह सरेआम दिन के 6–30 बजे की घटना है। ज ून के महीने मे ं शाम 6–30 बजे उजाला रहता है। पत्रावली पर उपलब्ध नक्शा नजरी प्रदर्श क–7 का हमने सम्यक परिशीलन किया। नक्शा नजरी प्रदर्श क–7 मे ं ए0 स्थान मकान राधेश्याम के सामने दर्शाया गया है तथा बी0 स्थान मेवालाल के मकान के अन्दर दर्शाया गया है। ए0 स्थान से बी0 स्थान की द ूरी करीब 100 मीटर दर्शायी गयी है। राधेश्याम के मकान के दरवाजे पर मृतक पर पहले फायर करने की बात कही जाती है तत्पश्चात मृतक को राधेश्याम के दरवाजे से भागकर मेवालाल के मकान मे ं घुसना बताया जाता है जहा ं पर अपीलार्थीगण द्वारा तमंचो ं से फायर कर चाक ू से चोटे ं पहुंचाकर मृतक की हत्या कारित करना बताया गया है। नक्शा नजरी के अवलोकन से यह विदित है कि मृतक का करीब 100 मीटर पीछा कर मेवालाल के घर मे ं घुसकर तमंचो से फायर कर व चाक ू से चोटे ं पहुंचाकर उसकी हत्या कारित कर दी गयी। पंचायतनामा मे ं मृतक का शव मेवालाल के मकान मे ं पडे होने का उल्लेख किया गया है। अतएव इससे भी स्पष्ट है कि पंचायतनामा के समय मृतक का शव मेवालाल के मकान मे ं पडा पाया गया था। ऐसी दशा मे ं अभियोजन साक्षी संख्या 1 राम सुमेर की साक्ष्य पर अविश्वास करने का कोई कारण प्रतीत नही ं होता है तथा इस साक्षी द्वारा अपीलार्थीगण को झूंठा फसाये जाने की कोई सम्भावना नही ं पायी जाती है। फिर यह साक्षी घटना का प्रत्यक्षदर्शी साक्षी है। इस साक्षी के समक्ष उसके भाई को तमंचो ं से गोली मारकर व चाक ू से चोटे ं पहुंचाकर उसकी हत्या की गयी है। इस साक्षी की सम्पूर्ण साक्ष्य पर सावधानीपूर्वक विचार करने के उपरान्त हम इस मत के है कि इस साक्षी की साक्ष्य पर अविश्वास करने का कोई आधार नही ं पाया जाता है। प्रथम सूचना रिपोर्ट मे ं यह उल्लेख है कि अपीलार्थीगण से जमीन का विवाद था। इसी रंजिश के कारण अपीलार्थीगण द्वारा मृतक की हत्या कारित करना बताया गया है। इस घटना के पीछे घटना का कारण व हेतुक जमीन का विवाद बताया गया है। उल्लेखनीय है कि इस घटना के सम्बंध मे ं घटना की प्रत्यक्षदर्शी साक्ष्य उपलब्ध है। ऐसी दशा मे ं जहा ं घटना की प्रत्यक्षदर्शी साक्ष्य उपलब्ध हो वहा ं घटना के हेतुक का कोई विशेष महत्व नही ं रह जाता है।

47. *(2010) 12 एस0 सी0 सी0 91 बिपिन कुमार मोण्डल प्रति राज्य वेस्ट बंगाल के मामले में माननीय उच्चतम न्यायालय* द्वारा यह अवधारित किया गया है कि:–

"24- It is settled legal proposition that even if the absence of motive as alleged is accepted that is of no consequence and pales into insignificance when direct evidence establishes the crime. Therefore, in case there is direct trustworthy evidence of witnesses as to commission of an offence, the motive part loses its significance. Therefore, if the genesis of the motive of the occurrence is not proved, the ocular testimony of the witnesses as to the occurrence could not be discarded only by the reason of the absence of motive, if otherwise the evidence is worthy of reliance. (Vide Hari Shankar Vs. State of U.P., (1996) 9 SCC 40; Bikhu Pandey & Ors. Vs. State of Bihar, (2003) 12 SCC 616; and Abu Thakir & Ors. Vs. State of Tamil Nadu, (2010) 5 SCC 91)."

48. चूँकि अभियोजन साक्षी संख्या 1 राम सुमेर इस घटना का प्रत्यक्षदर्शी साक्षी है। इस साक्षी ने अपने बयान में अभियोजन कथानक की भली भांति पुष्टि की है तथा घटना के समय मौके पर उसकी उपस्थिति सिद्व है एवं उसकी साक्ष्य चिकित्सीय साक्ष्य से भी सम्पुष्ट है। प्रथम सूचना रिपोर्ट में एवं अभियोजन साक्षी संख्या 1 राम सुमेर ने अपने बयान में अपीलार्थीगण से जमीन का विवाद बताया है। ऐसी दशा में घटना का जो हेतुक रखा गया है वह साक्ष्य से साबित है।

49. अभियोजन साक्षी संख्या 9 राम भरोसे कुशवाहा द्वारा इस मामले की विवेचना की गयी थी उन्होनें अपने द्वारा की गयी विवेचना तथा विवेचना के दौरान तैयार किये गये प्रपत्रों को साबित किया है। इस साक्षी ने अपने बयान में यह उल्लेख किया है कि धारा 82–83 दं0 प्र0 सं0 की कार्यवाही के पश्चात अपीलार्थीगण के विरूद्व मफरूरी में आरोप पत्र न्यायालय प्रेषित किया था। आरोपपत्र दाखिल होने तक अपीलार्थीगण फरार रहे हैं। इस साक्षी ने

अपीलार्थी अशोक कुमार द्वारा आत्मसर्मपण कर देने के पश्चात उसकी निशानदेही पर दिनांक 15–9–2005 को मृतक की हत्या में प्रयुक्त तमंचे को बरामद करने की पुष्टि की है। यह बात अवश्य है कि मौके से बरामद खोखा कारतूस तथा अपीलार्थी अशोक कुमार की निशानदेही पर बरामद तमंचे को विधि विज्ञान प्रयोगशाला जांच हेतु नहीं भेजा गया है तो मात्र उक्त आधार पर अभियोजन कथानक को पूर्णता गलत एवं अविश्वसनीय मान लेना न्यायोचित प्रतीत नहीं होता है। यह बात अवश्य है कि अपीलार्थीगण सन्तोष कोरी व वीरेन्द्र कुमार से किसी भी हथियार की बरामदगी नहीं बतायी जाती है तो अभियोजन साक्षी संख्या 9 (विवेचनाधिकारी) की साक्ष्य से यह स्पष्ट है कि उसके द्वारा बार बार दबिश देने के बावजूद अपीलार्थीगण/अभियुक्तगण दस्तयाब नहीं हुए थे तत्पश्चात उसने धारा 82–83 दं0 प्र0 सं0 के अन्तर्गत कार्यवाही के उपरान्त अपीलार्थीगण के विरूद्व मफरूरी में आरोप पत्र न्यायालय प्रेषित किया था। ऐसी दशा में यदि अपीलार्थीगण सन्तोष कोरी व वीरेन्द्र कुमार की निशानदेही पर किसी हथियार की कोई बरामदगी नही दिखायी गयी है तो उक्त अपीलार्थीगण की संलिप्तता के सम्बंध में संदेह करने का कोई आधार नहीं पाया जाता है।

50. अपीलार्थीगण की ओर से एक तर्क यह रखा गया कि अपीलार्थी वीरेन्द्र कुमार एक अन्य दूसरे गांव का है तथा अन्य अपीलार्थीगण से उसका कोई सम्बंध एवं सरोकार नहीं है और न ही वह उन्हे जानता हैं तो उल्लेखनीय है कि अपीलार्थी वीरेन्द्र कुमार प्रथम सूचना रिपोर्ट में नामजद है तथा उसके हाथ में चाकू होना दर्शाया गया है एवं शव विच्छेदन के समय मृतक के शरीर पर चाकू की चोटें पायी गयी है। मृतक के शरीर पर चोट संख्या 5 के रूप जो चोटें दर्शायी गयी है उसमें करीब 11 कटे हुए घाव पाये जाने का उल्लेख है। अभियोजन साक्षी संख्या 1 राम सुमेर की साक्ष्य में यह आया है कि जब अपीलार्थीगण सन्तोष व अशोक मृतक पर फायर कर दिये और जब ये लोग मार चुके तब वीरेन्द्र ने उसके भाई को चाकू से मारना शुरू किया और जब वीरेन्द्र चाकू मार रहा था तब वह वहीं पर खडा था। इस प्रकार अपीलार्थी वीरेन्द्र कुमार की संलिप्तता भी संदेह से परे साबित पायी जाती है।

51. अपीलार्थीगण की ओर से एक तर्क यह रखा गया कि मृतक की हत्या मेवालाल के घर में होना बताया गया है। अभियोजन साक्षी संख्या 1 राम सुमेर की साक्ष्य में यह आया है कि घटना के समय मेवालाल की पत्नी व उसकी बहू मौजूद थी लेकिन विवेचनाधिकारी ने न तो उनका बयान अन्तर्गत धारा 161 दं0 प्र0 सं0 अंकित किया और न ही उन्हें गवाह बनाया और न ही उन्हें साक्ष्य में परीक्षित कराया गया जब कि वे महत्वपूर्ण साक्षी हो सकते थे तो उल्लेखनीय है कि यह एक हत्या का मामला है समान्यता आसानी से कोई व्यक्ति किसी दूसरे के झगडे में नहीं पडना चाहता है तथा अपराधिक प्रवृत्यिों के व्यक्तियों के विरूद्व गवाही देने में भी लोग कतराते हैं। अभियोजन साक्षी संख्या 1 राम सुमेर घटना का प्रत्यक्षदर्शी साक्षी है तथा उसकी साक्ष्य संदेह से परे विश्वसनीय है एवं कथित घटना के समय उसकी उपस्थिति साबित है। ऐसी दशा में यदि इस मामले में मेवालाल की पत्नी व उसकी बहू को गवाह नहीं बनाया गया या उन्हें साक्ष्य में परीक्षित नहीं कराया गया तो मात्र उक्त आधार पर घटना के सम्बंध में संदेह करने का कोई आधार प्रतीत नहीं होता है।

52. पत्रावली पर उपलब्ध समस्त साक्ष्य एवं अभिलेखों पर सम्यक विचार करने के उपरान्त हम इसी मत के हैं कि अपीलार्थीगण द्वारा कथित घटना कारित करना संदेंह से परे सिद्व है तथा अपीलार्थी अशोक कुमार की निशानदेही पर मृतक की हत्या में प्रयुक्त तमंचे की बरामदगी भी साबित है। ऐसी दशा में हम विद्वान विचारण न्यायालय के निर्णय एवं आदेश में कोई विधिक त्रुटि नहीं पाते हैं तथा अपीलार्थीगण की ओर से उठाये गये बिन्दुओं में हम कोई बल नहीं पाते हैं।

53. विद्वान विचारण न्यायालय ने पत्रावली पर उपलब्ध साक्ष्य एवं अभिलेखों पर सम्यक विचार करने के उपरान्त अपीलार्थीगण को प्रश्नगत अपराध में दोषी पाते हुए तदनुसार दण्डित किया है जिसमें हम कोई विधिक त्रुटि अथवा अनियमितता नहीं पाते हैं।

54. उपरोक्त विवेचना से हम इसी मत के हैं कि यह अपील बलहीन है एवं निरस्त होने योग्य है तदनुसार यह दाण्डिक अपील निरस्त की जाती है

तथा विद्वान विचारण न्यायालय द्वारा पारित दोषसिद्धि एवं दण्डादेश की **पुष्टि** की जाती है।

55. अपीलार्थीगण **अशोक कुमार, सन्तोष कोरी तथा वीरेन्द्र कुमार चमार** जेल में निरूद्व है उन्हें सजा भुगतने हेतु यथावत निरूद्व रखा जाए।

56. निर्णय की प्रति एवं परीक्षण न्यायालय की पत्रावली अविलम्ब अधीनस्थ न्यायालय को भेजी जाए।

(2021)02ILR A999
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 24.08.2020

BEFORE

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

Second Appeal No. 195 of 1993

Mahendra Singh ...Appellant
Versus
Ramesh Singh ...Respondent

Counsel for the Appellant:
Sri S.B. Pandey, Sri Ajay Singh Sengar, Sri Om Prakash Singh Sikarwar

Counsel for the Respondent:
Sri Lallan Pd. Singh, Sri Lallan Pd. Yadav, Sri Yashwant Singh

A. Civil Law – Specific Performance of Contract - Constitution Of India: Article 15 - Reversal of burden of proof (Para 25-50) – There is no rule that illiterate, ignorant and rustic men, like illiterate and ignorant women, would always be entitled to the protection of the rule about reversal of burden, when the issue is about their liability on a solemn document, executed by them regarding disposition of property etc. In case of men, it has to be established by one who seeks benefit of the rule by evidence *alluendi* that he is on account of illiteracy, ignorance and his utter unfamiliarity with the ways of world put against the nature of the transaction, entitled to a protection of the rule. (Para 42)

The constitutional guarantee against discrimination on ground of sex carries with in it, an acknowledgment of the fact that women on account of historical and social conditions are a special class, in whose favour the State may take affirmative action by way of reservation etc. without inviting the vice of hostile discrimination. This is what Article 15 of the Constitution postulates. (Para 43, 44)

Therefore, the principle judicially evolved regarding reversal of burden on a presumption regarding a particular class of women in India, entitling them to a protection of the rule, is no more than a recognition of the hard historical and social realities in the country. At the same time as already said, a man can ask for protection of the rule regarding reversal of burden, if he can show by the standard indicated hereinabove, that he is entitled to similar protection, as women of the specific classes are. **A man, however, is not entitled to the protection merely because he is ignorant and illiterate. Men in this country, howsoever illiterate, have been at the helm of affairs of the society and guided it.** Men, in fact, by the status flowing from their sex, have historically and traditionally formed the mainstream of society and have managed its affairs. The law, therefore, ascribes to them an understanding of their actions generally, irrespective of the fact whether they are illiterate, ignorant or rustic. It is, thus, a **hard social reality, historically testified too, that would work to exclude a presumptive application of the rule regarding reversal of burden to illiterate, ignorant and rustic men, the way it has been extended to illiterate and ignorant women.** (Para 44)

This is, however, not to say that in a given case, where an ignorant and illiterate man demonstrates by the totality of the circumstances and the transaction that he has entered into, his utter disability to understand the nature of the transaction and the contents of the document, the Court would not be entitled to invoke the rule and reverse the

burden. It cannot be, however, applied on a presumption in the same manner as it is done in the case of pardanashin women and certain other illiterate and ignorant women. (Para 49)

In the present case, the defendant/appellant has not led any evidence to show that he is a man, utterly unconnected with wordily affairs. He has not said in his evidence anything that may project him to be a simpleton, leading a secluded life away from wordly intercourse. Rather, he has indicated his inclination to do business, which he also says that he undertook. He claims that he took a loan in the sum of Rs. 15,000/- from the plaintiff to invest in business. If those are his circumstances and engagements in life, it cannot be inferred, on the basis of his illiteracy alone, that he is entitled to a protection of the rule about reversal of burden in the manner that it is applied to pardanashin women and certain other traditional women, who are illiterate and ignorant. Accordingly, it is held, that burden of proof has not been wrongly shifted upon the defendant (appellant) for the reasons indicated. (Para 50)

B. The terms of agreement are very material on the point of determining the true nature of the transaction. (Para 55) – the substantial question of law involved here is whether the Court could decree specific performance where the evidence proved that the intention of the executor was not to execute a sale deed, but to furnish security for the loan?

Here, the suit agreement made provision for the sale deed to be executed within a year of the said agreement dated 24.06.1989, but the plaintiff/respondent acted within a few months as soon as he had garnered the remainder of funds. A notice to execute the sale deed was got issued to the defendant/appellant on 17/19.03.1990 and served on 21.03.1990. The suit was instituted on 31.05.1990. The fact that of the entire agreed sale consideration of Rs. 50,000/-, a sum of Rs. 45,000/- was paid in advance, leaving a remainder of Rs. 5000/-, does not show that the transaction was not bona fide or one to serve as security for a loan. Rather, the promptness with which the plaintiff/respondent acted in the matter, shows that once he had expended all his resources in paying the substantial part of the sale consideration, that is to say, a sum of Rs. 45,000/- out of agreed sale consideration of Rs. 50,000/-, he needed breathing time to arrange the remainder of funds of Rs. 5000/- and more to defray expenses of execution and registration. He could do so within a period of few months, and, thereafter, acted with all promptitude. Moreover, a reading of the terms of the suit agreement, besides considering the testimony of parties in the witness box, a case about the suit agreement, serving as a security for repayment of the loan, is not even remotely made out. (Para 55)

The case of the defendant/appellant is about the character of the suit agreement being not at all understood by the defendant when he appended his mark to it. This case cannot coexist with the suit agreement, serving as a security. This is so, because the two are not merely alternate pleas, that can be urged together, but ones that cannot coexist. Here as already said, the case about the suit agreement being there, but intended to serve as a security for a loan, has not been pleaded by the defendant and, therefore, not determined by the Courts below. The present substantial question of law, therefore, does not at all arise. (Para 56)

C. Indian Contract Act, 1872 - Section 73 - Specific Relief Act, 1963 - Section 10, 16(c), 20 - **Discretion to grant specific performance – Words and Phrases: 'Readiness', 'willingness' - The law relating to 'readiness' and 'willingness' to be proved by the plaintiff is well settled.** 'Readiness' refers to the financial capacity of the person obliged to perform his part of the contract, whereas 'willingness' refers to his mental state or psychological inclination to perform it. So far as readiness and willingness are concerned, there is no substantial question about it raised before this Court, as such. It only arises in the context whether specific performance could be granted as a matter of course, without any consideration by the Court of evidence, facts and circumstances to exercise discretion in favour of the plaintiff. (Para 63)

The law requires that a plaintiff in order to entitle him to the relief of specific performance must show his bona fides

throughout, and not just a breach of contract by the defendant. These bona fides are to be judged on the parameters of 'readiness' and 'willingness', and much more. It is the conduct of the plaintiff on a wholesome basis, vis-a-vis the contract and his dealings with the defendant, that is relevant. It is also relevant that he must come to Court with clean hands, candidly disclosing his case and proving it by untainted evidence. (Para 64)

The defendant/appellant has urged it to be inequitable to enforce specific performance given the disability of the defendant/appellant, arising from his illiteracy. This Court has looked into the evidence and the findings of the two Courts below. It is of paramount importance to note that it is proven by the plaintiff's evidence generally, and particularly, by the Sub-Registrar's endorsement on the suit agreement that the defendant received before the Sub-Registrar a sum of Rs. 15,000/-, and further, that he acknowledged that he had received a sum of Rs. 30,000/- as an advance. This endorsement by the Sub-Registrar on the suit agreement has been perused by the Court. It is available on record in original. It is an endorsement dated 24.06.1989. The suit agreement also bears the photograph of the defendant as well as the plaintiff. There is a presumption about the genuineness of the Sub-Registrar's endorsement. Since the suit agreement bears the defendant's photograph, it is safe to presume that nobody else made this acknowledgment before the Sub-Registrar. It is, thus, evident that there is evidence of a highly dependable character, available on record to show that the defendant had received a total sum of Rs. 45,000/- from the plaintiff in terms of the suit agreement, at the time when this agreement was executed. The endorsement also indicates that the defendant/appellant had signed it after understanding its contents. About that part also, there is a presumption as to its correctness. (Para 67)

Once this Court is assured that the Lower Appellate Court has rightly concluded that the defendant/appellant has received a sum of Rs. 45,000/-, out of the total sale consideration of Rs. 50,000/- agreed, the scales for the exercise of discretion in favour of specific performance are decisively tipped. The fact that the defendant has received a sum of Rs. 45,000/- for one part, excludes any doubt about the defendant being inequitably dealt with by the plaintiff/respondent on account of his illiteracy etc. At the same time, the fact that the defendant/appellant has received a sum, that accounts for ninety percent of the sale consideration, places the plaintiff in a position where he has done substantial acts in performance of his part of the contract. Nothing remains to be done on the plaintiff's part, except payment of the balance of Rs. 5000/- and meeting the expenses of execution and registration of the conveyance. The doing of all substantial acts in performance of the plaintiff's part of the contract is a relevant consideration, under sub-Section (3) of Section 20 of the Specific Relief Act. (Para 70)

D. There is no straitjacket formula that governs the exercise of discretion to grant or refuse specific performance on account of price escalation. In this case, what is most pertinent, is that the suit was instituted promptly and within a year of the suit agreement. In fact, it was instituted during time contemplated by the agreement, which was one year, once the plaintiff/respondent noticed refusal. This adds to the bona fides about his claim and strengthens entitlement to the relief of specific performance that he seeks. (Para 72)

There is nothing to show that plaintiff/respondent has decisively contributed to delay in any manner. The price rise, if that be a factor, during these 27 years that this second appeal by the defendant has remained pending, cannot be capitalized upon to sway this Court’s discretion. (Para 74)

Second appeal dismissed.(E-3)

Precedent followed:

1. Laxmi Narain & anr. Vs Smt. Hubraja @ Barki, 1989 (15) All L.R. 800 (Para 27)

2. Byles, J. in Foster Vs Mackinnon, [1869() C.P. 704] (Para 31)

3. Mst. Kharbuja Kuer Vs Jangbahadur Rai & ors., AIR 1963 SC 1203 (Para 32)

4. Paras Nath Rai Vs Tilesar Kunwar, 1965 All. L.J. 1080 (Para 33)

5. Manohar Lal Vs Rajeshwari Devi & ors., AIR 1977 All 36 (Para 33)

6. Hodges & anr. Vs Delhi and London Bank, Ltd., (1899-1900) XXVII Indian Appeals 168 (Para 34)

7. Sm. Sonia Parshini Vs Sheikh Moula Baksha, AIR 1955 Cal 17 (Para 36)

8. Chidambaram Pillai & 3 ors. Vs Muthammal & anr. (1993) 1 M.L.J. 535 (Para 38)

9. Madhukar Nivrutti Jagtap & ors. Vs Smt. Pramilabai Chandulal Parandekar & ors., 2019 SCC OnLine SC 1026 (Para 55)

10. Ram Das Vs Jagat Singh (Deceased) Thr. LRs, (2015) 4 All LJ 46 (Para 57)

11. Aniglase Yohannan Vs Ramlatha & ors., (2005) 7 SCC 534 (Para 64)

12. P. D'Souza Vs Shondrilo Naidu, (2004) 6 SCC 649 (Para 71)

Precedent distinguished:

1. Ramaswami Jadaya Gounder (died) & anr. Vs V.T. Elaiya Pillai & anr., AIR 1972 Mad 336 (Para 48)

2. Tejram Vs Patirambhau, (1997) 9 SCC 634 (Para 54)

3. Omanhene Kwamin Bassayin Vs Omanhene Bendentu II, AIR 1937 PC 274 (Para 45)

Present appeal has been filed against judgment and decree dated 31.08.1992, passed by the 1st Additional District Judge.

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

1. This is a defendant's second appeal, arising from a suit for specific performance of contract.

2. The plaintiff-respondent's suit, being Original Suit no.319 of 1999, was tried and decreed by the learned Civil Judge, Kanpur Dehat vide his judgment and decree dated 03.02.1991. The plaintiff-respondent appealed to the learned District Judge, Kanpur Dehat vide Civil Appeal no.10 of 1992. The said appeal was heard and allowed with costs by the Ist Additional District Judge, decreeing the suit for specific performance of contract, vide his judgment and decree dated 31.08.1992.

3. Ramesh Singh, the plaintiff-respondent instituted Original Suit no.319 of 1990 in the Court of the learned Civil Judge, Kanpur Dehat on 31.05.1990 against Mahendra Singh, the defendant-appellant, seeking specific performance of a registered agreement to sell dated 24.06.1989, relating to an unpartitioned half share in agricultural land, detailed in Schedule क to the plaint.

4. Mahendra Singh, the defendant-appellant shall hereinafter be called, "the defendant'. Ramesh Singh, the plaintiff-respondent shall hereinafter be referred to as, "the plaintiff'. The registered agreement to sell dated 24.06.1986 executed by the defendant in the plaintiff's favour, shall be called, "the suit agreement'. The property, subject matter of dispute between parties, set forth in Schedule क to the plaint, bears the following description: half share in agricultural plot no.64, admeasuring 6 *bigha* 4 *biswa* and 5 *biswansi*, with a total annual revenue of half part of Rs.33.25 *paise*, situate at Village Anwan, *Tehsil* Bhognipur, District Kanpur Dehat. The defendant is *bhumidhar* with transferable rights of the aforesaid half share in plot along with his brother, Sewa Ram. The said land is hereinafter referred to as, "the suit property'.

5. The plaintiff's case is that the defendant is *bhumidhar* with transferable

rights of the suit property, a right which he held on 24.06.1989. The plaintiff is a native of Village Anwan since days of his ancestors, but has meager agricultural holding. The plaintiff desired a larger holding. The defendant, on the other hand, wished to part with the suit property in order to invest in business and to meet his other needs. He disclosed his desire to sell the suit property to natives of the village, as also others in the vicinity. The plaintiff and the defendant entered into negotiations about working out a deal for the plaintiff to purchase the suit property. The parties struck bargain at a price of Rs.50,000/-.

6. In accordance with the aforesaid settlement of the transaction, the defendant executed a registered agreement to sell dated 24.06.1989 in the plaintiff's favour, covenanting to execute a sale deed, conveying the suit property to the plaintiff. Of the agreed sale consideration, the plaintiff paid to the defendant a sum of Rs.30,000/- as earnest prior to execution of the suit agreement. It is averred in the plaint that at the time of execution of the suit agreement and its registration, the plaintiff paid a further sum of Rs.15,000/- towards the agreed consideration, which the defendant received before the Sub-Registrar.

7. It is the plaintiff's case that in this manner, the defendant received a total sum of Rs.45,000/- in cash until execution of the suit agreement, leaving a residue of Rs.5000/- to be paid at the time of execution and registration of the covenanted sale deed. The suit agreement stipulated a period of one year for the execution of the deed of sale. It is the plaintiff's further case that a few months after execution of the suit agreement, he secured necessary funds to pay the remainder consideration of Rs.5,000/- and to defray expenses of execution and registration of the conveyance. It is specifically averred in the plaint that the plaintiff had and still has ready money with him to pay the balance sale consideration and expenses for purchase of requisite stamp papers and defraying expenses of execution and registration of the sale deed. The plaintiff in the company of some respectable men approached the defendant, requesting him to execute the agreed sale deed, which he may do after accepting the balance sale consideration. The plaintiff conveyed to the defendant that he would bear all necessary expenses of execution and registration and to do all this, he is always ready. The defendant despite being persuaded by the plaintiff to fulfill his obligations under the suit agreement warded off the same.

8. Faced with inaction on the defendant's part, the plaintiff instructed his Counsel, Sri Ram Prakash Saxena, Advocate, Kanpur Dehat to serve a notice upon the defendant, calling upon him to execute a sale deed, in terms of the suit agreement. A notice dated 17/19.03.1990 was sent by the plaintiff's Counsel to the defendant by registered post, which the defendant received on 21.03.1990. The notice clearly informed the defendant that the latter may come over to the office of the Sub-Registrar, Pukhranya on 26.03.1990 at 10 O' clock, where after receipt of the balance sale consideration, he may execute the covenanted sale deed in the plaintiff's favour. It was also indicated in the notice that the plaintiff would defray all expenses of execution and registration, and that he would await the defendant at the appointed time and venue along with his witnesses. The defendant, however, did not turn up. The plaintiff remained present at the Sub-

Registrar's office with the balance sale consideration and other expenses throughout (the day), awaiting the defendant's arrival. As the defendant did not turn up, the plaintiff made an application to the Sub-Registrar, reporting his presence.

9. The plaintiff has averred that post 26.06.1990 also, the plaintiff has with him the balance sale consideration and is ready to get the agreed sale deed executed. The plaintiff has requested the defendant by word of mouth regularly to fulfill his obligations under the suit agreement. It is averred that on 28.05.1990, the defendant, in the presence of a number of other men, refused to execute the promised sale deed. It is on these allegations that the suit was instituted.

10. The defendant appeared and filed his written statement dated 09.08.1991 and contested the suit. He traversed the plaintiff's case. The defendant has asserted that he never wished to sell the suit property and has no need or motive to do so. He has denied the fact that he ever entered into negotiations with the plaintiff about a deal to sell the suit property. It is also denied that he ever executed the suit agreement. It is also denied that the defendant ever received a sum of Rs.30,000/- prior to execution of the suit agreement. The receipt of Rs.15,000/- before the Sub-Registrar also, by way of earnest has been denied by the defendant. It is a wholesome denial by the defendant about his subscription to the suit agreement. The other assertions about the demanded performance have been denied. It has been asserted that the notice dated 17/19.03.1990 served by the plaintiff through learned Counsel was answered through his Counsel vide a reply dated 26.03.1990. To substantiate his stand about disowning the suit agreement, the defendant has pleaded that he borrowed from the plaintiff a sum of Rs.15,000/-. In order to secure the loan, the plaintiff asked the defendant to come over to Pukhranya, where the necessary paper work was understood to be done. There, the plaintiff took the defendant to Sri Ram Prakash Saxena, Advocate, who drew up a document that the defendant signed, understanding it to be one to secure the plaintiff's money loaned.

11. It is the defendant's further case that the said document was neither read over to him by the learned Counsel, or by anyone in the Sub-Registrar's office. It is also pleaded by the defendant that if the plaintiff had in fact paid him a sum of Rs.30,000/- prior to execution of the suit agreement, he would have required him to execute a sale deed on 24.06.1989, which he did not do. It is also the defendant's case that on asking the contents of the suit agreement to be read over to him, he came to know that witnesses of this execution were one Ram Shanker, an uncle of the plaintiff (father's brother) and Sri Ram Prakash Saxena, the plaintiff's Advocate. The endorsement of the Sub-Registrar on the suit agreement has been dubbed as falsehood. It is pleaded that the Sub-Registrar never asked the defendant anything when the suit agreement was presented for registration. Also, the defendant claims that the Sub-Registrar never apprised him about the contents of the document, or that it was an agreement to sell.

12. It is specifically pleaded that the suit agreement has been secured by the plaintiff in conspiracy with the witnesses playing fraud upon the defendant,

misrepresenting the character of the document. The suit agreement was got signed by the defendant, representing to him that it was a document to secure the loan in the sum of Rs.15,000/- paid to him. It is also pleaded that the defendant is an illiterate village dweller, who thumb marked the suit agreement, understanding it to be security papers for the loan. He never understood it to be an agreement to sell.

13. The Trial Court, on the pleadings of parties, framed the following issues (translated into English from Hindi vernacular):

"(1) Whether the disputed agreement to sell dated 24.06.89 has been secured by defrauding the defendant?

(2) Whether the disputed agreement to sell is void and cannot be specifically enforced as pleaded in paragraph 12 of the written statement?

(3) Whether the defendant negotiated sale of his land with the plaintiff and settled the transaction for a sum of Rs.50,000/-?

(4) Whether the defendant executed any agreement to sell in favour of the plaintiff on 24.06.1980?

(5) Whether the plaintiff paid the defendant by way of earnest a sum of Rs.30,000/- in the parties' village?

(6) Whether the plaintiff ever approached the defendant with money in order to secure execution of a sale deed?

(7) Whether the defendant received from the plaintiff a sum of Rs.15,000/- by way of earnest in the presence of Sub-Registrar?

(8) Whether the plaintiff is entitled to any relief?"

14. The parties led evidence before the Trial Court.

15. On behalf of the plaintiff, three witnesses were examined, to wit, the plaintiff himself as PW-1, Ram Shanker, PW-2 and Ram Prakash Saxena, PW-3. Documentary evidence was also led on behalf of the plaintiff comprising the suit agreement (Ex. 6Kha), a photostat copy of the suit agreement (paper no. 7Ga), a copy of the notice (paper no. 8Ga), registered postal receipt (paper no.9Ga), postal acknowledgment (paper no. 10Ga), application dated 26.03.1990 (paper no. 11Ga), a copy of the *khatauni* (paper no.12Ga) and a copy of the application dated 26.09.1990 (paper no. 32Kha).

16. On behalf of the defendant, two witnesses were examined: Sahendra Singh, DW-1 and Moti Lal, DW-2. The defendant in his documentary evidence filed a copy of the reply notice, numbered as paper no.32Ga.

17. The Trial Court decided issues nos.1, 2 and 4 together. It was held that the suit agreement was got executed by the plaintiff defrauding the defendant. The defendant executed the suit agreement, understanding it to be a document to secure the loan of Rs.15,000/-, advanced to him by the plaintiff. It was further held that the suit agreement was void and could not be specifically enforced. Thus, issues nos.1 and 2 were answered in the affirmative, whereas issue no.4 was answered in the negative. Issues nos.3 and 5 were answered in the manner that in view of the findings on issues nos.1, 2 and 4, the plaintiff did not negotiate any deal about a sale with the defendant or settled for a sum of Rs.50,000/-. The defendant entered into the suit agreement, understanding it to be security papers relating to the loan of Rs.15,000/-. Also, the defendant never received a sum of Rs.30,000/- from the

plaintiff, back at the parties' village. Thus, issue no.3 and 5 were both answered in the negative and against the plaintiff. Issues nos.6 and 7 were also decided against the plaintiff and in favour of the defendant. With conclusions reached on the basis of the Court's findings on issues nos.1 to 7, the Trial Court answered issue no.8 in the manner that the suit agreement was got executed by playing fraud on the defendant and that, therefore, the plaintiff was not entitled to any relief. The suit was ordered to be dismissed with costs.

18. The plaintiff appealed the Trial Court's decree to the learned District Judge, Kanpur Dehat vide Civil Appeal no.10 of 1992. The appeal aforesaid was instituted on 03.03.1992. The appeal came up for determination before the Ist Additional District Judge on 31.08.1992. The Lower Appellate Court, by the impugned judgment and decree dated 31.08.1992, allowed the appeal, set aside the judgment and decree of the Trial Court and decreed with costs the suit for specific performance. The defendant was ordered to execute a sale deed within two months, after receiving the balance sale consideration. The decree also carries a direction that in the event of default by the defendant, the plaintiff would be entitled to secure execution of the sale deed through process of Court, upon deposit of the balance sale consideration and necessary expenses for execution and registration of the sale deed in the Execution Department.

19. Aggrieved, the defendant has brought this appeal from the appellate decree.

20. This appeal was admitted to hearing, vide order dated 16.02.1993, on questions nos.1, 2, 3, 4, 5 and 6, formulated in the memorandum of appeal. These substantial questions of law read thus:

(1) Whether the suit can be decreed if the plaintiff is (*sic* has) failed to prove his own case?

(2) Whether the lower appellate court can allow the appeal and decreed (*sic* decree) the suit without reversing or setting aside the findings recorded by the trial court.

(3) Whether the suit can be decreed by lower appellate court on the basis of findings which are based on surmises and conjectures?

(4) Whether the suit can be decree (*sic* decreed) by wrong shifting of burden of prove (*sic* proof) to (*sic* the) appellant?

(5) Whether it was obligatory for (*sic* the) court to record the finding regarding intention for executing the sale deed?

(6) Whether the court can decree the suit for specific performance even if the evidence proved that the intention of the executor of the document was for executing the sale deed but for security of the loan?"

21. This Court, by recording reasons carried in the order dated 05.02.2020, framed an additional substantial question of law numbered 7, that reads:

"7. Whether the relief of specific performance is to be granted, in case of an immovable matter (*sic* property) as a matter of course, without any consideration by the Court of evidence, facts and circumstances that may sway its discretion under Section 20 of the Specific Relief Act?"

22. Heard Mr. Vivek Singh along with Mr. Ajay Singh Sengar, learned Counsel for the defendant and Mr. Yashwant Singh,

learned Counsel appearing on behalf of the plaintiff.

23. Learned Counsel for parties have addressed this Court in the present appeal on substantial questions of law nos.4, 6 and 7, and not the others. This Court, too, after hearing learned Counsel for parties, finds that substantial questions of law nos.1, 2, 3 and 5 do not arise for consideration in this appeal.

24. The first substantial question of law to be considered is whether the suit can be decreed by a wrong shifting of the burden of proof upon the defendant. Learned Counsel for the defendant, in advancing his submissions, says that there is no quarrel about the fact that the defendant is an illiterate and rustic villager, who cannot read or write. He cannot even sign his name. It is pointed out that the defendant has specifically pleaded a case in paragraph 14 of the written statement that the plaintiff, in conspiracy with the witnesses of the suit agreement, falsely represented to him the character of the document as one to secure the loan of Rs.15,000/- advanced, instead of its true character and made the defendant thumb mark it, taking advantage of his illiteracy. Learned Counsel for the defendant submits that it is a case where the defendant does not dispute his thumb mark on the suit agreement, but denies its contents. He does so by saying that his mind did not accompany his mark. According to the learned Counsel for the defendant, this mistake, on the defendant's part, was brought about as a result of a fraudulent representation by the plaintiff and the witnesses of the suit agreement, about character of the document.

25. Learned Counsel for the defendant takes his submission forward by saying that normally in the case of a plea about the mind not accompanying the signature, or so to speak, where the contents are denied but the signatures admitted, the burden is upon the person who sets up that plea. But, the learned Counsel for the defendant is quick to add that in the case of an illiterate and rustic villager, who does not know how to read or write, the burden of proof would lie on the party, who propounds the document. In his submission, the burden of proof would, therefore, rest on the plaintiff to show that the suit agreement was subscribed to by the defendant after understanding the nature of the transaction. Learned Counsel for the defendant urges that no evidence has been led on behalf of the plaintiff to demonstrate that the defendant was made aware of the nature of the transaction, before he put his mark.

26. To the contrary, Mr. Vivek Singh, learned Counsel for the defendant submits that the fact that both witnesses of the suit agreement are partisan, excludes the possibility about the nature of the transaction embodied in the document, being known to the defendant. Learned Counsel points out that one of the two witnesses, Ram Shanker is an uncle of the plaintiffs (father's brother) and the other Sri Ram Prakash Saxena, is the plaintiff's Advocate. One of them is partisan by friendship and the other by his professional loyalty. Learned Counsel for the defendant has drawn attention of the Court to the testimony of the defendant in the dock, where in his examination-in-chief on 17.11.1991, he has stated: "जब श्री राम प्रकाश सक्सेना ने मेरा निशान अंगुठा यह कहकर लगवाया कि सादे कर्जे की लिखा-पढ़ी है। रजिस्ट्री दफ्तर में पढ़कर नहीं सुनाया गया।"

27. It is pointed out that in his cross-examination too, the defendant has stood

by his case that he was kept in oblivion about the character and the contents of the suit agreement. Learned Counsel for the defendant submits that on the facts and evidence, particularly, the fact that the defendant is an illiterate and rustic villager, burden of proof lay on the plaintiff to prove that the defendant entered into the transaction, embodied in the suit agreement, after fully understanding its nature and terms. This burden, according to the learned Counsel, has been placed in error on the defendant's shoulders in accordance with the normal rule applicable to a plea of "the signatures being admitted but the contents denied'. Learned Counsel submits that the Lower Appellate Court has committed a manifest error of law in completely overlooking the defendant's disability, on account of his abject illiteracy, that would lead to a reversal of the burden of proof. In support of his submission, learned Counsel for the defendant has placed reliance upon a decision of this Court in **Laxmi Narain and another vs. Smt. Hubraja alias Barki, 1989 (15) All L.R. 800.** Learned Counsel for the defendant has called attention of the Court to what has been held by S.H.A. Raja, J. in **Laxmi Narain** *(supra)*:

"In *Paras Nath Rai v. Tilesar Kunwar*, [1965 Alld. L.J. 1080.] this court has indicated the law regarding the transaction executed by a *Pardanashin* lady or an illiterate ignorant woman, though she may not be *pardanashin*, in the following words:

"Rules regarding transaction by a *Pardanashin* lady are equally applicable to an illiterate and ignorant woman, though she may not be a *Pardanashin*. It is not by reason of the Pardah itself that the law throws its protection around a *Pardanashin* lady but by reason of those disabilities which a life of seclusion lived by a *Pardanashin* lady gives rise to and which are consequently presumed to exist in the case of such a lady. But the disabilities which make the protection necessary may arise from other causes as well. Old age, infirmity, ignorance, illiteracy, mental deficiency in-experience and dependence upon others, may by themselves create disabilities that may render the protection equally necessary. If therefore, it is proved that a woman, although she is not a paradanashin lady, suffers from the disabilities to which a *pardanashin* lady is presumed to be subject, the validity and the binding nature of a deed executed by her have to be judged in the light of those very principles which are applied to a deed by a *pardanashin* lady where the plaintiff was illiterate and when she executed the deed in question she was not only more than sixty years old, but was also hard of hearing and she was described by the defendant themselves as a foolish and rustic woman completely devoid of intelligence and according to the finding of the lower appellate court she was correctly described as such and besides the defendants stood in relation to her in a position of active confidence, held--that there could be no doubt that she was as much entitled to protection of the law as a *pardanashin* lady....."

"It is not necessary to ascertain whether fraud, misrepresentation or undue influence has been established when it has been found that the deed executed by a *pardanashin* lady has not been executed by her voluntarily and after appreciating the nature and import of the transaction, and the latter finding alone is sufficient for holding that the deed is not binding on her and it conveyed no title."

If it is assumed that the alleged document was read out and explained to the

respondent, even then it is not sufficient to discharge the burden which rests upon the appellant who claims right under a deed from aged, illiterate and mentally deficient lady. The appellants have failed to establish that the respondent knew what the consequences of her act were going to be and how they were to affect her. In this case it was necessary to establish that it was explained to the lady that by the execution of the sale-deed she would have to part with a part of her property. There is not an iota of evidence on the record to establish that any one explained these consequences to the respondent. There existed no evidence to establish that the respondent understood the result of what she was doing and any independent advice was available to her at the time of execution of sale deed. The first appellate Court was fully justified in allowing the appeal and decreeing the suit of respondent-plaintiff. No substantial question of law is involved in this appeal."

28. Mr. Yashwant Singh, learned Counsel for the plaintiff has refuted the submissions advanced on behalf of the defendant. He has urged that the principle about reversal of burden to sustain a transaction relating to disposition of property is confined in its application to *pardanashin* women and also to illiterate and ignorant women, not acquainted with the ways of the world. He points out that this principle is not attracted to the case of men, howsoever illiterate, who are by traditions of the society, always exposed to and engaged in worldly business. In short, learned Counsel for the plaintiff says that the principle has to be confined in its application to a particular class of women alone - *pardanashin*, or illiterate and ignorant. It is not at all applicable in case of men, howsoever rustic, ignorant and illiterate.

29. This Court has keenly considered the submissions advanced. At the hearing of this appeal, this Court asked Mr. Vivek Singh to show any authority, where this principle, relating to reversal of burden regarding validity of a transaction entered into by women of a certain class distinguished by their disabilities, has also been extended to men with similar disability. Mr. Vivek Singh very fairly accepted before this Court that he could not lay his hands on any authority, where the principle has been extended to men with disability similar to illiterate and ignorant women. Nevertheless, Mr. Vivek Singh said that the principle ought to be extended to illiterate, ignorant and rustic men, who are not in any way better placed than a woman similarly circumstanced. He urged that non-extension of the principle about reversal of burden, that is designed to protect *pardanashin* women as well as illiterate and ignorant women, to rustic and illiterate men would indeed be an application of the principle that discriminates on the ground of sex alone.

30. Learned Counsel for the defendant has argued that though the principle judicially evolved, like judicial orders, cannot be subjected to judicial review by invoking the writ jurisdiction, under Article 226 or Article 32, but the creed of Article 15 binds all Courts while laying down principles of law governing rights of parties. He submits that legal principles cannot be applied in a manner that they work hostile discrimination against a citizen on the ground of sex alone, though otherwise similarly circumstanced.

31. It would be profitable first to look at the principle about a person's solemn deed, regarding which he/ she says that he/ she signed, understanding it to be

something else. This plea is often described as the mind not accompanying the signatures. It is also familiarly referred to in the world of law as *non est factum*. This plea, on the basis of which the maker of a solemn deed could avoid liability about the disposition made, had its origin in the English Law. The principle finds its class*ic*al statement in the oft-quoted decision of **Byles, J. in Foster vs. Mackinnon, [1869(4) C.P. 704]**. It is held there:

"it is invalid not on the ground of fraud where fraud exists but on the ground that the mind of the signor did not accompany the signature: in other words, that he never intended or contemplated to sign, and, therefore, in contemplation of law never did sign the contract to which his name is appended."

The principle had a long history of evolution in England and was always recognized as distinct and different from a plea to avoid a transaction on the ground of fraud, duress or undue influence. There was, however, no principle about reversal of burden of proof, that obliged the beneficiary of a transaction to prove its due understanding by the maker of a solemn deed, who alleged *non est factum*. The principle about reversal of burden in the case of *pardanashin* women, in the first instance and its later extension to other ignorant and illiterate women, as a distinct class, entitled to that protection in the matter of disposition of their rights in property, was evolved by the Privy Council, bearing in mind disabilities, associated with the members of the beneficiary class.

32. The origin of the principle about reversal of burden regarding transactions entered into with *pardanashin* women and the way it evolved about how that burden was to be discharged, was the subject matter of decision by the Supreme Court in **Mst. Kharbuja Kuer vs. Jangbahadur Rai and others, AIR 1963 SC 1203**. In the said decision, tracing the origin of the rule and laying down by what standard and in what manner that burden is to be discharged, K. Subba Rao, J. (as His Lordship then was) held:

"(5). ..... This proposition, in our view, is clearly wrong and is contrary to the principles laid down by the Privy Council in a series of decisions. In India *pardahnashin* ladies have been given a special protection in view of the social conditions of the times; they are presumed to have an imperfect knowledge of the world, as, by the pardah system they are practically excluded from social intercourse and communion with the outside world. In *Farid-Un-Nisa v. Mukhtar Ahmad, 52 Ind App 342 at p. 350:* (AIR 1925 PC 204 at p. 209), Lord Sumner traces the origin of the custom and states the principle on which the presumption is based. The learned Lord observed:

"In this it has only given the special development, which Indian social usages make necessary, to the general rules of English law, which protect persons, whose disabilities make them dependent upon or subject them to the influence of others, even though nothing in the nature of deception or coercion may have occurred. This is part of the law relating to personal capacity to make binding transfers or settlements of property of any kind."

The learned Lord also points out:

"Of course fraud, duress and actual undue influence are separate matters."

It is, therefore, manifest that the rule evolved for the protection of pardahnashin ladies shall not be confused

with other doctrines, such as, fraud, duress and actual undue influence, which apply to all persons whether they be pardahnashin ladies or not.

(6). The next question is what is the scope and extent of the protection. In *Geresh Chunder Lahoree v. Mst. Bhuggobutty Debia, 13 Moo Ind App 419 (PC)* the Privy Council held that as regards documents taken from pardahnashin women the court has to ascertain that the party executing them has been a free agent and duly informed of what she was about. The reason for the rule is that the ordinary presumption that a person understands the document to which he has affixed his name does not apply in the case of a pardahnashin woman. In *Kali Baksh v. Ram Gopal, 43 Ind App 23 at p. 29 (PC)*, the Privy Council defined the scope of the burden of a person who seeks to sustain a document to which a pardahnashin lady was a party in the following words:

"In the first place, the lady was a pardahnashin lady, and the law throws round her a special cloak of protection. It demands that the burden of proof shall in such a case rest, not with those who attack, but with those who found upon the deed, and the proof must go so far as to show affirmatively and conclusively that the deed was not only executed by, but was explained to, and was really understood by the grantor. In such cases it must also, of course, be established that the deed was not signed under duress, but arose from the free and independent will of the grantor."

The view so broadly expressed, though affirmed in essence in subsequent decisions, was modified, to some extent, in regard to the nature of the mode of discharging the said burden. In 52 Ind App 342 at p. 352: (AIR 1925 PV 204 at p. 210) it was stated:

"The mere declaration by the settler, subsequently made, that she had not understood what she was doing, obviously is not in itself conclusive. It must be a question whether, having regard to the proved personality of the settler, the nature of the settlement, the circumstances under which it was executed, and the whole history of the parties, it is reasonably established that the deed executed was the free and intelligent act of the settler or not. If the answer is in the affirmative, those relying on the deed have discharged the onus which rests upon them."

While affirming the principle that the burden is upon the person who seeks to sustain a document executed by a *pardahnashin* lady that she executed it with a true understanding mind, it has been held that the proof of the fact that it has been explained to her is not the only mode of discharging the said burden, but the fact whether she voluntarily executed the document or not could be ascertained from other evidence and circumstances in the case. The same view was again reiterated by the Judicial Committee, through Sir George Rankin, in *Hem Chandra* v. Suradhani Debya, AIR 1940 PC 134. Further citation is unnecessary. The legal position has been very well settled. Shortly it may be stated thus: The burden of proof shall always rest upon the person who seeks to sustain a transaction entered into with a pardahnashin lady to establish that the said document was executed by her after clearly understanding the nature of the transaction. It should be established that it was not only her phys*ic*al act but also her mental act. The burden can be discharged not only by proving that the document was explained to her and that she understood it, but also by other evidence, direct and circumstantial."

33. The application of the rule, regarding reversal of burden, governing transactions by *pardanashin* women was acknowledged to be extended to illiterate and ignorant women by this Court in **Paras Nath Rai vs. Tilesar Kunwar, 1965 All. L.J. 1080**, which has been followed by this Court in **Laxmi Narain** *(supra).* The extension of the rule to an illiterate widow was acknowledged by this Court in **Manohar Lal vs. Rajeshwari Devi and others, AIR 1977 All 36**.

34. The earliest origin for an extension of the rule about reversal of burden relating to *pardanashin* women to other classes of women, subject to the same disabilities, though not strictly *pardanashin*, had origin in the decision of the **Privy Council in Hodges and another vs. Delhi and London Bank, Limited, (1899-1900) XXVII Indian Appeals 168.** The suit that led to the appeal was about the validity of certain transactions between a traditional Indian women from Kashmir (who had married a British Army Officer) and a Bank, where she had dealt with her shares, assigning them to the Bank, in order to liquidate a loan, if required. The loan appears to have been taken by her son, a certain Colonel Oldham, from the Bank. The loan agreement on the debtor's part was signed by Colonel Oldham, Katherine Hodges and one Captain Craster. The Indian woman had lived as a British Army Officer's wife, and in course of time had become a widow. She had taken the name of Katherine Hodges. In the loan agreement, though she was a party, the loan was taken by her son, Colonel Oldham. Katherine Hodges and Captain Craster were understood to have stood sureties with joint and several liability. In order to secure the loan advanced to her son, Katherine Hodges had handed over to the Bank certain shares in other Banks, through a letter written by her to the Bank. There was also a power of attorney, authorizing the Bank to sell the shares, in order to liquidate the loan, in case conditions of repayment were violated. After her death, there was some default by Colonel Oldham. There are other issues about discharge of sureties, but all that is not relevant. The Bank brought a suit to recover against the parties to the loan agreement personally, and from the estate of Katherine Hodges. On behalf of the estate of Katherine Hodges, there was a very interesting defence that she "was a *quasi purdanashin* lady, of no education, unable to read or write English, and quite incapable of understanding the terms of the three instruments in question; which were not explained to her, and on which she had no independent advice." (quoted verbatim from the report of the judgment). The plea in substance asked for extension of the principle governing cases of dealings by a third party with *pardanashin* women, regarding disposition of their property or interest. In answering the question, Lord Hobhouse, speaking for the Board, held:

"In this part of the case there is no discrepancy in the evidence except on some small immaterial details, and none at all in the findings of the two Courts. It is abundantly clear that Mrs. Hodges was not a *pardanashin*. The term quasi-purdanashin seems to have been invented for this occasion. Their Lordships take it to mean a woman who, not being of the *pardanashin* class, is yet so close to them in kinship and habits and so secluded from ordinary social intercourse, that a like amount of incapacity for business must be ascribed to her, and the same amount of protection which the law gives to *pardanashin* must be extended to her. The contention is a novel one and their Lordships are not favourably

impressed by it. As to a certain well known and easily ascertained class of women, well known rules of law are established, with the wisdom of which we are not now concerned. Outside that class it must depend in each case on the character and position of the individual woman whether those who deal with her are or are not bound to take special precautions that her action shall be intelligent and voluntary, and to prove that it was so in case of dispute. Mrs. Hodges was an independent woman of more than ordinary capacity for, and experience in, dealing with property. It would be very unjust to hold that the Bank was bound to treat her on any other footing." (Emphasis by Court)

35. The principle then, on which the decision of the Privy Council turned, was not to extend the protection to illiterate women or those who could not read, write or understand English as a class, like *pardanashin* women by treating them to be what was dubbed as quasi *pardanashin*. Rather, it was held that extension of the protection, that is to say, reversal of burden, in cases of such women, who were claimed to be illiterate or otherwise not acquainted with the ways of the world or as it is described in later decisions as secluded from the society, would depend in each case on the character and position of the person concerned.

36. In **Sm. Sonia Parshini vs. Sheikh Moula Baksha, AIR 1955 Cal 17,** Debabrata Mukharjee, J, speaking for the Division Bench of the Calcutta High Court, posed the following question, opening the judgment:

"The question raised in this appeal is whether a deed of sale executed by an illiterate woman without the benefit of independent advice is subject to the same jealous scrutiny of the Court as an instrument executed in similar circumstances by a *pardanashin* lady strictly so-called."

His Lordship went on to hold thus:

"(6) The substantial question here is whether in the facts and circumstances proved the plaintiff appellant could be held to be entitled to this protection. This would require examination of the reasons behind the rule protecting transactions in which paradanashin women are concerned. The inhibitions imposed by social conditions upon women of a certain well-defined class bring in their train disabilities which have compelled reversal of the rule that ordinarily a person is to be held to his contract. These disabilities are due largely to illiteracy and ignorance which superadded to restrictions on free movement and contact with the world outside induce a condition of helplessness requiring the utmost vigilance to prevent unfairness in a deal in which she is concerned. The parties to the transaction not being evenly placed, courts called upon to pronounce on such transactions have always jealously guarded against possible unfairness. It has therefore come to be recognised as a rule of law that a party founding on a deed executed in such circumstances has to establish intelligent understanding of the deed and the burden is not discharged by mere proof of the execution of the document. Questions of fraud or undue influence apart, the plain requirement of the law in such cases is clear proof of comprehension of the contents of the document executed by her.

Such protection cannot plainly be the exclusive privilege of the class commonly known as pardanashin. The parda with its inhibitions may be an

additional feature or element in the case but the real reason behind the rule is lack of understanding and appreciation of what an illiterate woman without independent advice, is about. Where ignorance and illiteracy are proved exposing the woman concerned to the danger and the risk of an unfair deal it would, we think, be a perversion of the rule to deny in such case the protection, despite the helplessness of her state, merely on the ground that she is not strictly *pardanashin*. It is quite conceivable that a woman belonging to the *pardanashin* class properly so-called may in spite of the restraints of the parda have sufficient understanding and appreciation of the contents of a document to which she is a party. In such case there can be no question of the protective cloak being thrown around her and she cannot be heard to plead her pardah in avoidance of the transaction. The criterion cannot be the social status implied in the pardah class but the ability to comprehend the contents of the document in question and the means or opportunities of such comprehension. The emphasis must be on the factual understanding of the document with reference to the individual concerned and not upon presumptive disability incidental to mere status. (Emphasis by Court)

37. To the understanding of this Court, this rule has been approved to apply to the identified class of women, called *pardanashin* on a presumptive basis. In dealing with *pardanashin* women, the rule appears to be that the beneficiary of transactions from such women, where they deny the transaction or plead *non est factum*, must discharge the burden to affirmatively prove that the executor of the document understood what the transaction was, as also its terms broadly. Even in case of *pardanashin* women, there are noticeable remarks in the authorities which indicate that in a given case, it could be shown that a particular *pardanashin* woman, though properly a member of that class, was wordly-wise, and, therefore, not entitled to a protection of the rule about reversal of burden. In course of time, the rule has been extended to other ignorant and illiterate women, who are similarly circumstanced and subject to the same disabilities as *pardanashin* women. The *raison d'être* to extend protection of the rule in question as remarked in **Sm. Sonia Parshini,** is not a membership of the class, known as *pardanashin* women, but the presumed inability of members of that class to comprehend the nature of the transaction, they have gone about due to myriad factors, that inhibit their understanding. For the same reason, the protection has been extended to women who are ignorant and illiterate and frequently described as unacquainted with the ways of the world.

38. This Court cannot ignore to refer to a decision of the Madras High Court in **Chidambaram Pillai and 3 others vs. Muthammal and another, (1993) 1 M.L.J. 535**, which undertakes a most comprehensive review about the law on the subject of reversal of burden in case of *pardanashin* women and other illiterate women. The decision in **Chidambaram Pillai** *(supra)* expounds the principle that the protection is available to illiterate women in the same manner as *pardanashin* women. Their Lordships of the Division Bench in **Chidambaram Pillai** *(supra)* have expounded and summarized the principles about extension of the rule regarding reversal of burden to illiterate women, thus:

"16. The pardah system as understood by the courts in India is not the

system of keeping a woman under a veil indoors in zenana, but in seclusion, away from the knowledge of the world, in the sense that they are not ordinarily allowed to interact with the male folk and are kept away from social intercourse and communion with the outside world. The view of the Lahore Court in the case of *Favvar-ud-din v. Kutab-ud-Din1* had almost worked as an alarm for the courts to develop a sense that any strict meaning to parda was going to exclude a greatly deprived section of the society from the protection cloak of the law, namely, the illiterate women and other women having such infirmities that they practically live without any social intercourse and communion with the outside world. The judicial consensus, as we have already noticed, has been expressed thus:--

"The rules regarding transaction by the *Pardanashin* apply equally to illiterate women though they may not be in a strict sense *Pardanashin*."

A *Pardanashin* may not be illiterate, but she still may be ignorant in the sense that she has an imperfect knowledge of the world, and she is practically excluded from social intercourse and communion with the outside world. Her ignorance is the curse of a social usage that womenfolk depend upon malefolk for transaction of their business with the outside world. Thus, not all women, but only those who are practically excluded from social intercourse and communion with the outside world fall in this category. If it is for this reason that they are taken as persons suffering from disabilities which make them dependent upon or subject to the influence of others, the illiterate women who, for the reason of social compulsion are required to move out to work in the fields and elsewhere for livelihood, cannot be said to be less disabled and deprived. Even if they are intelligent to know where to go and how to earn their livelihood, yet they cannot read anything nor write anything, and unless told about the contents by others, will not know what the document contains. To the extent the character, content and the effect of the document are concerned, she has to be presumed to be ignorant by sheer illiteracy, the curse which is still pervading the ancient society particularly the women living in this part of the country, a fact about which, we think, we are competent to take judicial notice. We find ourselves in complete agreement with the view that the special cloak of protection applied to *Pardanashin* women has to be applied to illiterate women as well."

(emphasis by Court)

39. The decision in **Chidambaram Pillai** *(supra)* is remarkable in the sense that it sheds light on the very pertinent, but at the same time very ignored question that Mr. Vivek Singh has mooted. It is about the application of the rule as to reversal of burden in case of a transaction done by a man, who is illiterate; one who cannot read, write or even sign his name. To add, he may be a rustic, engaged in a rural occupation, like that of an agricultural labourer. Is he not entitled to say that he never understood the nature of the transaction, to which he has affixed his mark? Is he not entitled to say that denied development of the human faculty by illiteracy absolute, and living the life of a rustic in a remote village, engaged in some traditional and simple occupation, like that of an agricultural labourer or a village artisan, he is entitled to the benefit of the rule regarding reversal of burden? The decision in **Chidambaram Pillai** *(supra)* carries some very pertinent remarks, bearing reference to rare authority. Mishra

J., speaking for the Division Bench in **Chidambaram Pillai** *(supra)* observed:

"17. When we have said as above, we should not be understood to say that in a given case, a male cannot be protected by such a rule. In **Omanhene Kwamin Bassayin** *v. Omanhene Bendentu2* the Privy Council applied such a rule of burden of proof upon the defendant in the case of a person who was illiterate and who pleaded that the contents of the document were not read over and explained to him. A learned Judge of this Court in *Ramaswami Jadaya Gounder v. V.T. Ilaya Pillai3* has dealt with a case of a person who knew to sign his name, but said, he had no knowledge of the contents of the document to which his signatures were taken, and he was not informed of the contents of the documents as the documents were not read over or explained to him. The learned Judge has said:--

"In this case, the plea of the plaintiff is that he is illiterate and that apart from putting his signature he does not know how to read or write. In the circumstances the burden is on the plaintiff to prove that the defendant had executed the document."

It is possible to say that the special protection as the courts have described this rule, is a modification of rule of *non est factum* properly woven and wherever needed chistled to suit the Indian conditions. Since in the instant case, we are concerned with a woman who is an illiterate, we are in no need to say anything further.

....."

40. The last quoted remarks in **Chidambaram Pillai** are of great significance. The opening words there, put differently, are that a male can be protected by the rule regarding reversal of burden in a given case. It is also remarked that this rule regarding reversal of burden is a modification of the rule of *non est factum*, to borrow the words of their Lordships in **Chidambaram Pillai**, "properly woven and wherever needed chistled to suit the Indian conditions". It is also remarked that this modification of the rule has been described by Courts as a special protection. Now, these remarks in **Chidambaram Pillai** are in the context of a male, who is as disadvantaged, as disabled, as handicapped in understanding the consequences or the nature of the solemn transaction as a *pardanashin* women, or an illiterate and ignorant women. But, the most important words here are that the protection of this rule can be extended to a male "in a given case'.

41. This Court is of opinion that the remarks in **Chidambaram Pillai** in the context of illiterate men or those under disability of the kind described above to a protection of the rule regarding reversal of burden, do not represent the ratio there; these are most certainly *obiter*. This is so because **Chidambaram Pillai** was not at all a case about an illiterate, ignorant or rustic man, asking for a protection of the Rule. The remarks though *obiter* are still sterling. It must also be pointed out that to justify the remarks under reference, the Court in **Chidambaram Pillai** has referred to two authorities, where the rule regarding reversal of burden was applied to men, who could not at all understand the nature of the document, to which they appended their mark. These cases would be referred to a little later in this judgment.

42. To the understanding of this Court, the significance of the words in **Chidambaram Pillai** that the rule

regarding reversal of burden could even apply to a male "in a given case', signify that an illiterate, ignorant and rustic man, like an illiterate and ignorant woman, cannot claim benefit of application of the rule on a presumption. There is no rule that illiterate, ignorant and rustic men, like illiterate and ignorant women, would always be entitled to the protection of the rule about reversal of burden, when the issue is about their liability on a solemn document, executed by them regarding disposition of property etc. In case of men, it has to be established by one who seeks benefit of the rule by evidence *alluendi* that he is on account of illiteracy, ignorance and his utter unfamiliarity with the ways of world put against the nature of the transaction, entitled to a protection of the rule.

43. To better understand the reasoning behind this conclusion, one has to bear in mind why this rule was invented to protect Indian women of a particular class about their transactions. The original rule, that was designed to protect *pardanashin* women alone, going by their particular life style and the social conditions, prevalent in India at the time, was based on practical sagacity. The idea was that women who were living a life of such isolation that made them utterly ignorant about wordly matters, ought to be protected. The rule was extended further to protect a larger class of Indian women, who though not *pardanashin*, were so illiterate and ignorant, that placed them in a position of identical disadvantage as *pardanashin* women, properly so called. The disability was not inferred from illiteracy alone or membership of the class called *pardanashin* merely because the person belonged to a particular class or was disabled in a particular matter. The disability entitling those class of women to a protection of the rule on a presumption, arose from the prevalent conditions in India, where women were kept out of most affairs of the world, if they happened to fall in the class of women described. It was never thought to be a principle that a *pardanashin* woman or an illiterate and ignorant woman, who otherwise had business capability, would still be protected by the rule. The rule is, thus, no more than a recognition about a certain class of Indian women in society, who were under disability in the matter of understanding affairs of the world.

44. Men to the contrary, have never been under such a disability in this country, or for that matter elsewhere. It must be remarked here, to answer a submission of Mr. Vivek Singh, that the constitutional guarantee against discrimination on ground of sex carries with in it, an acknowledgment of the fact that women on account of historical and social conditions are a special class, in whose favour the State may take affirmative action by way of reservation etc. without inviting the vice of hostile discrimination. This is what Article 15 of the Constitution postulates. Therefore, the principle judicially evolved regarding reversal of burden on a presumption regarding a particular class of women in India, entitling them to a protection of the rule, is no more than a recognition of the hard historical and social realities in the country. At the same time as already said, a man can ask for protection of the rule regarding reversal of burden, if he can show by the standard indicated hereinabove, that he is entitled to similar protection, as women of the specific classes are. A man, however, is not entitled to the protection merely because he is ignorant and illiterate. Men in this country, howsoever illiterate, have been at the helm

of affairs of the society and guided it. Men, in fact, by the status flowing from their sex, have historically and traditionally formed the mainstream of society and have managed its affairs. The law, therefore, ascribes to them an understanding of their actions generally, irrespective of the fact whether they are illiterate, ignorant or rustic. After all men have managed for centuries whatever the contemporary society has been mostly about. It is, thus, a hard social reality, historically testified to, that would work to exclude a presumptive application of the rule regarding reversal of burden to illiterate, ignorant and rustic men, the way it has been extended to illiterate and ignorant women.

45. This Court must notice the decision of the Privy Counsel in **Omanhene Kwamin Bassayin vs. Omanhene Bendentu II, AIR 1937 PC 274.** The decision appears to have arisen on appeal from West Africa about a territory dispute between two chiefdoms of Aowin and Upper Wassaw. There was a dispute about the border of the two chiefdoms. It appears that demarcation between the two chiefdoms had been done through arbitration, in consequence of an agreement to refer, between the two chiefdoms. Aowin assailed the demarcation on ground that the contract to refer to arbitration had not been properly explained and interpreted to the Omanhene of Aowin, when he affixed his mark to it. The plea was that the Omanhene of Aowin could not understand the true import of the contract as he did not know the English language. Aowin had claimed in the action instituted that the boundaries between the two territories was a River Tanu, that ought to be declared. Damages on account of trespass were also claimed. The claim was decreed by the Courts in West Africa, and that is how the verdict was appealed to their Lordships of the Privy Council.

46. The relevant question about the law that fell for consideration was whether the Omanhene of Aowin would be bound by the contract that he marked, in the absence of the document being explained and interpreted to him. This was because the Omanhene did not know the English language. It was held that the onus lay upon Upper Wassaw to establish "that the document had in fact been properly explained and interpreted so as to make the Omanhene of Aowin understand its real import". The rule about reversal of burden in this case was, therefore, applied to a man, who was a high ranking traditional Chief in West Africa, because he did not understand the English language, in which the document was written and by which he was claimed to be bound. It may be mentioned here that an Omanhene, according to the New Shorter Oxford English Dictionary (volume 2) Third Edition, 1993 reprint/published by the Oxford University Press Inc., New York, means, "Among the Ashanti people: a paramount chief of a state or district"

47. Now in this case, one may infer the disabilities about understanding of a legal document written in English by a traditional Chief in West Africa, in the early part of the 20th Century. The decision to apply the rule regarding reversal of burden was apparently taken because the traditional West African Chief did not know the English language. It was apparently in the circumstances of the country, the social conditions, lack of understanding the English language, the nature of the document and its consequences on the entire chiefdom that this rule was apparently applied. This Court may hasten

to add that on the express words of the decision, the rule was applied because the traditional chief did not understand the English language. However, the other factors, that would have entered judgment, cannot be missed. From the decision in **Omanhene Kwamin Bassayin**, no principle can be inferred that in case of all illiterate, ignorant and rustic men, burden of proof must be reversed about their title deeds, when denied by the executant about an understanding of its contents.

48. In **Ramaswami Jadaya Gounder (died) and another vs. V. T. Elaiya Pillai and another, AIR 1972 Mad 336,** the rule was indeed applied to a case, where a compromise decree entered in a suit on the basis of an agreement was assailed by one of the parties saying that he only knew how to sign his name and, therefore, had no understanding of the contents of the document, to which his signatures were put. It was claimed that he was not informed of the contents of the document, the document being not read over or explained to him. It was held by the lower Court, where these proceedings were brought, that since the party alleging did not say that he had signed blank sheets, but a completed document, the burden was on him to prove this case. There could be no reversal of burden. Following the decision in **Omanhene Kwamin Bassayin**, it was held by the Madras High Court in **Ramaswami Jadaya Gounder** *(supra)*:

"3. In this case, the plea of the plaintiff is that he is illiterate and that apart from putting his signature he does not know how to read or write. In the circumstances, the burden is on the plaintiff to prove that the defendant had executed the document. The learned counsel for the respondents submitted that in the memorandum of grounds to the revision petition, the plea taken was that the petitioner executed the blank sheet of paper end this is contrary to the plea taken in the trial. The learned counsel is right, but the lower Court was passing the order on the pleadings before it where the defendant submitted that he was illiterate and that the contents of the document were not read over or explained to him. In the circumstances, the decision in AIR 1937 PC 274 is applicable and it has to be held that the burden is on the defendant to prove that the plaintiff had executed the compromise agreement. The petition is allowed and the defendant will be directed to begin and prove his case of execution of the document by the plaintiff."

49. This Court with the greatest respect is of opinion that the principle in **Ramaswami Jadaya Gounder** *(supra)* is too widely worded. It virtually extends the benefit of the rule about reversal of burden to every illiterate man, just by the factum of his illiteracy. It virtually places at par an illiterate man with an illiterate and ignorant women without anything more to be proved, about the maker's disability in the understanding of its contents or the ways of the world. The proposition in **Omanhene Kwamin Bassayin** in the considered opinion of this Court does not warrant a mathematical application or extension of the rule about reversal of burden to all illiterate men in India. This Court, therefore, with utmost respect is not in agreement with the principle in Ramaswami Jadaya Gounder *(supra)*. This is, however, not to say that in a given case, where an ignorant and illiterate man demonstrates by the totality of the circumstances and the transaction that he has entered into, his utter disability to understand the nature of the transaction and

the contents of the document, the Court would not be entitled to invoke the rule and reverse the burden. It cannot be, however, applied on a presumption in the same manner as it is done in the case of *pardanashin* women and certain other illiterate and ignorant women.

50. In the present case, the defendant has not led any evidence to show that he is a man, utterly unconnected with wordily affairs. He has not said in his evidence anything that may project him to be a simpleton, leading a secluded life away from wordly intercourse. Rather, he has indicated his inclination to do business, which he also says that he undertook. He claims that he took a loan in the sum of Rs.15,000/- from the plaintiff to invest in business. If those are his circumstances and engagements in life, it cannot be inferred, on the basis of his illiteracy alone, that he is entitled to a protection of the rule about reversal of burden in the manner that it is applied to *pardanashin* women and certain other traditional women, who are illiterate and ignorant. The Lower Appellate Court has refused to apply the rule of reversal of burden, and, in the opinion of this Court, rightly so. Accordingly, substantial question of law no.4 is decided in the negative, and it is held, that burden of proof has not been wrongly shifted upon the defendant for the reasons indicated.

51. The next substantial question of law that the defendant has pressed is the one framed as substantial question of law no.6. A reading of the question shows that there appears to be a clerical error in not mentioning the word "not', between the words "was' and "for', occurring in the last but one line of the question. Learned Counsel for both parties do not dispute that, that is the purport of this substantial question of law. This Court, therefore, proceeds on the assumption that the substantial question of law under reference is to the effect whether the Court could decree specific performance, where the evidence proved that the intention of the executor was not to execute a sale deed, but to furnish security for the loan.

52. On the pleadings and case of parties before the Courts below, this question does not really seem to arise in the present case. The case of the defendant throughout has been that he executed the suit agreement, mistaking the character of the document as an instrument, creating a security for the loan. He never understood it to be an agreement to sell. Once that is the case of the defendant and that is how the two Courts below have dealt with the matter, there is little scope for the defendant to say that the document though executed as an agreement to sell, was in fact intended to serve as a security for the loan advanced. This kind of a plea or case arises where the defendant acknowledges the character of the document as an agreement to sell, attaching to the property, subject matter thereof, but says that the parties never intended or contemplated a sale; rather, the parties intended the agreement to serve as a security for the loan advanced. This kind of a plea by the defendant, is not at all there.

53. The issues framed by the Trial Court also do not indicate that the parties ever suited that case before the Courts below. Before the Lower Appellate Court also, a case of this kind was not even remotely urged. It is before this Court, for the first time, that a ground has been taken to the effect that the Courts below have not recorded any finding as to whether the intention of the defendant while executing

the suit agreement was to execute a sale deed, and not a security for the loan. It has been urged through that ground that in the absence of a finding on the said issue, specific performance cannot be granted. The present substantial question of law is referable to the aforesaid ground in the memo of appeal.

54. Learned Counsel for the defendant has urged that this substantial question does arise in this case, inasmuch as the Supreme Court in **Tejram vs. Patirambhau, (1997) 9 SCC 634** has held that where out of the total agreed sale consideration of Rs.50,000/-, a sum of Rs.48,000/- was paid by the vendee and the balance of Rs.2000/- was required to be paid within one year, the suit being instituted a month prior to the expiry of three years from the date of agreement, it could be inferred that the transaction was not about a contemplated sale. It was about creating a security in the form of an agreement to secure repayment of the loan. Apart from the fact that there were other circumstances in **Tejram** *(supra)*, that led their Lordships to the conclusion that the transaction was not an agreement to sell, but merely a security for the loan, like the vendee there being a professional money lender, the principles there would otherwise also not apply to this case.

55. Here, the suit agreement made provision for the sale deed to be executed within a year of the said agreement dated 24.06.1989, but the plaintiff acted within a few months as soon as he had garnered the remainder of funds. A notice to execute the sale deed was got issued to the defendant on 17/19.03.1990 and served on 21.03.1990. The suit was instituted on 31.05.1990. The fact that of the entire agreed sale consideration of Rs.50,000/-, a sum of Rs.45,000/- was paid in advance, leaving a remainder of Rs.5000/-, does not show that the transaction was not *bona fide* or one to serve as security for a loan. Rather, the promptness with which the plaintiff acted in the matter, shows that once he had expended all his resources in paying the substantial part of the sale consideration, that is to say, a sum of Rs.45,000/- out of agreed sale consideration of Rs.50,000/-, he needed breathing time to arrange the remainder of funds of Rs.5000/- and more to defray expenses of execution and registration. He could do so within a period of few months, and, thereafter, acted with all promptitude. Moreover, a reading of the terms of the suit agreement, besides considering the testimony of parties in the witness box, a case about the suit agreement, serving as a security for repayment of the loan, is not even remotely made out. The terms of agreement are very material on the point of determining the true nature of the transaction as held by the Supreme Court in **Madhukar Nivrutti Jagtap and Others vs. Smt. Pramilabai Chandulal Parandekar and Others, 2019 SCC OnLine SC 1026**. In **Madhukar Nivrutti Jagtap** *(supra)*, it has been held:

"34. There had not been even a remote suggestion in the documents in question that there was any loan or borrowing transaction between the parties and the said documents were being executing towards security. On the contrary, the recitals and stipulations in the said agreements had only been in affirmation of the agreement for sale and of the receipt of part payment from time to time against the sale consideration. Of course, defendant No. 1, while deposing as DW1 attempted to suggest that he had approached the plaintiff No. 3 seeking loan

to the tune of Rs. 5000-5500/- through a broker; and, at the instance of the plaintiff No. 3, executed the document in question as security while taking loan at the interest rate of 1 per cent per month. This defendant also admitted having obtained another sum of Rs. 2,000/- from the plaintiff No. 1 and having put an endorsement on the document in question. He, however, denied having received any other amount or having delivered possession of the suit property. The evidence on the part of the defendants in this case remains rather vague and sketchy; and it is difficult to accept the oral assertions of defendant No. 1 as against the recitals in the agreements."

56. In the present case, there is not even a hint in the testimony of the parties in the witness box that any of them came up with a case that the suit agreement though executed as such, was in fact meant to serve as a security for repayment of the loan. The case of the defendant is about the character of the suit agreement being not at all understood by the defendant when he appended his mark to it. This case cannot coexist with the suit agreement, serving as a security. This is so, because the two are not merely alternate pleas, that can be urged together, but ones that cannot coexist. Here as already said, the case about the suit agreement being there, but intended to serve as a security for a loan, has not been pleaded by the defendant and, therefore, not determined by the Courts below. The present substantial question of law, therefore, does not at all arise. Now, this Court may proceed to consider substantial question of law no.7 involved in this appeal.

57. Learned Counsel for the defendant has submitted that the discretion to grant specific performance is not to be exercised even in cases where the contract is not voidable, because it is not vitiated by fraud, coercion or undue influence. It is to be refused in such cases, if granting specific performance is not consistent with equity and good conscience. It is also urged that the conduct of the plaintiff is an important matter, particularly, where he is dealing with a person who is disadvantaged, as in this case he says, due to illiteracy. In this connection, learned Counsel for the defendant has placed reliance upon a decision of this Court in **Ram Das vs. Jagat Singh (Deceased) Thr. LRs, (2015) 4 All LJ 46.** He has called attention of the Court to paragraphs 33, 34, 35, 36 and 43 of the report, where it is held:

"33. It is also well settled that a discretion exercised by the Trial Court will not be interfered in appeal unless it has been exercised perversely, arbitrarily, capriciously, unreasonably or against judicial principles.

34. As stated above, the circumstances as mentioned in the section itself are not exhaustive. It is not possible to lay down the circumstances and the Court can exercise its discretion against the plaintiff. However, they must be such that the representation by or the conduct or neglect of the plaintiff is directly responsible for including the defendant to change his position to his prejudice or such as to bring about situation when it would be inequitable to give such a relief.

35. It is also settled that under the specific performance of a contract, it is not vitiated by fraud or misrepresentation, can not be granted if it could give an unfair advantage to the plaintiffs, and where the purpose of the contract would involve some hardship to the defendant, which he did not foresee.

36. It is also a Court's discretion to grant specific performance, which is not exercised if the contract is not "equal and

fair'. Even where the contract is not voidable because the conduct of the defendant falls short of fraud, coercion or undue influence such as to justify rescission is shown, the Court may still not enforce the contract if it would not be consistent with equity and good conscience to do so.

43. In the Case of *K. Narendra v. Riviera Apartments Private Ltd.* [JT 1999 (4) SC 428 : 1999 (37) ALR 9 (Sum.) (SC).] , it has been held by the Supreme Court that the jurisdiction to decree specific performance is discretionary and the Court is not bound to grant such relief merely because it is lawful to do so and that the discretion of the Court ought not to be arbitrary in nature but must be based upon sound and reasonable judicial principles, which may be capable of correction by the Superior Court. In short, grant of decree of specific performance is not automatic even if the agreement is found to be duly executed and the plaintiff ready and willing to perform his part of the agreement but such grant of decree is dependent upon principles of justice, equity and good conscience."

58. Learned Counsel submits that in this case the plaintiff was dealing with an absolutely illiterate man, who could not understand a word of what was scribed in the agreement. The stand of the defendant has been that nothing was read out or explained to him, either by the learned Advocate, who drafted the agreement or in the office of the Sub-Registrar. It is his submission that if the said fact be not proved to the hilt so as to render the contract void, his disability on account of illiteracy is a valid consideration, pitted against a well advised plaintiff, to refuse the discretionary relief of specific performance.

59. On the other hand, learned Counsel for the plaintiff has urged that the discretion ought to be exercised in favour of specific performance, because the plaintiff has performed almost the entire part of the contract by paying the due sale consideration to the defendant at the time of execution of the suit agreement. He points out that ninety percent of the sale consideration has been paid to the defendant, leaving a minuscule part of the plaintiff's obligation to be discharged.

60. This Court has considered the submissions advanced and perused the record.

61. Section 10 of the Specific Relief Act, 1963 [as it stood prior to its amendment vide Act no.18 of 2018 (w.e.f. 01.10.2018)] is quoted below:

"10. *Cases in which specific performance of contract enforceable.*--Except as otherwise provided in this Chapter, the specific performance of any contract may, in the discretion of the court, be enforced--

(a) when there exists no standard for ascertaining the actual damage caused by the non-performance of the act agreed to be done; or

(b) when the act agreed to be done is such that compensation in money for its non-performance would not afford adequate relief.

Explanation.--Unless and until the contrary is proved, the court shall presume--

(i) that the breach of a contract to transfer immovable property cannot be adequately relieved by compensation in money; and

(ii) that the breach of a contract to transfer moveable property can be so relieved except in the following cases--

(a) where the property is not an ordinary article of commerce, or is of special value or interest to the plaintiff, or consists of goods which are not easily obtainable in the market;

(b) where the property is held by the defendant as the agent or trustee of the plaintiff."

62. A perusal of explanation (i) of Section 10 shows that the law presumes that the breach of a contract to transfer immovable property, cannot be adequately relieved by compensation in money. The aforesaid provision introduces a fundamental rule governing breaches of contract regarding sale of immovable property. It is a remedy provided by statute, that has origins in the old equity jurisdiction in England. Section 73 of the Contract Act postulates damages for the breach of a contract that would include breach of a contract to sell immovable property. The Rule in Section 73 represents the old common law remedy in England for the breach of a contract. In India, as is well known, the source of both remedies are traceable to statutes. But as indicated earlier, the historical origins are different and traceable to two different jurisdictions in England that existed at one time: Common Law and Equity. Equity had its own rules, which have now made their way into statutes. Section 10 provides the fundamental rule about a presumption in favour of the specific performance, so far as contracts governing sale of immovable property are concerned. Section 16(c) details what are known as personal bars to relief. These are traceable not to the idle words of the contract, but the conduct of parties post formation of the contract and until commencement of action. Section 16(c) reads:

"16. Personal bars to relief.--Specific performance of a contract cannot be enforced in favour of a person--

(a) x x x x

(b) x x x x

(c) who fails to prove] that he has performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him, other than terms the performance of which has been prevented or waived by the defendant.

Explanation.--For the purposes of clause (c),--

(i) where a contract involves the payment of money, it is not essential for the plaintiff to actually tender to the defendant or to deposit in court any money except when so directed by the court;

(ii) the plaintiff must prove aver performance of, or readiness and willingness to perform, the contract according to its true construction.

63. The law relating to 'readiness' and 'willingness' to be proved by the plaintiff is well settled. 'Readiness' refers to the financial capacity of the person obliged to perform his part of the contract, whereas 'willingness' refers to his mental state or psychological inclination to perform it. So far as readiness and willingness are concerned, there is no substantial question about it raised before this Court, as such. It only arises in the context whether specific performance could be granted as a matter of course, without any consideration by the Court of evidence, facts and circumstances to exercise discretion in favour of the plaintiff.

64. The law requires that a plaintiff in order to entitle him to the relief of specific performance must show his bona fides throughout, and not just a breach of

contract by the defendant. These bona fides are to be judged on the parameters of 'readiness' and 'willingness', and much more. It is the conduct of the plaintiff on a wholesome basis, vis-a-vis the contract and his dealings with the defendant, that is relevant. It is also relevant that he must come to Court with clean hands, candidly disclosing his case and proving it by untainted evidence. This requirement, that would govern discretion of the Court to grant specific performance, has been exposited in the decision of the Supreme Court in **Aniglase Yohannan vs. Ramlatha and others, (2005) 7 SCC 534,** where it is held:

"12. The bas*ic* principle behind Section 16(c) read with Explanation (ii) is that any person seeking benefit of the specific performance of contract must manifest that his conduct has been blemishless throughout entitling him to the specific relief. The provision imposes a personal bar. The Court is to grant relief on the basis of the conduct of the person seeking relief. If the pleadings manifest that the conduct of the plaintiff entitles him to get the relief on perusal of the plaint he should not be denied the relief."

65. The discretion to grant specific performance, is governed by Section 20 of the Specific Relief Act, 1963 [as it stood prior to its amendment vide Act no.18 of 2018 (w.e.f. 01.10.2018)]. Section 20 of the Specific Relief Act, is extracted below:

"20. *Discretion as to decreeing specific performance*.--(1) The jurisdiction to decree specific performance is discretionary, and the court is not bound to grant such relief merely because it is lawful to do so; but the discretion of the court is not arbitrary but sound and reasonable, guided by judicial principles and capable of correction by a court of appeal.

(2) The following are cases in which the court may properly exercise discretion not to decree specific performance--

(a) where the terms of the contract or the conduct of the parties at the time of entering into the contract or the other circumstances under which the contract was entered into are such that the contract, though not voidable, gives the plaintiff an unfair advantage over the defendant; or

(b) where the performance of the contract would involve some hardship on the defendant which he did not foresee, whereas its non-performance would involve no such hardship on the plaintiff; or

(c) where the defendant entered into the contract under circumstances which though not rendering the contract voidable, makes it inequitable to enforce specific performance.

Explanation I.--Mere inadequacy of consideration, or the mere fact that the contract is onerous to the defendant or improvident in its nature, shall not be deemed to constitute an unfair advantage within the meaning of clause (a) or hardship within the meaning of clause (b).

Explanation II.--The question whether the performance of a contract would involve hardship on the defendant within the meaning of clause (b) shall, except in cases where the hardship has resulted from any act of the plaintiff, subsequent to the contract, be determined with reference to the circumstances existing at the time of the contract.

(3) The court may properly exercise discretion to decree specific

performance in any case where the plaintiff has done substantial acts or suffered losses in consequence of a contract capable of specific performance.

(4) The court shall not refuse to any party specific performance of a contract merely on the ground that the contract is not enforceable at the instance of the other party."

66. What the learned Counsel for the defendant has urged is an argument based on Clause (c) of sub-Section (2) of Section 20 of the Act, last mentioned. It is also based on the principle embodied in sub-Section (1) of Section 20, which makes grant of specific performance, a discretion of the Court, though to be exercised on settled principles.

67. This Court has considered the case that the defendant has attempted to make out. He has urged it to be inequitable to enforce specific performance given the disability of the defendant, arising from his illiteracy. This Court has looked into the evidence and the findings of the two Courts below. It is of paramount importance to note that it is proven by the plaintiff's evidence generally, and particularly, by the Sub-Registrar's endorsement on the suit agreement that the defendant received before the Sub-Registrar a sum of Rs.15,000/-, and further, that he acknowledged that he had received a sum of Rs.30,000/- as an advance. This endorsement by the Sub-Registrar on the suit agreement has been perused by the Court. It is available on record in original. It is an endorsement dated 24.06.1989. The suit agreement also bears the photograph of the defendant as well as the plaintiff. There is a presumption about the genuineness of the Sub-Registrar's endorsement. Since the suit agreement bears the defendant's photograph, it is safe to presume that nobody else made this acknowledgment before the Sub-Registrar. It is, thus, evident that there is evidence of a highly dependable character, available on record to show that the defendant had received a total sum of Rs.45,000/- from the plaintiff in terms of the suit agreement, at the time when this agreement was executed. The endorsement also indicates that the defendant had signed it after understanding its contents. About that part also, there is a presumption as to its correctness.

68. In the evidence of witnesses, there is a consistent affirmation of fact that Rs.30,000/- were received by the defendant as earnest back home on 22nd June, 1989, two days before the suit agreement was executed. It has been remarked by the Lower Appellate Court that the defendant's case is that he had received Rs.15,000/- only that day at the plaintiff's home, but he accepts that it was received before Ramesh Singh, Ram Shanker Singh, Jagdish Singh and Natthu Singh. Ramesh Singh and Ram Shanker Singh, being the plaintiff and the plaintiff's uncle, Jagdish Singh and Natthu Singh could well be called by the defendant to prove that he had received as earnest a sum of Rs.15,000/-, and not Rs.30,000/-. It has also been remarked by the Lower Appellate Court that the defendant has not clarified why these two witnesses were not summoned by him to prove his case.

69. This Court need no go into the details of these findings. All that this Court is required to examine is whether the Lower Appellate Court's findings about the issue of payment of Rs.45,000/- in two parts, as claimed by the plaintiff, is based on relevant evidence and draws reasonable conclusions. About that, this Court has no doubt. Moreover, the defendant has not

adduced any evidence to rebut the presumption that attaches to the Sub-Registrar's endorsement, above described.

70. Once this Court is assured that the Lower Appellate Court has rightly concluded that the defendant has received a sum of Rs.45,000/-, out of the total sale consideration of Rs.50,000/- agreed, the scales for the exercise of discretion in favour of specific performance are decisively tipped. The fact that the defendant has received a sum of Rs.45,000/- for one part, excludes any doubt about the defendant being inequitably dealt with by the plaintiff on account of his illiteracy etc. At the same time, the fact that the defendant has received a sum, that accounts for ninety percent of the sale consideration, places the plaintiff in a position where he has done substantial acts in performance of his part of the contract. Nothing remains to be done on the plaintiff's part, except payment of the balance of Rs.5000/- and meeting the expenses of execution and registration of the conveyance. The doing of all substantial acts in performance of the plaintiff's part of the contract is a relevant consideration, under sub-Section (3) of Section 20 of the Specific Relief Act.

71. So far as equities go, a fact which the learned Counsel has impressed upon this Court to work in the defendant's favour at this stage, is the escalation in prices. It is decisive according to him. There may be cases where price rise may be decisive, but not in every case. In this connection, reference may be made to a decision of the Supreme Court in **P. D'Souza vs. Shondrilo Naidu, (2004) 6 SCC 649.** In P. **D'Souza** *(supra)*, the issue about the relevance of escalation in price was considered by the Court in the context of discretion to grant specific performance. It was held in **P. D'Souza** *(supra)* thus:

"39. It is not a case where the defendant did not foresee the hardship. It is furthermore not a case that non-performance of the agreement would not cause any hardship to the plaintiff. The defendant was the landlord of the plaintiff. He had accepted part-payments from the plaintiff from time to time without any demur whatsoever. He redeemed the mortgage only upon receipt of requisite payment from the plaintiff. Even in August 1981 i.e. just two months prior to the institution of suit, he had accepted Rs 20,000 from the plaintiff. It is, therefore, too late for the appellant now to suggest that having regard to the escalation in price, the respondent should be denied the benefit of the decree passed in his favour. Explanation I appended to Section 20 clearly stipulates that merely inadequacy of consideration, or the mere fact that the contract is onerous to the defendant or improvident in its nature would not constitute an unfair advantage within the meaning of sub-section (2) of Section 20.

40. The decision of this Court in *Nirmala Anand* [(2002) 5 SCC 481] may be considered in the aforementioned context.

41. Raju, J. in the facts and circumstances of the matter obtaining therein held that it would not only be unreasonable but too inequitable for courts to make the appellant the sole beneficiary of the escalation of real estate prices and the enhanced value of the flat in question, preserved all along by Respondents 1 and 2 by keeping alive the issues pending with the authorities of the Government and the municipal body. It was in the facts and circumstances of the case held: (SCC p. 501, para 23)

"23. ... Specific performance being an equitable relief, balance of equities have also to be struck taking into account all these relevant aspects of the matter, including the lapses which occurred and parties respectively responsible therefor. Before decreeing specific performance, it is obligatory for courts to consider whether by doing so any unfair advantage would result for the plaintiff over the defendant, the extent of hardship that may be caused to the defendant and if it would render such enforcement inequitable, besides taking into (*sic* consideration) the totality of circumstances of each case."

42. The Court for arriving at the said finding gave opportunities to the parties to settle the matter and Respondents 1 and 2 were prepared to pay up to Rs 60 lakhs as against the demand of the appellant to the tune of rupees one-and-a-half crores which was subsequently reduced up to Rs 120 lakhs. In view of the respective stands taken by the parties, the Court inter alia directed Respondents 1 and 2 to pay a sum of Rs 40 lakhs in addition to the sum already paid by them.

43. Bhan, J., however, while expressing his dissension in part observed: (SCC pp. 506 & 507, paras 38 & 40)

"38. It is well settled that in cases of contract for sale of immovable property the grant of relief of specific performance is a rule and its refusal an exception based on valid and cogent grounds. Further, the defendant cannot take advantage of his own wrong and then plead that decree for specific performance would be an unfair advantage to the plaintiff.

***

40. Escalation of price during the period may be a relevant consideration under certain circumstances for either refusing to grant the decree of specific performance or for decreeing the specific performance with a direction to the plaintiff to pay an additional amount to the defendant and compensate him. It would depend on the facts and circumstances of each case."

45. The said decision cannot be said to constitute a binding precedent to the effect that in all cases where there had been an escalation of prices, the court should either refuse to pass a decree on specific performance of contract or direct the plaintiff to pay a higher sum. No law in absolute terms to that effect has been laid down by this Court nor is discernible from the aforementioned decision."

72. It would, thus, appear that there is no straitjacket formula that governs the exercise of discretion to grant or refuse specific performance on account of price escalation. In this case, what is most pertinent, is that the suit was instituted promptly and within a year of the suit agreement. In fact, it was instituted during time contemplated by the agreement, which was one year, once the plaintiff noticed refusal. This adds to the bona fides about his claim and strengthens entitlement to the relief of specific performance that he seeks.

73. The suit, thus, instituted on 31.05.1990, was decided by the Trial Court on 03.02.1992. The plaintiff loosing before the Trial Court, promptly lodged an appeal. The appeal was filed to the District Judge on 03.03.1992. The appeal was decided on 31.08.1992. The Lower Appellate Court on 31.08.1992 decreed the suit. Now, the defendant filed the present appeal before this Court on 15.02.1993. It was admitted to hearing on 16.02.1993 and the decree stayed till further orders. Thus, the plaintiff secured the decree before the Lower Appellate Court within a span of about two

years and a half. The long lapse of time during which the decree has remained in limbo is on account of pendency of this second appeal before this Court, preferred by the defendant.

74. There is nothing to show that the plaintiff has decisively contributed to this delay in any manner. The price rise, if that be a factor, during these twenty-seven years that this second appeal by the defendant has remained pending, cannot be capitalized upon to sway this Court's discretion. This Court is assured that the Lower Appellate Court has rightly exercised discretion to grant specific performance on the facts of the case, the pleadings of parties, the evidence on record and circumstances that appear. Substantial question of law no.7 is answered in the negative, but in terms that the discretion has been properly exercised on a consideration of relevant evidence, facts and circumstances by the Lower Appellate Court.

75. In the result, the second appeal fails and is dismissed with costs to the plaintiff in all Courts.

76. Let a decree be drawn up, accordingly.

(2021)02ILR A1029
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 09.02.2021

BEFORE

THE HON'BLE VED PRAKASH VAISH, J.

Criminal Appeal No. 2951 of 2009

Dinesh ...Appellant
Versus
State of U.P. ...Respondent

Counsel for the Appellant:
Jail Appeal, Rajeev Raman

Counsel for the Respondent:
Govt. Advocate, Amicus Curaie

Criminal Law - Indian Penal Code, 1860- Sections 364 & 368 – Kidnapping and Abduction - The prosecution must prove that person charged with the offence had the intention at the time of kidnapping or abduction that the person kidnapped should be murdered or would be so disposed of as to be put in danger of being murdered. In order to bring home a charge under this Section, the Court must be satisfied that at the time when the accused took away the victim/ person so kidnapped, he had the intention to cause his death.

In order to bring home the charge of kidnapping or abduction, the burden of proof lies upon the prosecution to prove that the accused had the intention to cause the death of the abductee.

Criminal Law - Indian Penal Code, 1860- Sections 364 & 368 - The appellant cannot be fastened with the liability for the offence under Section 364 and 368 of the I.P.C. merely because the child was recovered from the possession of the appellant-No reliable evidence to show that the child was concealed by the appellant or that the child was kidnapped in order to commit murder. There is no material on record to hold that the appellant had knowledge that the child was kidnapped or abducted. Hence, it can be said that the prosecution has failed to prove the case and, therefore, the conviction of the appellant is not proper and the appellant would be entitled to acquittal on benefit of doubt.

Where the prosecution fails to prove that the child was kidnapped or abducted in order to commit his murder, then mere recovery of the child from the possession of the accused cannot make out the offence u/s 364 and 368 against the accused.

Criminal Appeal accordingly allowed. (Para 15, 23, 24) (E-2)

Judgements/ Case law relied upon:-

1. Ranjit Kumar Haldar Vs St. of Sikkim, (2019) 7 SCC 684

2. Upendra Nath Ghosh Vs Emperor, AIR 1940 Cal 561

3. Badshah & ors. Vs St. of U.P, (2008) 3 SCC 681

4. Smt. Saroj Kumari Vs St. of U.P.', (1973) 3 SCC 669

(Delivered by Hon'ble Ved Prakash Vaish, J.)

1. This is a jail appeal sent by the appellant, namely, Dinesh, S/o Baijnath against the judgment and order dated 14th July, 2009 passed by learned Additional District and Sessions Judge, Lucknow in Sessions Trial No.587/08 whereby the appellant has been convicted for the offence under Sections 364 and 368 Indian Penal Code ('I.P.C.') and sentenced to undergo rigorous imprisonment for six years and to pay fine of Rs.5,000/-, in default of payment of fine to further undergo imprisonment for five months.

2. The facts of the case as unfolded by prosecution during trial are that complainant (who is father of the child) lodged a complaint that his son, namely, Akhilesh aged three years, resident of Munshipulia, D-Block, Indira Nagar, P.S. Ghazipur, Lucknow went missing from Munishipuliya Chauraha on 16.03.2008 at 08:45 P.M; he requested in his complaint that his son be traced and handed over to him. On the basis of said complaint, F.I.R. No.182 of 2008 bearing Case Crime No.421 of 2008 was registered at P.S. Ghazipur, District-Lucknow. On 22.03.2008, at about 05:00P.M., the child was recovered by police from the custody of the accused-appellant from Daliganj Railway Station; seizure memo was prepared and the accused-appellant was arrested for the offence under Section 364/368 I.P.C. On completion of investigation, chargesheet for the offences under Sections 364 and 368 I.P.C. was filed. After complying with the provisions of Section 207 Cr.P.C., the case was committed to learned Sessions Judge, Lucknow.

3. After hearing arguments on charge and considering record of the case, learned trial court found sufficient ground to proceed against the appellant-Dinesh for the offence punishable under Sections 364 and 368 I.P.C. and accordingly, charges were framed on 02.06.2008. The appellant abjured his guilt and claimed trial.

4. In order to prove its case, the prosecution examined as many as five witnesses. Shri Nandu (P.W.1) is complainant/ father of the child. He deposed that his son, namely, Akhilesh aged about three years went missing on 17.03.2008 at 08.:45 P.M.; he lodged a complaint with the police. He has proved the complaint as Ex.Ka.1. He also deposed that on 22.03.2008, his son was recovered from Daliganj Railway Station at 05:00 P.M. from the possession of the accused-Dinesh and the child was delivered to him; thumb impressions of the complainant and his wife were taken. P.W.2 is the mother of the child. She deposed that at the time of incident, her son's age was three years. Her son was missing about four to five months before making her statement and after six to seven days, his son was recovered from the possession of the accused-Dinesh at Daliganj Railway Station. P.W.3 is Rakesh

Kumar Singh, Constable, P.S. Ghazipur, Lucknow. He deposed that on 22.03.2008, on the basis of information received from a secret informer, he along with S.I. Vijay Kumar Pandey went to Daliganj Railway Station; the child was recovered from the possession of the accused-appellant and thereafter the appellant was arrested. Seizure memo was prepared at the railway station, the same bears the signature of the appellant and the same is Ex. Ka.2. F.I.R. was written by constable Ashok Kumar Singh and the same bears signature of Ashok Kumar Singh, Constable which is Ex.Ka.3. G.D. in the aforesaid case was written and signed by Ram Prasad Chaudhary, Head Constable, the same is Ex.Ka.4. P.W.4 is Ashok Singh, Mohrir, P.S. Ghazipur, Lucknow. He deposed that on 17.03.2008, he received tehrir, on the basis of which, he recorded F.I.R. No.182 of 2008 having Case Crime No.421 of 2008 under Section 364 I.P.C., the same is Ex.Ka.3. P.W.5 is the Investigating Officer of the case, Vijay Kumar Pandey, P.S.Ghazipur, Lucknow. He deposed that on 16.03.2008, investigation of Case Crime No.421 of 2008 for the offence under Section 364 I.P.C. was handed over to him; he received information from a secret informer that a person was taking a child aged about two and a half years from Aliganj Station Crossing; it was further informed that the child belonged to some other person as the child was crying and can be apprehended. Thereafter, he called the complainant and his wife. He along with the complainant and his wife went to the railway crossing and apprehended the accused-Dinesh in between railway crossing and Aliganj Railway station along with the child at 05:00 P.M. Complainant and his wife identified the child as their son. After disclosing reasons, the accused was arrested. On inquiry, the accused disclosed his name and the Fard was prepared by constable Rakesh Singh. The Fard of kidnapped child, namely, Akhilesh and arrest memo of the accused are papers A-7/1 and the same is Ex.Ka.2; the child was handed over to the child. Site plan was prepared which are Ex.Ka.5 and 6.

5. After completion of prosecution evidence, statement of the appellant was recorded under Section 313 Cr.P.C and incriminating evidence were put to him. The appellant denied the same and pleaded innocence. The appellant did not lead any defence evidence.

6. After completion of evidence and considering the rival contentions of the parties, learned trial court found the appellant to be guilty for the offence under Section 364/368 I.P.C. and sentenced the appellant.

7. Being aggrieved by the impugned judgment and order of sentence dated 14th July, 2009, the appellant has preferred the present jail appeal.

8. Learned Amicus Curiae for the appellant vehemently urged that the appellant is neither named in the complaint nor in the F.I.R,; he was not known to the complainant or his wife; there is no allegation that the appellant kidnapped or abducted the child. According to learned Amicus Curiae for the appellant the offence under Section 364 I.P.C. is not made out.

9. Learned Amicus Curiae for the appellant also submitted that the ingredients of Section 368 I.P.C. are not made out. He submitted that there is no allegation that the appellant knew that the child was kidnapped or abducted. He also submitted that the child was not recovered

from the custody of the appellant; no independent witness was joined at the time of alleged recovery; the appellant has been falsely implicated in this case.

10. On the other hand, learned Addl. G.A. for the State submitted that the child was recovered from the custody of the appellant at Daliganj Railway Station on 22.03.2008; the appellant was apprehended and on inquiry, he disclosed his name as Dinesh Kumar. Learned Addl. G.A. for the State referred to the statements of Investigating Officer, Vijay Kumar Pandey, Sub Inspector (P.W.5) who stated that the appellant was apprehended and on inquiry he disclosed his name as Dinesh Kumar.

11. According to learned Addl. G.A. for the State, the child was recovered from possession of the appellant and therefore, it can be presumed that the appellant kidnapped the child and concealed him for six days. In support of her submissions, she has relied upon the judgment of Hon'ble Supreme Court in the case of **'Ranjit Kumar Haldar v. State of Sikkim', (2019) 7 SCC 684.**

12. I have carefully considered the rival submissions made by Sri Anurag Shukla, learned Amicus Curiae for the appellant and Ms. Meera Tripathi, learned Addl. G.A. for the State and have also perused the material available on record.

13. Before embarking upon the legal issues, it is necessary to consider the definition of 'Kidnapping' and 'Abduction' as contained under Sections 359 and 362 of the I.P.C. which are in the following terms:-

"359. Kidnapping

Kidnapping. is of two kinds: kidnapping from, and kidnapping from lawful guardianship.

* * * * *

362. Abduction

Whoever by force compels, or by any deceitful means induces, any person to go from any place, is said to abduct that person."

14. It is also necessary to consider the relevant provisions of Section 364 and 368 of the I.P.C., the same read as under:-

"364. Kidnapping or abducting in order to murder

Whoever kidnaps or abducts any person in order that such person may be murdered or may be so disposed of as to be put in danger of being murdered, shall be punished with 152[imprisonment for life] or rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.

...

368. Wrongfully concealing or keeping in confinement, kidnapped or abducted person

Whoever, knowing that any person has been kidnapped or has been abducted, wrongfully conceals or confines such person, shall be punished in the same manner as if he had kidnapped or abducted such person with the same intention or knowledge, or for the same purpose as that with or for which he conceals or detains such person in confinement."

15. On a bare reading of Section 364 I.P.C., it is manifestly clear that the prosecution must prove kidnapping by the accused, such person was kidnapped in order (a) that such person might be murdered; or (b) that such person might be so disposed of as to be put in danger of

being murdered. In case of abduction, the prosecution must prove that the accused compelled the person to go from the place in question, that he so compelled the person by means of force; or that he induced that person to do so by deceitful means and that he so abducted the person in question in order that (a) such person might be murdered, or (b) such person might be so disposed of as to be put in danger of being murdered. The prosecution must prove that person charged with the offence had the intention at the time of kidnapping or abduction that the person kidnapped should be murdered or would be so disposed of as to be put in danger of being murdered. In order to bring home a charge under this Section, the Court must be satisfied that at the time when the accused took away the victim/ person so kidnapped, he had the intention to cause his death.

16. In this regard, reference can be made to a decision in the case of **'Upendra Nath Ghosh v. Emperor', AIR 1940 Cal 561**, in the said case, it was held:-

"To establish an offence punishable under Section 364, Penal Code, it must be proved that the person charged with the offence had the intention at the time of the abduction that the person abducted would be murdered or would be so disposed of as to be put in danger of being murdered. Even if after the abduction the accused perso placed the abducted person in danger of being murdered that would not establish sthe charge of abduction punishable under Section 364 against him. It would be necessary for the Crown to establish that he intended at the time of the abduction to place the abducted person in a position which would put that person in danger of being murdered"

17. The Hon'ble Supreme Court in **'Badshah and ors. vs. State of Uttar Pradesh', (2008) 3 SCC 681** considered the ingredients of Section 364 I.P.C. and it was held:-

"13. Ingredients of the said offence are (1) Kidnapping by the accused must be proved; (2) it must also be proved that he was kidnapped in order to;

(a) that such person may be murdered; or (b) that such person might be disposed of as to be put in danger of being murdered. The intention for which a person is kidnapped must be gathered from the circumstances attending prior to, at the time of and subsequent to the commission of the offence. A kidnapping per se may not lead to any inference as to for what purpose or with what intent he has been kidnapped."

18. In order to invoke the provisions of Section 368 I.P.C., the following ingredients must be satisfied;

(i) the person has been kidnapped or abducted;

(ii) the accused was knowing that fact; and

(iii) the accused must have concealed or confined such person.

19. In the case of **'Smt. Saroj Kumari vs. the State of U.P.', (1973) 3 SCC 669**, the Hon'ble Supreme Court considered the provisions of Section 368 I.P.C. and it was observed as under:-

"10. To constitute an offence under Section368, it is necessary that the prosecution must establish the following ingredients:

(1) The person in question has been kidnapped.

(2) The accused knew that the said person had been kidnapped.

(3) The accused having such knowledge, wrongfully conceals or confines the person concerned."

20. I have gone through the judgment in **Ranjit Kumar Haldar's case (Supra).** The law laid down in the said judgment is well settled. The same is not applicable to the facts and circumstances of this case. The Hon'ble Supreme Court after considering the provisions of Section 101 and 106 of the Evidence Act, 1872 observed as under:

"17. In State of Rajasthan v. Thakur Singh, this Court reiterated the principle that burden of proving guilt of the accused is on the prosecution but there may be certain facts pertaining to a crime that can be known only to the accused. The Court held as under: (SCC p.218, para22)

"22. The law, therefore, is quite well settled that the burden of proving the guilt of an accused is on the prosecution, but there may be certain facts pertaining to a crime that can be known only to the accused, or are virtually impossible for the prosecution to prove. These facts need to be explained by the accused and if he does not do so, then it is a strong circumstance pointing to his guilt based on those facts."

21. In the instant case, according to the case of prosecution, child , namely, Akhilesh aged about three years, resident of Munshipulia, D-Block, Indira Nagar, P.S. Ghazipur, Lucknow went missing; complainant/ father of the the child, namely, Nandu (P.W.1) lodged a complaint that his child was missing from Munishipuliya Chauraha on 16.03.2008 at 08:45 P.M; on the basis of said complaint, F.I.R. No.182 of 2008 bearing Case Crime No.421 of 2008 under Section 364 I.P.C. was registered at P.S. Ghazipur, District-Lucknow was registered against an unknown person. Thereafter, on 22.03.2008 at about 05:00 P.M., on the basis of secret information, the child was recovered from possession of the appellant from Daliganj Railway Station; the Investigating Officer (P.W.5) along with P.W.1 and P.W.2 reached at Daliganj Railway Station and found that the appellant was giving sweets (Jalebi) to the child; the child was recovered and handed over to the father (complainant) and the appellant was apprehended.

22. It is not understandable that when the complainant, namely, Nandu lodged a missing report, he did not name any person and he did not allege that the child was kidnapped or abducted by anyone, how the F.I.R. under Section 364 I.P.C. was registered. The complainant (who is father of the child), namely, Nandu (P.W.1) and mother of the child, namely, Preeti (P.W.2) entered into witness box and they have stated that they did not know the appellant before the date when the child was recovered. They have not uttered even a single word that the child was kidnapped or abducted by the appellant. They have also not stated that the appellant had the knowledge that the child was kidnapped or abducted. They have also not stated that the child was concealed or confined by the appellant for a period of six days. Even the Investigating Officer has not stated that the child was kidnapped or abducted by the appellant in order to commit murder or the appellant had the knowledge that the child was kidnapped or abducted or that the child remained in custody of the appellant for a period of six days.

23. At this juncture, it may be mentioned that the Investigating Officer should have moved an application for recording statement of the child under Section 164 Cr.P.C. No efforts were made by the Investigating Officer for recording statement under Section 164 Cr.P.C. Moreover, the child has not been produced in the Court. Thus, the appellant cannot be fastened with the liability for the offence under Section 364 and 368 of the I.P.C. merely because the child was recovered from the possession of the appellant.

24. After a careful scrutiny of the evidence on record, I do not find any reliable evidence to show that the child was concealed by the appellant or that the child was kidnapped in order to commit murder. There is no material on record to hold that the appellant had knowledge that the child was kidnapped or abducted. Hence, it can be said that the prosecution has failed to prove the case and, therefore, the conviction of the appellant is not proper and the appellant would be entitled to acquittal on benefit of doubt.

25. As a result of above discussion, the appeal is **allowed** and the impugned judgment and order dated 14th July, 2009 passed by learned Additional District and Sessions Judge, Lucknow in Session Trial No.587 of 2008 arising out of Case Crime No.421 of 2008, P.S. Ghazipur, District Lucknow is set aside and the appellant is acquitted.

26. On 20.01.2021, Sh. Anurag Shukla, Advocate was appointed as Amicus Curiae. The fees of learned Amicus Curiae is fixed at Rs.11,000/- (Rupees Eleven Thousand Only).

27. Trial court record along with copy of this judgment be sent back forthwith.

(2021)02ILR A1035
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 20.01.2021

BEFORE

THE HON'BLE ARVIND KUMAR MISHRA-I, J.
THE HON'BLE SUBHASH CHAND, J.

Criminal Appeal No. 7291 of 2019
&
Criminal Appeal No. 7649 of 2019

Hotilal Rajput & Anr. ...Appellants (In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellants:
Sri Purushottam Dixit

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

Criminal Law - Indian Penal Code, 1860- Section 302/34- Hostile witnesses- Although all these witnesses of fact have been declared hostile yet their testimony cannot be discarded in toto. All the witnesses of fact have admitted in their statements that death of Arti was caused in the matrimonial house and the death of deceased is homicidal. Obviously it appears, these witnesses of fact have been won over by the defence.

It is settled law that even where witnesses are hostile, that part of their testimony can be considered which supports the case of the prosecution.

Evidence Act - Indian Evidence Act, 1872- Section 106- The death of deceased Arti was homicidal as per ocular evidence is also corroborated with medical evidence- Where the incident had taken place inside the house, the onus lies upon the persons of the house present. In such cases it is difficult for the prosecution to lead any direct evidence to establish the guilt of he

accused. In view of the circumstantial evidence adduced by the prosecution the burden of proving the case beyond doubt has been discharged, how the burden of proof shifts upon the accused-appellants to explain how the homicidal death of deceased was caused in their house.

Where a fact is especially within the knowledge of the accused, then the burden of proving that fact is upon the accused hence, in a case of homicidal death within the house the burden of explaining the death would lie upon the inmates of the house.

Evidence Act - Indian Evidence Act, 1872- Section 11- Plea of alibi- Once the prosecution succeeds in discharging its burden and it is incumbent upon the accused-appellants taking the plea of alibi to prove it with certainty so as to exclude the possibility of presence at the place of occurrence. Plea of alibi means accused elsewhere. It is based on physical impossibility for participation in the crime by the accused-appellants, thus, distance would be relevant fact from the place of occurrence.

The burden of proof is upon the accused who have adopted the plea of alibi to prove the same beyond all reasonable doubt.

Evidence Act - Indian Evidence Act, 1872- Section 106- So far as the burden of prove to be discharged by the appellants under Section 106 of Evidence Act is concerned, the death of deceased was caused admittedly in the matrimonial house situated near the Highway in which the accused-appellant Arvind Kumar and deceased Arti both resided. The appellants Hotilal Rajpoot and Lajjawati both had been residing in another house separately, therefore, the burden of proof under Section 106 of the Evidence Act cannot be placed upon these two appellants Hotilal Rajpoot and Lajjawati. This burden can be shifted only upon accused-appellant Arvind Kumar, who resided with the deceased in the new house situated near the Highway, wherein the homicidal death of the deceased was caused.

The burden of proof under Section 106 of the Evidence Act cannot be placed upon those accused who were residing separately from the deceased.

Accordingly, Criminal Appeal No. 7291 of 2019 (Hotilal Rajpoot and another Vs. State of U.P.) is **allowed** and the Criminal Appeal No. 7649 of 2019 (Arvind Kumar Vs. State of U.P.) is **dismissed**.

(Para 23, 26, 27, 29, 35, 36, 41, 43) **(E-2)**

Judgements/ Case law cited/ relied:-

1. Jose @ Pappachan Vs Sub-Insp. of Police, Koyilandy (2017) 1 SCC (Cri) 171(Cited)

2. Subhash Har Narayan Ji Laddha Vs St. of Maha. (2006) 12 SCC 545

3. Criminal Appeal No. 590 of 2015 Jayanti Lal Verma Vs St. of M.P. (Now Chhatisgarh),

(Delivered by Hon'ble Subhash Chand, J.)

1. Criminal Appeal No. 7291 of 2019 (Hoti Lal Rajpoot and another Vs. State of U.P.) has been preferred on behalf of convict Hoti Lal Rajpoot and Lajjawati and the Criminal Appeal No. 7649 of 2019 (Arvind Kumar Vs. State of U.P.) was preferred on behalf of convict Arvind Kumar, against the judgment and conviction order dated 14.11.2019 passed by Sessions Judge, Auraiya, convicting the appellants Hotilal Rajpoot, Lajjawati and Arvind Kumar for the charges under Sections 302 r/w 34 IPC and sentenced them with imprisonment for life and fine Rs.25,000/-. In default of payment of fine additional imprisonment of six months was directed to be undergone by the appellants in S.T. No. 5 of 2016, arising out of Case Crime No. 675 of 2015, under Sections 498-A, 304-B, 302/34 IPC and Section 4 of

Dowry Probibition Act, P.S. Auraiya, Disrtrict Auraiya.

2. Since both the Criminal Appeals arise out of the same Sessions Trial number, they have been heard together and are being disposed of by a common judgment.

3. The matrix of the prosecution case as gathered from the record are that the first informant Sarman Lal's daughter Arti was married with accused Arvind Kumar son of Hotilal Rajpoot, resident of Dayalpur, P.S. Kotwali Auraiya, District Auraiya about three years ago. Arti had also a daughter about one and half years old. The daughter of informant was subjected to cruelty by the husband Arvind Kumar, father-in-law Hotilal Rajpoot and mother-in-law Lajjawati. Since the time of marriage because of less dowry, besides she was also tortured and an additional demand for Rs.1,00,000/- in cash was made, which could not be fulfilled by the informant. On 30.07.2015 the informant received information from the cousin brother of his son-in-law Shambhu that his daughter Arti was ill and she was being taken to the hospital at Kanpur. Accordingly, the informant reached the Regency Hospital, Kanpur but none was found there. Thereafter the informant along with his family reached Auraiya where the in-laws of his daughter were residing, the house was locked, thereafter he came on the road and saw the dead body of his daughter lying on the road. The dead body was thrown down from the Maruti Van. Dowry death of his daughter was caused by the husband Arvind Kumar, father-in-law Hotilal Rajpoot, mother-in-law Lajjawati and sister-in-law Rinki and Pinki respectively. On this written information (Ext. Ka-1), at Case Crime No. 675 of 2015, a case under Sections 498-A, 304-B IPC and 3/4 D.P. Act was registered against Arvind Kumar, Hotilal Rajpoot, Lajjawati, Rinki and Pinki with the police station Auraiya, District Auraiya.

4. The investigating officer after having concluded the investigation filed charge-sheet against the accused-appellants Arvind Kumar, Hotilal Rajpoot and Lajjawati, under Sections 498-A, 304-B IPC and 3.4 Dowry Prohibition Act, exonerating the remaining two accused Rinki and Pinki. The cognizance was taken on the charge-sheet by the Court of CJM, Auraiya and the offence alleged being exclusively triable by the Court of Sessions, the CJM concerned committed the case to the Court of Sessions Judge, Auraiya.

5. The Court of Sessions Judge, registered the case as Sessions Trial and issued process to the accused. The charges were framed against the accused-appellants under Sections 498-A, 304-B IPC and 3/4 Dowry Prohibition Act besides alternative framing charge under Section 302 r/w 34 IPC. The charges were read over and explained to all the accused, who denied the charges and claimed to be tried.

6. On behalf of the prosecution to prove the case in oral evidence examined P.W.1 Sarman Lal (informant), P.W.2 Radha Devi, P.W. 3 Sushil Kumar, P.W.4 Smt. Kiran, P.W.5 Ajay Rajpoot and P.W.6 Devi Prasad as witnesses of fact and also examined P.W.7 constable Kishore Kumar to prove the check FIR Ext. Ka-3, P.W.8 Dr. Om Prakash to prove the postmortem report Ext. Ka-4, P.W.9 was examined to prove the inquest report and other papers relating to inquest Ext. Ka-2-A, Ext. Ka-5 to Ka-8, P.W.10 Subhash Khatri was also

exmined as the Investigating Officer in regard to the details of investigation and he has proved the site plan and the charge-sheet Ext. Ka-9 and Ka-10, respectively.

7. On behalf of prosecution in documentary evidence also filed the written information Ext. Ka-1, recovery memo in regard to taking into possession the Sari of deceased Ext. Ka-2, inquest report Ext. Ka-2A, Check FIR Ext. Ka-3, postmortem report Ext. Ka-4, photo of dead body Ext. Ka-5, police form no.13 Ext. Ka-6, letter to CMO Ext. Ka-7, letter to R.I. Ext. Ka-8, site plan Ext. Ka-9 and charge-sheet Ext. Ka-10.

8. The statement of the accused-appellants under sections 313 of the Code of Criminal Procedure was also recorded, in which all the accused persons denied the incriminating circumstance in evidence against them and claimed to have been falsely implicated and in defence no evidence was adduced.

9. Learned trial Court after hearing the rival arguments advanced, convicted the accused-appellant Arvind Kumar, Hotilal Rajpoot and Lajjawati for the charges under Section 302 r/w 34 IPC and acquitted them of the charges under Sections 498-A, 304-B IPC and 4 Dowry Prohibition Act.

10. Feeling aggrieved the appellants/convicts Hotilal Rajpoot and Lajjawati preferred Criminal Appeal No. 7291 of 2019 and the appellant/convict Arvind Kumar preferred aforesaid Criminal Appeal No. 7649 of 2019, under Section 374(2) Cr.P.C. challenging the judgment and conviction order dated 14.11.2019, whereby the appellants were convicted for the offences under Section 302 read with 34 IPC and were sentenced with imprisonment for life and fine of Rs.25,000/- and in default of payment of fine further additional imprisonment of six months was to be suffered.

11. The above criminal appeals have been preferred on the grounds that the conviction and sentence awarded against the appellants by the trial Court was illegal and the conviction and the sentence awarded by the trial Court was against the weight of Evidence on record. The trial Court had acquitted the appellants of the charges under Sections 498-A, 304-B IPC and 3/4 Dowry Prohibition Act. All the witnesses of fact had been declared hostile and the prosecution witnesses P.W.1 Sarman Lal also admitted that none of the appellants were present at the place of occurrence, as such the conviction and sentence passed by the trial Court was based on wrong appreciation of evidence and prayed for allowing these appeals and set aside the conviction and sentence awarded by the trial Court.

12. It has been vigorously claimed by the learned counsel for the appellants (in Criminal Appeal No. 7291 of 2019) that the conviction of Hotilal and Lajjawati by virtue of application of Section 34 IPC is grossly erroneous for certain reasons that it is virtually admitted that both these appellants were residing separately from the deceased and they were not present on the spot. Then application of Section 34 IPC in shape of sharing common intention with Arvind Kumar (husband of deceased) to cause murder of the deceased is absurd. In no way here, ingredients of Section 34 IPC shall be applicable. Even the burden to prove particular fact under Section 106 of Indian Evidence Act, 1872 also does not

arise as the two above appellants are separate residents.

13. We have heard Sri Purushottam Dixit, learned counsel for the appellants and learned A.G.A. for the State and perused the record.

14. Learned counsel for the appellants contended that the prosecution had miserably failed to prove the case beyond all reasonable doubts. Although the learned trial Court had acquitted all the accused-appellants from the charges under Sections 498-A, 304-B IPC and 4 Dowry Prohibition Act, yet the learned trial Court convicted the accused-appellants for the charges under Section 302 r/w 34 IPC. Initially the burden was upon the prosecution to prove the case against the accused-appellants and after that alone the burden of proof should have been shifted and placed upon the accused under Section 106 of the Evidence Act. All the witnesses of fact produced on behalf of prosecution have been declared hostile. All the witnesses have denied the prosecution. Moreover all the witnesses of fact stated in their statement that the accused -appellants were not present at the place of occurrence at the time of incident and have also admitted fact that in absence of accused some miscreants had intruded in the house and while committing robbery they have caused the murder of deceased Arti. The informant P.W.1 Sarman Lal, P.W.2 Radha Devi the wife of informant, both in their statements have admitted that accused Hotilal Rajpoot and Lajjawati, who are the father-in-law and mother-in-law of deceased had been residing in a separate house while the occurrence took place in the house in which the deceased Arti along with her husband Arvind Kumar had been residing. Learned trial Court did not rely upon the evidence of the witnesses of fact and had wrongly shifted the burden of proof upon the accused-persons under Section 106 of the Evidence Act.

15. Learned Counsel for the appellant in support of his contention relied upon the case of ***Jose alias Pappachan vs. Sub-Inspector of Police, Koyilandy (2017) 1 SCC (Cri) 171*** in which the Hon'ble Supreme Court held that the burden of proving fact specially within the knowledge, shifting this burden upon the accused is not permissible unless and until the prosecution had discharged its burden to prove the prosecution case.

16. Learned A.G.A. vehemently opposed the contention of learned counsel for the appellants and contended that the learned trial Court was right in placing the burden of proof upon the accused, since this fact was in specific knowledge of the accused how the deceased was murdered more so when the death was caused inside the house of he accused-persons. Theory of defence set up to the ambit that some miscreants had intruded in the house to commit robbery and on being opposed by the deceased the miscreants committed the murder of the deceased cannot be relied because on behalf of the accused no such evidence was adduced to prove the defence plea, therefore, both the appeals deserve to be dismissed and the conviction and sentence awarded to the accused-appellants deserves to be upheld.

17. For disposal of these criminal appeals point for determination is being framed.

Whether the findings of learned trial Court is perverse on shifting the burden of proof upon the accused-appellants under Section 106 of Evidence

Act and had convicted to the appellants on the basis of wrong appreciation of evidence on record.

18. On behalf of prosecution to prove the case, six witnesses of fact have been examined and all these witnesses in their statements have stated that the deceased (Arti) was married with Arvind Kumar on 6.2.2013 and no alleged demand of dowry was ever made by the inmates of in-laws house and Arti was never subjected to cruelty. The trial Court relying upon the statement of witnesses of fact acquitted the accused persons of the charges under Sections 498-A, 304-B IPC and 4 of D.P. Act.

19. The prosecution case is based on circumstantial evidence. On behalf of prosecution to prove the charges against the accused-appellants under Section 302/34 IPC six witnesses of fact have been examined.

20. P.W.1 Sarman Lal, who is the informant has admitted his signature on the written report Ext. Ka-1, he has denied the contents of the written information to the extent that no demand of dowry was made by the inmates of in-laws of house of his daughter and she was never subjected to cruelty for demand of dowry. This witness has also fortified that at the time of occurrence none of the accused was present at the place of occurrence and on the fateful day some miscreants intruded in the house to commit robbery and on being opposed by his daughter the miscreant committed the murder of his daughter. This witness was declared hostile by the prosecution and cross-examined. This witness admits that he got the information in regard to the death of his daughter from cousin brother of his son-in-law Shambhu on 30.07.2015 and when he reached the house of his daughter, none was present over there and he found the dead body of his daughter on the roadside near the Maruti Van. At that time his wife P.W.2 Radha Devi was also accompanied him.

21. P.W.2 Radha Devi, who is the wife of informant, she reiterated the same thing as has been stated by the P.W.1 Sarman Lal (informant).

22. P.W.3 Sushil Kumar, P.W.4 Smt. Kiran and P.W. 5 Ajay Rajpoot, have also supported the version as has been stated by the informant P.W.1 Sarman Lal.

23. **Although all these witnesses of fact have been declared hostile yet their testimony cannot be discarded in toto. All the witnesses of fact have admitted in their statements that death of Arti was caused in the matrimonial house and the death of deceased is homicidal.** Obviously it appears, these witnesses of fact have been won over by the defence.

24. In corroboration on behalf of prosecution has examined **P.W.9 Shamsher Singh, who has proved the inquest report Ext. Ka-2A and the papers relating to inquest report Ext. Ka-5 to Ka-8.** This witness said that the dead body of the deceased was lying at the service road of Ram Dayalpur Highway and he prepared the inquest report of the deceased. All the witnesses of inquest report are persons of village of informant Sarman Lal (P.W.1). The cause of death was due to the injury at the neck and other reasons.

25. **P.W.8 Dr. Om Prakash**, who had conducted the postmortem of the deceased Arti has proved the **postmortem report**

Ext. Ka-4. This witness has stated that **cause of death was asphyxia due to strangulation**. In ante mortem injuries, there were two injuries (1) **ligature mark 27 cm x 3 cm continues x horizontal x high up on th neck behind the chin and larynx; injury no. (2) abraded contusion 1-1/2 cm x 1 cm on lower part of right cheek at mandibular area at 4 cm below from right ear lobule.**

26. **Therefore, the death of deceased Arti was homicidal as per ocular evidence is also corroborated with medical evidence.**

27. **The prosecution has been successful to prove its case that the death of deceased Arti was caused in the matrimonial house and was homicidal.** The testimony of all the witnesses of fact adduced on behalf of the prosecution shall be relied. Even if, all theses witnesses of fact have been declared hostile. So far as the statement given by the prosecution witnesses that the deceased was murdered by the miscreants on the fateful day, who had intruded in the house to commit robbery and on being opposed by the deceased the miscreants had committed murder. Upto this extent the statement of the prosecution witnesses cannot be relied upon because the same is based on hearsay evidence. **None of the prosecution witnesses of fact were present at the place of occurrence, the sole source of these witnesses in regard to the claim of commission of occurrence by the miscreants, are the in-laws and the persons of locality had told to them. On behalf of prosecution none of those persons have been examined, from whom these prosecution witnesses came to know in regard to commission of murder by the miscreants. To this extent the theory of committing murder by the miscreants is not admissible in evidence from the statement of prosecution witnesses.**

28. The Hon'ble Supreme Court held in **Subhash Har Narayan Ji Laddha Vs. State of Maharashtra (2006) 12 SCC 545**, *where the statement of witnesses before the Court was made on the basis of that, what she had information from her husband and she had no direct knowledge of the fact, her statement was held inadmissible in evidence.*

29. **Where the incident had taken place inside the house, the onus lies upon the persons of the house present. In such cases it is difficult for the prosecution to lead any direct evidence to establish the guilt of he accused. In view of the circumstantial evidence adduced by the prosecution the burden of proving the case beyond doubt has been discharged, how the burden of proof shifts upon the accused-appellants to explain how the homicidal death of deceased was caused in their house.**

30. The defence case as set up in their statements under Section 313 Cr.P.C. is that at the time of occurrence they were at the agricultural field and the death was caused by the miscreants, as such all the accused persons in their statements had taken the plea of alibi that at the time of occurrence on the fateful day that they were working at the agricultural field and some miscreants had committed the murder of deceased, while they had intruded in the house with an aim to commit robbery.

31. Moreover, learned counsel for the appellants also contended that star witnesses of the prosecution P.W.1 Sarman

Lal and P.W.2 Radha Devi, both have admitted that the appellants Hotilal Rajpoot and Lajjawati were residing another house and the deceased along with her husband (accused Arvind Kumar) were residing in a separate house. Admittedly there are two houses of the in-laws of deceased, in one house Accused Arvind Kumar resided along with his wife Arti and in another house resided Hotilal and Lajjawati, who are father-in-law and mother-in-law of the deceased respectively. The incident happened in the house near the Highway bridge where Arvind Kumar resided along with his wife Arti, as such, the burden of proof under Section 106 of the Evidence Act, cannot be shifted and fastened upon the accused-appellants Hotilal Rajpoot and Lajjawati.

32. Learned counsel for the appellants submits that trial Court had wrongly shifted the burden of proof on accused-appellants Hotilal Rajpoot and Lajjawati and claimed acquittal for both the appellants. He also contended that all the witnesses of fact have admitted that the accused were not present at the time of occurrence as such all the accused-appellants deserves to be acquitted from the charge leveled against them.

33. **P.W.1 Sarman Lal** in his testimony stated that the accused-appellant Hoti Lal had two houses and both the houses are situated at separate places. His son-in-law and his daughter Arti had been residing in the new house near the Highway. The occurrence took place in the house which is situated near the Highway.

34. **P.W.2 Radha Devi** in her testimony has stated that accused Hotilal Rajpoot and Lajjawati had been residing in a separate house, her daughter and son-in-law also residing in another separate house, which is situated near the Highway.

35. **On behalf of prosecution to prove the plea of alibi that at the time of occurrence accused-appellants were working at the agricultural field, no evidence has been adduced, even no cogent circumstance exists to corroborate to any such possibility.**

36. Once the prosecution succeeds in discharging its burden and it is incumbent upon the accused-appellants taking the plea of alibi to prove it with certainty so as to exclude the possibility of presence at the place of occurrence. Plea of alibi means accused elsewhere. It is based on physical impossibility for participation in the crime by the accused-appellants, thus, distance would be relevant fact from the place of occurrence.

37. **The theory of defence of plea of alibi is not proved by the accused-appellants even at the touchstone preponderance of probability.**

38. So far as the burden of prove to be discharged by the appellants under Section 106 of Evidence Act is concerned, **the death of deceased was caused admittedly in the matrimonial house situated near the Highway in which the accused-appellant Arvind Kumar and deceased Arti both resided. The appellants Hotilal Rajpoot and Lajjawati both had been residing in another house separately, therefore, the burden of proof under Section 106 of the Evidence Act cannot be placed upon these two appellants Hotilal Rajpoot and Lajjawati. This burden can be shifted only upon accused-appellant Arvind Kumar, who resided with the deceased in the new**

house situated near the Highway, wherein the homicidal death of the deceased was caused. To discharge this burden on behalf of the appellant Arvind no evidence has been adduced. In his statement under Section 313 Cr.P.C. this witness has said that at the time of occurrence he was working at his agricultural field and to this effect also no evidence has been produced to prove the plea of alibi. Even strewn circumstances of the case do not point to any such possibility.

39. So far as the theory of defence that on the fateful day miscreants had intruded in the house with the aim to commit robbery and on being opposed by the deceased, who was present in the house, the miscreants had committed her murder to eliminate hurdle in committing the robbery is concerned, the accused persons have not adduced any evidence. **The time of occurrence is 9 O'clock of day time, if the miscreants had intruded in the house with intention to commit robbery and on being opposed by the deceased the miscreants had committed murder, no such FIR was lodged on behalf of accused-appellant Arvind Kumar. This theory cannot be relied by any impartial and prudent person that if at day time i.e. 9 O'clock the miscreants had intruded in th house to commit the robbery and also committed the murder on being opposed by the deceased, none of the persons of the locality or vicinity were examined on behalf of the appellants. It was incumbent upon the accused-appellants to have produced some person in the vicinity to establish this fact that on the fateful day the miscreants intruded in the house with intention to commit the robbery.** All the witnesses of fact who have been examined by the prosecution, who have been declared hostile although have stated that the deceased was murdered by the miscreants and this fact came to the knowledge of the witnesses of fact from the family members of in-laws house and also from the persons of the locality. None of the family members of in-laws house or the persons of locality was examined by the accused-appellants in support of above claim to prove this defence theory. The conduct of the accused-appellants is very unnatural; had there been any robbery committed by the miscreants in his house as a man of ordinary prudence he must have informed the police about the incident.

40. The Hon'ble Supreme Court in ***Criminal Appeal No. 590 of 2015 Jayanti Lal Verma Vs. State of M.P. (Now Chhatisgarh),*** judgment dated 19.11.2020 *held the incident where the incident had taken place inside the privacy of the house, the onus was on persons residing in the house to give the explanation. It is difficult for the prosecution to lead any direct evidence to establish the guilt of the accused. The initial burden to prove the case would be upon the prosecution. It would be of right character. There would be corresponding burden upon the inmates of the house to give cogent explanation how the crime was committed. They cannot get away by keeping quiet.*

41. In the present case this fact was in particular knowledge of the accused-appellant Arvind who had been residing with the deceased to prove how the deceased was murdered.

42. Even he neither produced himself in the witness box before the trial Court nor did adduce any witness of the locality to prove and give credence to this defence of

committing robbery as well as murder by the miscreants. The findings of the learned trial Court to this extent bears no infirmity.

43. So far as shifting the burden of prove under Section 106 of Evidence Act upon the accused-appellants Hotilal Rajpoot and Lajjawati is concerned, same is against the evidence on record because there is evidence on record that Hotilal Rajpoot and Lajjawati had been residing in a separate house and on the fateful day they were not present at the place of occurrence, as such, the burden of proof under Section 106 of the Evidence Act cannot be shifted upon the accused-appellants Hotilal Rajpoot and Lajjawati. Therefore, the conviction and sentence passed against the appellants Hotilal Rajpoot and Lajjawati is based on the oral appreciation of evidence and same deserves to be set aside, while the conviction and sentence passed against appellant Arvind Kumar deserves to be upheld.

44. Accordingly, Criminal Appeal No. 7291 of 2019 (Hotilal Rajpoot and another Vs. State of U.P.) is **allowed** and the Criminal Appeal No. 7649 of 2019 (Arvind Kumar Vs. State of U.P.) is **dismissed**.

45. In Criminal Appeal No. 7291 of 2019, the appellants Hotilal Rajpoot and Lajjawati are **acquitted** of all the charges leveled against them. They are in jail. They be released forthwith, in case, they are not wanted in connection with some other case provided they file personal bonds and two sureties each in the like amount to the satisfaction of the Sessions Judge, Auraiya in compliance of the provisions contained under Section 437-A, Cr.P.C.

46. In Criminal Appeal No. 7649 of 2019, the appellant Arvind Kumar is in jail. **The conviction and sentence awarded against him vide judgment and order dated 14.11.2019 is hereby affirmed.** He is directed to serve out the remaining sentence as has been awarded by the trial Court.

47. Office is directed to communicate this order to the court concerned forthwith to ensure compliance and further send back the lower court record.

(2021)02ILR A1044
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 12.02.2021

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER , J.
THE HON'BLE GAUTAM CHOWDHARY, J.

Criminal Appeal No. 2324 of 2014

Pradeep Kumar ...Appellant(In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellants:
Sri D.K.Singh, Sri A.K.Rai, Sri Hemendra Pratap Singh, Sri Jitendra Pal Singh, Sri Nisheeth Yadav, Sri Pankaj Kumar Shukla, Sri Rupesh Sharma, Sri Sudhir Dixit, Sri Urvashi Jain

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

Criminal Law - Indian Penal Code, 1860- Section 302- Conviction of husband- It is proved fact that deceased died out of septicemia. The learned judge below punished appellant-accused under Section 302 I.P.C - The deceased has deposed that it was her husband who had set her

ablaze. The dying declaration has to coupled with the other evidence as evidence on record of P.W. 1, P.W. 2 and P.W. 3 before turning hostile goes to show that his sister was in hospital and was trying to struggle for life-The question which falls for our consideration is whether, on reappraisal of the peculiar facts and circumstances of the case, the conviction of the appellant under Section 302 of I.P.C. of the Indian Penal Code should be upheld or the conviction deserves to be converted under Section 304 Part-I or Part-II of the Indian Penal Code

From the evidence it is proved that the cause of death of the deceased was septicaemia and she died several days after the occurrence therefore the offence of culpable homicide not amounting to murder is made out.

Criminal Law - Indian Penal Code, 1860- Sections 302 & 304 (Part1)- On overall scrutiny of the facts and circumstances of the present case coupled with the opinion of the Medical Officer and considering the principle laid down by the Apex Court in the Case of Tukaram and Ors VsState of Maharashtra, reported in (2011) 4 SCC 250 and in the case of B.N. Kavatakar and Another VsState of Karnataka, reported in 1994 SUPP (1) SCC 304, we are of the considered opinion that the offence would be one punishable under Section 304 part-I of the IPC.

It is settled law that where the accused had no intention to cause death but had knowledge that the injuries inflicted by him are sufficient in the ordinary course of nature to cause death, then the offence would be one u/s 304(Part I) of the IPC.
The conviction of the appellant under Section 302 of Indian Penal Code is converted to conviction under Section 304 (Part I) of Indian Penal Code and the appellant is sentenced to undergo 10 years of incarceration with fine which is reduced to Rs.1,000/-.

Criminal Appeal partly allowed.(Para 15, 17, 18, 19, 20, 21) (E-2)

Judgements/ Case law cited:-

1. Sudershan Kumar Vs St. of Delhi, AIR 1974 SC 2328

2. St. of Har. Vs Pala & ors., (1996) 8 SCC 51

3. Veerla Satyanarayana Vs St. of A.P., (2009) 16 SCC 316

4. Munnawar & ors. Vs St. of U.P. & ors., (2010) 5 SCC 451

5. Vidya Sagar Dwivedi Vs St. of U.P., MANU/UP/0502/2020

6. Ashiq Ali & anr. Vs St. of U.P., Crl. Appeal No.4702 of 2012 decided on 10.2.2021

7. Manish Jain Vs St. of U.P., Crl. Appeal No. 3347 of 2015 decided on 29.1.2021

Judgements/ Case law relied upon:-

1. Maniben Vs St. of Guj., AIR 2010 SC 1261

2. Crl. Appeal No. 954 of 2007 (Gulam Hussain Zalil Ahmed Shaikh Vs St. of Guj.) decided on 5.8.2013

3. Crl. Appeal No. 806 of 2011 (Chhaganbhai Limjibhai Palas Vs St. of Guj.) decided on 20.11.2013

4. Crl. Appeal No.318 of 2015 (Pramod Kumar Vs St. of U.P.) decided on 28.2.2019

(Delivered by Hon'ble Dr. Kaushal Jayendra Thaker, J. &
Hon'ble Gautam Chowdhary, J.)

1. This appeal has been preferred against the Judgment and order dated 29.5.2014 passed by learned Additional Sessions Judge, Court No. 4, Aligarh in Sessions Trial No. 892 of 2011, State Vs. Pradeep Kumar and another, arising out of Case Crime No.8 of 2011 under Sections 498A, 304B I.P.C. and ¾ Dowry Prohibition Act, Police Station Harduaganj, District Aligarh.

2. Facts in short as culled out from the prosecution story are that on 16.1.2011 first informant moved a written report at Police Station Harduaganj, District Aligarh alleging that on 25th February 2008 he solemnized the marriage of his sister Rashmi with Pradeep Kumar giving 10 tola gold ornaments, T.V., fridge, washing machine, bed, almirah, sofa, etc. and 4 lakh rupees in cash as dowry. But, father of accused-appellant, namely, Rishi Pal was not happy with the dowry given and used to harass his sister and demand motor cycle. When his sister asked the first informant to give motor cycle otherwise they will kill her, the first informant said that he will give motor cycle on which they told him as to why less money was given while deal was of Rs.6 lakhs. It is further alleged that they send his sister many times to informant's home and she lived with him for many months. Sister of the first informant told that her sister-in-law Neetu. Sushama, father-in-law Rishipal and husband Pradeep colluding themselves used to commit mar peet with her. On 6.1.2011 first informant came to know that her sister was killed by her in-laws pouring kerosene oil and setting her ablaze. On information, when first informant and some persons of village reached village Samastpur, his sister was not there. They came to know that she was admitted in Aligarh Medical College. Reaching there, they found that his sister was struggling hard in between life and death. First informant took her out from Medical College and got admitted in Jeevan Hospital. None of her in-laws came at neither Medical College nor Jeevan Hospital to see her. He asked his sister as to how she suffered who told him that brother as told by her already for giving them motor cycle if he wanted to keep her alive, on account of not giving motor cycle, at about 5.00 p.m. her sister-in-law Sushama and Neetu caught her hold and father-in-law exhorted what was being looked at on which her husband Pradeep poured kerosene oil from cane; stroke the matchstick and threw it upon her; her clothes caught fire; when she raised alarm, neighbours converged the place and extinguished the fire but her in-laws were only seeing her and waiting for her death and they along with some villagers dropped her at Medical College and rushed away. It is further alleged that during treatment, on 14.1.2011 at about 9.15, she died. On 15.1.2011, post mortem of her person was conducted and after performing her last rites, he had gone to police station for getting report lodged.

3. With regard to the aforesaid incident which occurred on 6.1.2011 at about 21.15, the police registered Case Crime No. 8 of 2011 under Sections 498A, 304B I.P.C. and Section ¾ Dowry Prohibition Act on 16.1.2011 at 17.30. Police started investigation and after investigation, charge sheet was submitted in the court.

4. Trial Court on 23.8.2012 framed charges under Sections 498A, 304B, 302/34 I.P.C. and Section ¾ of the Dowry Prohibition Act. The accused pleaded not guilty and claimed to be tried.

5. In order to bring home the charges, prosecution examined as many as eleven witnesses, namely, P.W. 1 Satish Kumar (first informant); P.W. 2 Viresh Kumar (brother of deceased); P.W.3 Chandravir (brother of deceased); P.W. 4 Manoj Kumari (bhabhi of the deceased); P.W. 5 Mamta Devi (bhabhi of the deceased); P.W. 6 Smt. Kusuma Devi (mother of the deceased) and as formal witnesses P.W.7 Shyam Mohan Pathak, Retired Additional

City Magistrate-I; P.W.8 Dr. Amit Agrawal; P.W. 9 Head Constable Pradeep Kumar; P.W. 10 Dr. Sudhir Kumar Verma and P.W. 11 Virendra Singh, Investigating Officer (retired Police Superintendent).

6. In support of ocular version, documents, namely, chik F.I.R. (Ext. Ka-20); G.D. Entry (Ext. Ka-21); site plan of the place of occurrence (Ext. Ka-23); letter written to R.I. (Ext. Ka-3); letter to C.M.O. (Ext. Ka-4); photo nash (Ext. Ka-5), Police Form No. 13 (Ext. Ka-6); panchayatnama of deceased Rashmi (Ext. Ka-7); post mortem report (Ext. Ka-12); document relating to treatment of deceased at Jeevan Hospital (Ext. Ka-9) with (Ext. Ka-19); charge sheet (Ext. Ka-24); statement of the deceased before death (Ext. Ka-2); case sheet (Ext. Ka-8) were filed by prosecution.

7. After hearing learned counsel for the prosecution as well as defence, learned Trial Judge convicted the appellant alone for commission of offence under Section 302 I.P.C. and sentenced him to life imprisonment with fine of Rs.10,000/- and in default of payment of fine, to undergo further six months additional imprisonment. The learned Judge acquitted the accused appellant of offences under Sections 498A, 304B I.P.C. and Section ¾ Dowry Prohibition Act in for lack of evidence. The learned Trial Judge acquitted all the other accused and held the present accused guilty of offence. Being aggrieved with his conviction and sentence, the accused-appellant is before this Court.

8. Heard Sharda Prasad Mishra, learned counsel for the appellant and Sri Ajit Rey, learned A.G.A. for the State.

9. Learned counsel for the appellant has made submissions that accused-appellant is the husband of the deceased. He is in jail for about 10 years. It is further submitted that no offence has been committed by the accused and the death of the deceased was due to septicemia.

10. In support of his submissions, learned counsel for the appellant has given a compilation of Judgments on which he places reliance titled **Tholan Vs. State of Tamil Nadu, 1984 (2) SCC 133; Shaiknurjahan Vs. State of A.P., 2003 0 Supreme (AP) 959; State of Uttar Pradesh Vs. Gambhir Singh, 2005 (11) SCC 271; Vineet Kumar Chauhan Vs. State of U.P., 2007 (14) SCC 660; Gurmukh Singh Vs. State of Haryana, 2009 3 Crimes (SC) 416; Rijo Vs. State of Kerala, 2010 CrLJ 1315; Tukaram and others Vs. State of Maharashtra, (2011) 14 SCC 250; Veeran and others Vs. State of M.P., 2011 (3) Supreme 228; State of Rajasthan Vs. Mehram & others, Criminal Appeal No. 1894 of 2010** decided by Apex Court on May 6, 2020; and S**talin Vs. State represented by the Inspector of Police,** Criminal Appeal No. 577 of 2020 decided by the Apex Court on September 9, 2020 and submitted that the accused could not have been convicted under Section 302 I.P.C. It is submitted that the the offence would be under Section 304 II or Section 304 I of I.P.C as per the decisions on which heavy reliance is being placed by the counsel for the appellant. It is further submitted that if the Court comes to the conclusion that the accused has committed offence, in that case as the accused has been in jail for more than 9 years without remission, he may be granted fixed term punishment of incarceration.

11. It has been vehemently objected by learned A.G.A. for the State. Learned counsel has taken us through the evidence

on record and the manner in which the deceased was done to death bu all accused. Learned A.G.A. for the State has submitted that life imprisonment awarded to the accused in the facts and circumstances of the case was the only punishment which can be awarded to the accused who had poured keorsene oil and set the deceased ablaze in the matrimonial home. The injuries were such that the death was not because of the septicemia but was coupled with the fact that injury hasd taken place due to setting the deceased at fire. Learned A.G.A. has relied on the decisions in **(i) Sudershan Kumar Vs. State of Delhi, reported in AIR 1974 SC 2328, (ii) State of Haryana Vs. Pala and others, (1996) 8 SCC 51, (iii) Veerla Satyanarayana Vs. State of Andhra Pradesh, (2009) 16 SCC 316, (iv) Munnawar and others Vs. State of Uttar Pradesh and others, (2010) 5 SCC 451 and (v) Vidya Sagar Dwivedi Vs. State of U.P., MANU/UP/0502/2020.** Learned counsel for the State has heavily relied on the decision of this Court in the case of **Ashiq Ali and another Vs. State of U.P., Criminal Appeal No.4702 of 2012** decided on 10.2.2021 and submitted that dying declaration cannot be brushed aside. Further he heavily relied on decision of this Court in the case of **Manish Jain Vs. State of U.P., Criminal Appeal No. 3347 of 2015** decided on 29.1.2021 and submitted that just because death occurred due to septicemia, the accused cannot be dealt with leniently. We place reliance on the decision titled **Maniben Vs. State of Gujarat, AIR 2010 SC 1261**, decision of Gujarat High Court in Criminal Appeal No. 954 of 2007 **(Gulam Hussain Zalil Ahmed Shaikh Vs. State of Gujarat)** decided on 5.8.2013 and in Criminal Appeal No. 806 of 2011 **(Chhaganbhai Limjibhai Palas Vs. State of Gujarat)** decided on 20.11.2013 and the decision of Lucknow Bench of this High Court in **Criminal Appeal No.318 of 2015 (Pramod Kumar Vs. State of U.P.)** decided on 28.2.2019 so as to see whether the case would fall under what provision of law.

12. We place reliance on the decision titled **Maniben Vs. State of Gujarat, AIR 2010 SC 1261**, decision of Gujarat High Court in Criminal Appeal No. 954 of 2007 **(Gulam Hussain Zalil Ahmed Shaikh Vs. State of Gujarat)** decided on 5.8.2013 and in Criminal Appeal No. 806 of 2011 **(Chhaganbhai Limjibhai Palas Vs. State of Gujarat)** decided on 20.11.2013 and the decision of Lucknow Bench of this High Court in **Criminal Appeal No.318 of 2015 (Pramod Kumar Vs. State of U.P.)** decided on 28.2.2019 so as to see whether the case would fall under what provision of law.

13. The incident occurred on 6.1.2011 and deceased died on 14.1.2011 due to septicemia. The evidence of Dr. Amit Agrawal and Dr. Sudhir Kumar Verma, who have been examined as P.Ws 8 and 10 and the post mortem and medical report go to show that death occurred due to septicemia as a result of thermal burns. The medical report shows that there was superficial to deep burn all over the body except part of face and skull, part of lower abodmen, part of left feet, part of right hand, sluff material present at places, there was 90 per cent burns injuries.

14. The evidence of Dr. Amit Agrawal and Dr. Sudhir Kumar Verma will have to be discussed at length the reason being the learned counsel for the appellant has contended that the deceased was not in proper state of mind to give her dying declaration. Dr. Amit Agrawal (P.W. 8) had

treated the patient. He had called the Magistrate. He had examined the patient who is in proper state of mind. Even after examining the patient and after the dying declaration was recorded, he had examined her action and thereafter gave certificte. He was treating doctor. He has withstood the cross-examination that he has given the certificate that patient was in stable mind. Dr. Sudhir Kumar Verma (P.W.10) is also doctor who had thereafter done the post mortem. He was 25 years of age. He had recorded injuries which were there. According to him, the death was due to thermal burn injuries which had caused infection in the entire body and patient died due to septicemia.

15. From the aforesaid fact, it is proved fact that deceased died out of septicemia. The learned judge below punished appellant-accused under Section 302 I.P.C.

16. The decision in Manish Jain **(supra**) though in different facts would enure benefit to the accused as, in our case, we find that accused had set ablaze his wife but, at the same time, from the evidence on record, it is seen that most of the witnesses have not supported the case of the prosecution. Evidence of P.W. 1 clinches the issue that the in-laws had taken the deceased to the hospital but thereafter they had rushed away. The deceased has deposed that it was her husband who had set her ablaze. The dying declaration has to coupled with the other evidence as evidence on record of P.W. 1, P.W. 2 and P.W. 3 before turning hostile goes to show that his sister was in hospital and was trying to struggle for life.

17. Considering the evidence of the witnesses and also considering the medical evidence including post mortem report, there is no doubt left in our mind about the guilt of the present appellant. However, the question which falls for our consideration is whether, on reappraisal of the peculiar facts and circumstances of the case, the conviction of the appellant under Section 302 of I.P.C. of the Indian Penal Code should be upheld or the conviction deserves to be converted under Section 304 Part-I or Part-II of the Indian Penal Code. It would be relevant to refer Section 299 of the Indian Penal Code, which read as under:

"299. Culpable homicide: *Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide."*

18. The academic distinction between "murder' and "culpable homicide not amounting to murder' has always vexed the Courts. The confusion is caused, if Courts losing sight of the true scope and meaning of the terms used by the legislature in these sections, allow themselves to be drawn into minute abstractions. The safest way of approach to the interpretation and application of these provisions seems to be to keep in focus the keywords used in the various clauses of Section 299 and 300 of I.P.Code. The following comparative table will be helpful in appreciating the points of distinction between the two offences.

Section 299	Section 300
A person commits culpable homicide if the act by	Subject to certain exceptions culpable homicide is murder is the act by which the death is caused is done.

which the death is caused is done-	
INTENTION	
(a) with the intention of causing death; or	(1) with the intention of causing death; or
(b) with the intention of causing such bodily injury as is likely to cause death; or	(2) with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused;
KNOWLEDGE	**KNOWLEDGE**
(c) with the knowledge that the act is likely to cause death.	(4) with the knowledge that the act is so immediately dangerous that it must in all probability cause death or such bodily injury as is likely to cause death, and without any excuse for incurring the risk of causing death or such injury as is mentioned above.

19. On overall scrutiny of the facts and circumstances of the present case coupled with the opinion of the Medical Officer and considering the principle laid down by the Apex Court in the Case of **Tukaram and Ors Vs. State of Maharashtra, reported in (2011) 4 SCC 250** and in the case of **B.N. Kavatakar and Another Vs. State of Karnataka,** reported in **1994 SUPP (1) SCC 304,** we are of the considered opinion that the offence would be one punishable under Section 304 part-I of the IPC.

20. In view of the aforementioned discussion, we are of the view that this appeal has to be partly allowed, hence, is partly allowed.

21. The conviction of the appellant under Section 302 of Indian Penal Code is converted to conviction under Section 304 (Part I) of Indian Penal Code and the appellant is sentenced to undergo 10 years of incarceration with fine which is reduced to Rs.1,000/-. Default sentence is reduced to three months.

22. Appellant-accused is in jail. If ten years of incarceration is over, he shall be released forthwith, if not required in any other case. He would be entitled to all kind of remissions. The judgement and order dated 29.5.2014 shall stand modified accordingly.

23. Let a copy of this judgment along with the trial court record be sent to the Court and Jail Authorities concerned for compliance.

(2021)02ILR A1050
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 29.01.2021

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER , J.
THE HON'BLE GAUTAM CHOWDHARY, J.

Criminal Appeal No. 3347 of 2015

Manish Jain ...Appellant(In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellants:
Sri Ranjit Saxena, Sri Mahabir Yadav, Sri Ram Awtar, Sri Subash Singh Yadav, Sri Y.S. Saxena, Sri Ram Bahadur Kushwaha, Sri V.P. Srivastava, Sri Sunil Kumar Singh

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

Criminal Law - Indian Penal Code, 1860- Sections 302 & 304 (Part I) - The death caused by the accused was not premeditated,-Accused had no intention to cause death of deceased, the injuries were though sufficient in the ordinary course of nature to have caused death, accused had no intention to do away with deceased, hence the instant case falls under the Exceptions 1 and 4 to Section 300 of IPC- ffence committed will fall under Section 304 Part-I.

It is settled law that where the accused had no intention to cause death but had knowledge that the injuries inflicted by him are sufficient in the ordinary course of nature to cause death, then the offence would be one u/s 304(Part I) of the IPC.

Criminal Law -Indian Penal Code, 1860- Sections 302 & 304 (Part I) - The deceased survived for more than 20 days. She was shifted from the ICU ward to general ward and thereafter she developed fissure and later on during treatment, she breathed her last. The death was because of after effect of the treatment as she had developed other diseases also and the deceased developed what is known as septicaemia. The conviction of the appellant under Section 302 of Indian Penal Code is converted to conviction under Section 304 (Part I) of Indian Penal Code.

Death was not solely due to the act of the accused but several other factors also contributed to her death which was the result of septicaemia, hence the said fact also establishes that the offence would be of culpable homicide not amounting to murder.

Criminal Appeal partly allowed. (Para 16, 17, 19, 20, 21) (E-2)

Judgements/ Case law Cited:-

1. Sudershan Kumar Vs St. of Delhi, AIR 1974 SC 2328

2. St. of Har. Vs Pala & ors., (1996) 8 SCC 51,

3. Veerla Satyanarayana Vs St. of A.P, (2009) 16 SCC 316

4. Munnawar & ors. Vs St. of U.P. & ors., (2010) 5 SCC 451

5. Vidya Sagar Dwivedi Vs St.of U.P., MANU/UP/0502/2020.

Judgements/ Case law relied upon:-

1. Tukaram & ors. Vs St. of Maha., (2011) 4 SCC 250

2. B.N. Kavatakar & anr. Vs St. of Kar., 1994 SUPP (1) SCC 304

3. Veeran & ors. Vs St. of M.P. (2011) 5 SCR 300

4. Crl. Appeal No.83 of 2008 (Gautam Manubhai Makwana Vs St.of Guj.)

(Delivered by Hon'ble Dr. Kaushal Jayendra Thaker, J. &
Hon'ble Gautam Chowdhary, J.)

1. Heard Senior Advocate assisted by Sri Sunil Kumar Singh, learned Advocate for the appellant and learned A.G.A. for the State.

2. This appeal challenges the judgment and order dated 28/30.7.2015 passed by Additional Sessions Judge, Court No.1, Agra in Sessions Trial No.280 of 2012 convicting appellant under Section 452, 307 & 302 of Indian Penal Code, 1860 (hereinafter referred to as 'IPC') and

Section 4/5 of the Explosive Substances Act, 1908 (for short 'Act, 1908'). The learned Additional Sessions Judge has sentenced the accused in the following manner and has held that all the sentences to run concurrently:

Conviction under Section	Sentence Awarded	Fine	Default Sentence
302 of I.P.C.	Life imprisonment	5000/-	6 months
307 of I.P.C.	7 years	1000/-	1 month
452 of I.P.C.	3 years	500/-	15 days
4/5 of Explosive Substances Act	10 years	1000/-	1 month

3. On the fateful day when grand daughter was born to daughter in law of legendary actor, Sri Amitabh Bachchan, the daughter of the complainant was injured by the bomb which was in fact a cracker bomb with which the accused was celebrating the birth of grand child of Sri Amitabh Bachchan in his home city namely Allahabad. The accused is said to have thrown two bombs shells into the house of the complainant at about 5.00 p.m. in the evening on the fateful day i.e. 11.11.2011. The accused who was staying near the house of the complainant. The complainant got injured. The particles of the bomb pierced her bad and her daughter Kavita who came out of the rest room at that time the accused came inside with a purpose to do away with the deceased, hurled the second bomb by which the young girl was injured. Many people came to spot and seeing them, the accused ran away. Complainant and her daughter were taken to the hospital. The complaint is of dated 11.11.2011. Unfortunately, on 3.12.2011, the daughter of the complainant passed away whose name was Kavita. The complainant identified the dead body at the mortuary. The postmortem was also performed on the very same day. The police officer took the fire cracker bomb and got it defused and sent the same for examination at the Forensic Science Laboratory Department. The police reported the death as unnatural death by violence and that is how the medico legal postmortem was prepared. The dead body was received on 3.12.2011. She was treated locally, shifted to Central Hospital, Northern Railway and then shifted to Dr. R.M.L. Hospital on 16.11.2011. She died on 2.12.2011 during treatment.

4. Investigation was moved into motion and after recording statements of various persons, the Investigating Officer submitted the charge-sheet against accused.

5. The accused was facing charges which were exclusively triable by the Court of Sessions, hence, the case was committed to the Court of Sessions.

6. On being summoned, the accused pleaded not guilty and wanted to be tried, hence, the trial started and the prosecution examined about 12 witnesses who are as follows:

1.	Deposition of Rajeshwari Sharma	22.4.2013 16.5.2013 19.11.2013	PW1

2.	Deposition of Jairaj Vir Singh	29/05/13	PW2
3.	Deposition of Dr. S.C. Jain	29/05/13	PW3
4.	Deposition of Bhrat Singh	14/03/16	PW4
5.	Deposition of Shanker Lal	14/03/16	PW5
6.	Deposition of Santosh Kumar	18/07/13	PW6
7.	Deposition of Dr.Manoj Kumar	14/08/13	PW7
8.	Deposition of Surendra Singh	08/10/13	PW8
9.	Deposition of Dr. Arun Kapoor	08/03/11	PW9
10.	Deposition of Dr. Anita Chandrayan	08/12/13	PW10
11.	Deposition of Rajan Singh	15/12/13	PW11
12.	Deposition of Shailendra Singh	12/03/14	PW12

7. In support of ocular version following documents were filed:

1.	F.I.R.	11/11/11	Ex.Ka.9
2.	Written Report	11/11/11	Ex.Ka.1
3.	Statement Regarding Identification of Body	03/12/11	Ex.Ka.12
4.	'Raseed Hawalgi Nash'	03/12/11	Ex.Ka.13
5.	Statement Regarding Identification of Body	03/12/11	Ex.Ka.15
6.	Certificate of Bomb Disposal Squad	11/11/11	Ex.Ka.5
7.	Injury Report	11/11/11	Ex.Ka.3
8.	Injury Report	11/11/11	Ex.Ka.4
9.	Death Report	03/12/11	Ex.Ka.14
10.	Postmortem Report	03/12/11	Ex.Ka.8
11.	Death Summary	02/12/11	Ex.Ka.11
12.	Report of Vidhi Vigyan Prayogshala	02/12/11	Ex.Ka.2
13.	Charge-sheet	02/12/11	Ex.Ka.7

8. At the end of the trial and after recording the statement of the accused under section 313 of Cr.P.C., and hearing arguments on behalf of prosecution and the defence, the learned Sessions Judge convicted the appellants as mentioned aforesaid. Being aggrieved by and

dissatisfied with the aforesaid judgement and order passed by the Sessions Court the appellants have preferred the present appeal.

9. Learned counsel for the appellant has made submissions that no offence has been committed by the accused. It is further submitted that the accused had no motive to do away with the deceased and that the death of the deceased was due to septicemia after a considerable period of time.

10. Learned counsel for the appellant has relied on the decision titled **Maniben Vs. State of Gujarat, AIR 2010 SC 1261,** decision of Gujarat High Court in Criminal Appeal No. 954 of 2007 **(Gulam Hussain Zalil Ahmed Shaikh Vs. State of Gujarat)** decided on 5.8.2013 and in Criminal Appeal No. 806 of 2011 (**Chhaganbhai Limjibhai Palas Vs. State of Gujarat)** decided on 20.11.2013 and the decision of Lucknow Bench of this High Court in Criminal Appeal No.318 of 2015 **(Pramod Kumar Vs. State of U.P.)** decided on 28.2.2019 so as to contend that the decision of imprisonment for life is bad and life could not be till the last breath and the conviction under Section 302 of I.P.C. is not made out. In alternative, it is submitted that the the offence would be under Section 304 II or Section 304 I of I.P.C as per the decisions on which heavy reliance is being placed by the counsel for the appellant. It is further submitted that if the Court comes to the conclusion that the accused has committed offence, in that case as the accused have been in jail for more than 9 years without remission, he may be granted fixed term punishment of incarceration.

11. It has been vehemently objected by learned A.G.A. for the State. He has taken us through the evidence on record and the manner in which the deceased was done to death. Sri Rupak Chaubey, learned A.G.A. for the state has submitted that life imprisonment awarded to the accused in the facts and circumstances of the case was the only punishment which can be awarded to the accused who had hurled the bomb not once but twice which shows the fact that he was well aware that the first bomb did not hurt the girl and, therefore, he came again and hurled the second bomb in the house. The injuries were such that the death was not because of the septicemia but was coupled with the fact that injury has taken place due to blasting. Learned A.G.A. has relied on the decisions in **(i) Sudershan Kumar Vs. State of Delhi, reported in AIR 1974 SC 2328, (ii) State of Haryana Vs. Pala and others, (1996) 8 SCC 51, (iii) Veerla Satyanarayana Vs. State of Andhra Pradesh, (2009) 16 SCC 316, (iv) Munnawar and others Vs. State of Uttar Pradesh and others, (2010) 5 SCC 451 and (v) Vidya Sagar Dwivedi Vs. State of U.P., MANU/UP/0502/2020.**

12. Before we start considering the evidence which we are not elaborately discussing, the reason being it is proved conclusively that the fire cracker bomb was hurled by none other than the accused. The mother of the complainant also received injuries which she has testified on oath as P.W.1. P.W.2 also corroborated and hence it was proved that accused was the person involved in the commission of the offence. The reasons are that the accused has been identified by the witnesses to have burst the crackers in the house of the complainant which injured the deceased and her mother and that it was the accused and accused alone who had committed the offence.

13. Considering the evidence of the witnesses and also considering the medical evidence including post mortem report,

there is no doubt left in our mind about the guilt of the present appellants.

14. However, the question which falls for our consideration is whether, on reappraisal of the peculiar facts and circumstances of the case, the conviction of the appellant under Section 302 of I.P.C. of the Indian Penal Code should be upheld or the conviction deserves to be converted under Section 304 Part-I or Part-II of the Indian Penal Code. It would be relevant to refer Section 299 of the Indian Penal Code, which read as under:

"299. Culpable homicide: Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide."

15. The academic distinction between "murder' and "culpable homicide not amounting to murder' has always vexed the Courts. The confusion is caused, if Courts losing sight of the true scope and meaning of the terms used by the legislature in these sections, allow themselves to be drawn into minute abstractions. The safest way of approach to the interpretation and application of these provisions seems to be to keep in focus the keywords used in the various clauses of Section 299 and 300 of I.P.Code. The following comparative table will be helpful in appreciating the points of distinction between the two offences.

Section 299	**Section 300**
A person commits culpable homicide if the act by which the death is caused is done-	Subject to certain exceptions culpable homicide is murder is the act by which the death is caused is done.
	INTENTION
(a) with the intention of causing death; or	(1) with the intention of causing death; or
(b) with the intention of causing such bodily injury as is likely to cause death; or	(2) with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused;
KNOWLEDGE	**KNOWLEDGE**
(c) with the knowledge that the act is likely to cause death.	(4) with the knowledge that the act is so immediately dangerous that it must in all probability cause death or such bodily injury as is likely to cause death, and without any excuse for incurring the risk of causing death or such injury as is mentioned above.

16. On overall scrutiny of the facts and circumstances of the present case coupled with the opinion of the Medical Officer and considering the principle laid down by the Apex Court in the Case of **Tukaram and Ors Vs. State of Maharashtra, reported in (2011) 4 SCC 250** and in the case of **B.N. Kavatakar and Another Vs. State of Karnataka,** reported in **1994 SUPP (1) SCC 304**, we are of the considered opinion that the offence would

be one punishable under Section 304 part-I of the IPC.

17. From the upshot of the aforesaid discussions, it appears that the death caused by the accused was not premeditated, accused had no intention to cause death of deceased, the injuries were though sufficient in the ordinary course of nature to have caused death, accused had no intention to do away with deceased, hence the instant case falls under the Exceptions 1 and 4 to Section 300 of IPC. While considering Section 299 as reproduced herein above offence committed will fall under Section 304 Part-I as per the observations of the Apex Court in **Veeran and others Vs. State of M.P. Decided, (2011) 5 SCR 300** which have to be also kept in mind.

18. We can safely rely upon the decision of the Gujarat High court in **Criminal Appeal No.83 of 2008 (Gautam Manubhai Makwana Vs. State of Gujarat)** decided on 11.9.2013 wherein the Court held as under:

*"12. In fact, in the case of **Krishan vs. State of Haryana reported in (2013) 3 SCC 280**, the Apex Court has held that it is not an absolute principle of law that a dying declaration cannot form the sole basis of conviction of an accused. Where the dying declaration is true and correct, the attendant circumstances show it to be reliable and it has been recorded in accordance with law, the deceased made the dying declaration of her own accord and upon due certification by the doctor with regard to the state of mind and body, then it may not be necessary for the court to look for corroboration. In such cases, the dying declaration alone can form the basis for the conviction of the accused. But where the dying declaration itself is attended by suspicious circumstances, has not been recorded in accordance with law and settled procedures and practices, then, it may be necessary for the court to look for corroboration of the same.*

13. However, the complaint given by the deceased and the dying declaration recorded by the Executive Magistrate and the history before the doctor is consistent and seems to be trustworthy. The same is also duly corroborated with the evidence of witnesses and the medical reports as well as panchnama and it is clear that the deceased died a homicidal death due to the act of the appellants in pouring kerosene and setting him ablaze. We do find that the dying declaration is trust worthy.

14. However, we have also not lost sight of the fact that the deceased had died after a month of treatment. From the medical reports, it is clear that the deceased suffered from Septicemia which happened due to extensive burns.

15. In the case of the B.N. Kavatakar and another (supra), the Apex Court in a similar case of septicemia where the deceased therein had died in the hospital after five days of the occurrence of the incident in question, converted the conviction under section 302 to under section 326 and modified the sentence accordingly.

*15.1 Similarly, in the case of **Maniben (supra),** the Apex Court has observed as under:*

"18. The deceased was admitted in the hospital with about 60% burn injuries and during the course of treatment developed septicemia, which was the main

cause of death of the deceased. It is, therefore, established that during the aforesaid period of 8 days the injuries aggravated and worsened to the extent that it led to ripening of the injuries and the deceased died due to poisonous effect of the injuries.

19. It is established from the dying declaration of the deceased that she was living separately from her mother-in-law, the appellant herein, for many years and that on the day in question she had a quarrel with the appellant at her house. It is also clear from the evidence on record that immediately after the quarrel she along with her daughter came to fetch water and when she was returning, the appellant came and threw a burning tonsil on the clothes of the deceased. Since the deceased was wearing a terylene cloth at that relevant point of time, it aggravated the fire which caused the burn injuries.

20. There is also evidence on record to prove and establish that the action of the appellant to throw the burning tonsil was preceded by a quarrel between the deceased and the appellant. From the aforesaid evidence on record it cannot be said that the appellant had the intention that such action on her part would cause the death or such bodily injury to the deceased, which was sufficient in the ordinary course of nature to cause the death of the deceased. Therefore, in our considered opinion, the case cannot be said to be covered under clause (4) of Section 300 of IPC. We are, however, of the considered opinion that the case of the appellant is covered under Section 304 Part II of IPC."

16. In the present case, we have come to the irresistible conclusion that the role of the appellants is clear from the dying declaration and other records. However, the point which has also weighed with this court are that the deceased had survived for around 30 days in the hospital and that his condition worsened after around 5 days and ultimately died of septicemia. In fact he had sustained about 35% burns. In that view of the matter, we are of the opinion that the conviction of the appellants under section 302 of Indian Penal Code is required to be converted to that under section 304(I) of Indian Penal Code and in view of the same appeal is partly allowed.

17. The conviction of the appellants - original accused under Section 302 of Indian Penal Code vide judgment and order dated 19.12.2007 arising from Sessions Case No. 149 of 2007 passed by the Additional Sessions Judge, Fast Track Court No. 6, Ahmedabad is converted to conviction under Section 304 (Part I) of Indian Penal Code. However, the conviction of the appellants - original accused under section 452 of Indian Penal Code is upheld. The appellants - original accused are ordered to undergo rigorous imprisonment for a period of ten years and fine of Rs. 5000/- each in default rigorous imprisonment for six months under section 304 (Part I) of Indian Penal Code instead of life imprisonment and sentence in default of fine as awarded by the trial court under section 302 IPC. The sentence imposed in default of fine under section 452 IPC is also reduced to two months. Accordingly, the appellants are ordered to undergo rigorous imprisonment for a period of ten years and fine of Rs. 5000/-, in default, rigorous imprisonment for six months for offence punishable under section 304(I) of Indian Penal Code and rigorous imprisonment for a period of five years and fine of Rs. 2,000/-, in default, rigorous imprisonment for two months for offence

punishable under section 452 of Indian Penal Code. Both sentences shall run concurrently. The judgement and order dated 19.12.2007 is modified accordingly. The period of sentence already undergone shall be considered for remission of sentence qua appellants - original accused. R & P to be sent back to the trial court forthwith."

19. We are unable to agree with learned A.G.A. who has relied on the recent decision of this Court in **Vidya Sagar Dwivedi (Supra)**. The said judgment nowhere deals with the issue of septicemia. The judgments in **Sudershan Kumar Vs. State of Delhi, AIR 1974 SC 2328, State of Haryana Vs. Pala and others, (1996) 8 SCC 51, Veerla Satyanarayana Vs. State of Andhra Pradesh, (2009) 16 SCC 316, Munnawar and others Vs. State of Uttar Pradesh and others, (2010) 5 SCC 451** on which the learned A.G.A. has placed reliance, relates to actual and motivated assault. In our case, none has mentioned that what was the motive of the accused. None of the witnesses has even remotely conveyed that the accused had with a purposeful motive hurled the bombs on the deceased, what was the motive or the accused had any intention of doing away with the injured or the deceased is not borne out from the record in our case.

20. One more glaring fact is that from the record of the medical papers that the deceased survived for more than 20 days. She was shifted from the ICU ward to general ward and thereafter she developed fissure and later on during treatment, she breathed her last. Though we concur learned Trial Judge that the death was homicidal death we are unable to accept the submission of Sri Rupak Chaubey, learned A.G.A. that the sole reason for the death was the cracker bomb hurled by the accused.

21. The death was because of after effect of the treatment as she had developed other diseases also and the deceased developed what is known as septicemia. The judgment cited by Sri Rupak Chaubey, learned A.G.A. will not be applicable to the facts of this case as unfortunately from the evidence of the record, what was the motive of the accused is not borne out.

Punishment:

22. We come to the definite conclusion that the death was due to septicemia. The judgments cited by the learned counsel for the appellant would permit us to uphold our finding which we conclusively hold that the offence is not under Section 302 of I.P.C. but is culpable homicide.

23. The accused is in jail since 12.11.2011. The decision of this Court and and of the Gujarat High Court in **Gautam Manubhai (Supra)** wherein the undersigned (Dr.K.J. Thaker,J.) was a also a signatory and the decision in **Maniben (Supra)** wherein the Apex Court has converted the conviction under Section 302 of I.P.C. to Section 304 Part II of I.P.C. which will come to the aid of the accused.

24. In view of the aforementioned discussion, we are of the view that the appeal has to be partly allowed, hence, it is partly allowed.

25. The conviction of the appellant under Section 302 of Indian Penal Code is converted to conviction under Section 304 (Part I) of Indian Penal Code and the

appellant is sentenced to undergo 7 years of incarceration with fine of Rs.5000/- and conviction under Section 4/5 of Explosive Substances Act,1908 is also reduced to 7 years of rigorous imprisonment looking to the facts of this case. Conviction and sentences as far as offences under Sections 452 & 307 of I.P.C. are maintained as the period of sentence is over even the default period would be over.

26. Appellant-accused is in jail since 12.11.2011, if 7 years of incarceration is over for all the offences and the default would start after the period of seven years, he shall be released forthwith, if not required in any other case. The accused would be entitled to all remissions. The judgment and order impugned in this appeal shall stand modified accordingly.

27. Let a copy of this judgment along with the trial court record be sent to the Court and Jail Authorities concerned for compliance.

(2021)02ILR A1059
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 27.01.2021

BEFORE

THE HON'BLE VIRENDRA KUMAR SRIVASTAVA, J.

Criminal Appeal No. 191 of 2016

Vimlesh ...Appellant
Versus
State of U.P. ...Respondent

Counsel for the Appellant:
Sunil Kumar, Rajiv Mishra, Soniya Mishra

Counsel for the Respondent:
Govt. Advocate

Criminal Law - Indian Penal Code, 1860- Sections 366 & 376(2)- Rape of minor- Determination of age- Neither Code nor I.P.C. or POCSO Act 2012 provides procedure for determination of victim's age. Alleged offence was committed on 07.12.2014. Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules, 2007 *(hereinafter referred to as the '2007 Rules')* framed under Section 67 of the Juvenile Justice (Care and Protection of Children) Act 2000, provides procedure for determination of juvenile's age.

Since neither the IPC and nor the POCSO Act provide for the methodology to determine the age of the victim, hence the same is to be determined in accordance with Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules, 2007. Where the school documents or other documents establishing the age of the victim are absent then the age has to be determined under Rule 12 (3) of the Act.

Juvenile Justice (Care and Protection of Children) Rules, 2007- Rule 12(3)- Neither any matriculation nor equivalent certificate or any date of birth certificate, from the victim's school or any extract of Kutumb Register (birth and death register) maintained at the level of Village-Pradhan/Gaon Sabha of the victim, was filed by the prosecution before the trial Court. It is also pertinent to note that the opinion regarding the age of any person, based on medical and radiological evidence, can not be treated accurate and exact. Such determination of age, by medical expert, may vary in view of race, gender, geographical area, nutritional status and other factors like colour of pubic and armpit hair, development of sexual characteristics and other changes in the body of the victim. Such variation may be of one or two year of either side. Thus, in the light of the evidence available on record and in view of the law laid down by Hon'ble Supreme Court in *Jarnail Singh (supra), Jaya Mala (supra)* and *Rajak Mohammad (supra)* as well as relying upon the medical evidence on record, it may be held that the victim, at the time of

occurrence, was more than 16 years but below to 18 years and the finding of the trial Court that the victim was below than 16 years is not acceptable.

Where the school documents or other documents required for establishing the age of the victim are absent then the age has to be determined under Rule 12 (3) of the Act, however the said medical opinion cannot be regarded as accurate and benefit of two years on either side has to be given to the accused.

Criminal Law - Indian Penal Code, 1860- Sections 375 &376(1)- Although, according to P.W.-4, no external or internal injury was present on the private part of the victim and no spermatozoa was found from her vagina, merely on the ground of non presence of injury or spermatozoa where victim's hymen was found torn and healed and she was recovered from the custody of the appellant after nine days of the occurrence, it cannot be said that the offence of rape was not committed, particularly, if the victim was below than 18 years because according to Section 375 read with Section 376 I.P.C., if the victim is below the age of 18 years, her consent is immaterial in sexual intercourse.

If the age of the victim is found to be below 18 years, then her consent is immaterial and only on the ground of absence of external or internal injuries in a delayed medico-legal examination, it cannot be said that that the offence of rape was not committed.

Criminal Law - Indian Penal Code, 1860- Section-376(1)- Section 376(2)- The conviction and sentence of the appellant for offence under Section 376 (2) and Section 366 I.P.C. is altered to for the offence under Section 376 (1) and Section 366 I.P.C. and the appellant is convicted and sentenced for the offence under Section 376 (1) I.P.C., for seven years rigorous imprisonment with fine of Rs. 10,000/- and so far as the conviction and sentence for the offence under Section 366 I.P.C., passed by trial Court, is concerned, it requires no interference.

Since the age of the victim is determined to be more than 16 years but less than 18 years, hence the offence is altered to Section 376(1). (Para 31, 37, 38, 42, 45, 49)

Appeal Partly Allowed. (E-2)

Judgements/ Case law relied-

1. Jarnail Singh Vs St. of Har. (2013) 7 SCC 263

2. Jaya Mala Vs Home Secy. J & K & ors. AIR 1982 SC 1297

3. Rajak Mohammad Vs St. of H.P, (2018) 9 SCC 248

4. St. of M.P. Vs Saleem @ Chamaru, AIR 2005 SC 3996

5. Ramashraya Chakravarti Vs St. of M.P. AIR 1976 SC 392

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

1. This Criminal Appeal, under Section 374 Code of Criminal Procedure, 1973 (hereinafter referred to as 'Code'), has been preferred by the appellant-Vimlesh (hereinafter referred to as 'appellant') against the judgment and order dated 28.1.2016, passed by Additional Sessions Judge, Court No. 10/Special judge Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as 'POCSO Act'), Unnao, in Special Sessions Trial No. 15/2015 *(State vs. Vimlesh)*, arising out of Case Crime No. 1043/2014, P.S. Makhi, District Unnao, whereby the appellant has been convicted and sentenced for offence under Section 376 (2) I.P.C., for 10 years rigorous imprisonment with a fine of Rs. 10,000/- and for offence U/s 366 I.P.C., for 5 years rigorous imprisonment with a fine of Rs. 5,000/- with further direction that all the sentences shall run concurrently.

2. The prosecution case, in brief, is that Dharam Pal (P.W.-2), father of victim (P.W.-3), lodged the first information report (Ext.-Ka-2) (in short F.I.R.) on 15.12.2014, at about 15:30 p.m. at P.S. Makhi, District Unnao, alleging that P.W.-3 aged about 14 years, had left her house on 07.12.2014 to go to her maternal uncle (mama)'s house situated in Village Kokarikhurd, but it was found that she did not reach there. It was also found that the appellant, who is distant relative, as mama (maternal uncle) of the victim, r/o Mustafabad h/o Pakhraura, had enticed the victim away with the help of appellant's elder brother-Kamlesh, his father-Gauri Shankar and his mother-Nanhi. It is further alleged that the victim had also taken away Rs. 35,000/- in cash, a silver anklet of 200 grams and 2 mobile phones bearing no. 7309354605 and 7052809921 with her.

3. On the said information, a criminal case was registered against the appellant-Vimlesh, Kamlesh along with co-accused-Gauri Shankar and Smt. Nanhi and the investigation was handed over to S.I., Suresh Chandra (P.W.-8), who, during investigation, recorded the statement of Dharam Pal (P.W.-2), visited the place of occurrence, prepared site plan (Ext.-Ka-11), arrested the appellant along with victim (P.W.-3), prepared a recovery memo (Ext.-Ka-3) and sent the P.W.-3 for medico legal examination.

4. Dr. Sanju Agarwal (P.W.-4), examined the victim on 16.12.2014, at about 3:45 p.m. According to her, at the time of examination, the victim was aged about 15 years ; no external or internal injury was found on the person of victim; her hymen was old and torn ; two slides of vaginal smear were prepared and sent for pathological examination. According to her further, she had prepared medico legal examination report (Ext.Ka-6) and supplementary medico legal examination report (Ext.-Ka-7) on the basis of pathological report, but no dead or alive sperm was found and the victim was also sent for determination of her age to radiological expert.

5. Dr. Rajendra Kumar (P.W.-1) conducted the radiological examination of the victim and according to him, on the basis of x-ray report (Ext.-Ka-1) and x-ray plates (material Ex.1), the right knee joint of the victim was fused, whereas the wrist joints were not fused and the victim was aged about 15 years.

6. Meanwhile, investigation was transferred to S.I., Pramod Kumar Yadav (P.W.-7), who produce the victim before the concerned Judicial Magistrate for recording her statement under Section 164 of the Code.

7. The statement, under Section 164 of the Code (Ext.-Ka-5), of the victim (P.W.-3), was recorded on 19.12.2014 by the concerned Judicial Magistrate, wherein she stated that the appellant-Vimlesh had come at her home and enticed her to come with money, which was kept by her father. She further stated that he (appellant) enticed her away and kept moving her till 8 days. She further stated that he used force (rape) with her ; she had requested him to carry her to her home but police had caught her at Chakalbansi. She further stated that the appellant is her maternal uncle (mama) in distant relationship and sometimes he used to come at her home. She further stated that he did not make any attempt to outrage her modesty (galat-kaam) at her home; she had not gone according to her own will ; and he (appellant) had asked her

for a visit to Chakalbansi. She further stated that she wanted to go with her parents ; rape was committed with her ; and she understood the meaning of rape.

8. Meanwhile, again the investigation was transferred to S.I., Srikant Dwivedi, who recorded the statement of witnesses and after investigation, filed the charge-sheet (Ext.-Ka-8) only against the appellant, for offence under Sections 363, 366, 376 I.P.C. and Section 3/4 POCSO Act before the concerned Magistrate, who took the cognizance of the offence and since the offence was exclusively triable by the Court of Sessions, after providing the copies of relevant police papers, as required under Section 207 of the Code, committed the case to the Court of Sessions, Unnao, for trial.

9. The learned trial Court framed the charges for offence under Sections-363 and 366 and 376 I.P.C. alternatively for offence under Section 3/4 POCSO Act against the appellant to which he denied and claimed for trial.

10. Prosecution, in order to prove its case, examined Dr. Rajendra Kumar (P.W.-1) (Radiologist), Dharam Pal (P.W.-2/informant), victim (P.W.-3), Lady Doctor-Sanju (P.W.-4), S.I. Srikant Dwivedi (P.W.-5/investigating officer), Constable-Moharir Chandra Pal (P.W.-6), S.I., Pramod Kumar Yadav (P.W.-7/Investigating Officer) and S.I., Suresh Chandra (P.W.-8/Investigating Officer), wherein, Dharam Pal (P.W.-2) and victim (P.W.-3) are witnesses of fact and rest are formal witnesses.

11. The prosecution has also relied upon documentary evidence i.e. x-ray report of the victim (Ex.Ka-1); x-ray plate (material Ex.1), written report (Ext.-Ka-2), recovery memo of victim (Ext.-Ka-3), statement of victim recorded by police (Ext.-ka-4), statement of victim under Section 164 of the Code (Ext.-Ka-5), medico legal examination report of victim (Ext.-Ka-6), supplementary medico legal examination report (Ext.-Ka-7), charge-sheet (Ext.-ka-8), Chik F.I.R. (Ext.-Ka-9), G.D. Report (Ext.-ka-10) and site plan of the place of occurrence (Ext.-Ka-11).

12. After conclusion of prosecution evidence, the statement of the appellant was recorded under Section 313 of the Code, wherein he denied the prosecution story as well as evidence adduced by the prosecution. The appellant further stated that the marriage of the victim with him was settled, but due to dispute arose in their settlement, marriage could not be solemnized and due to that enmity, a false report was lodged against him. In support of defence, no evidence was adduced by the appellant.

13. Learned trial Court, after hearing the learned counsel for both the parties and considering the material available on record, convicted and sentenced the appellant as above by the impugned judgment. Aggrieved by the said judgment, the appellant has preferred this appeal.

14. Heard Sri Rajiv Mishra, learned counsel for the appellant, Sri Tilak Raj Singh, learned A.G.A. for the State and peruse the record.

15. Learned counsel for the appellant has submitted that the appellant is innocent and has been falsely implicated, due to failure of settlement of marriage of the victim with appellant, between the parents of the appellant and father of the victim.

Learned counsel further submitted that both the appellant and victim are members of scheduled caste and the appellant is distant relative of the victim as mama. Learned counsel further submits that the victim was aged about more than 16 years, although her age was not proved by the prosecution. Learned counsel further submitted that according to the prosecution evidence, the victim had gone from her home according to her own will and the appellant had not taken her away. Learned counsel further submitted that Dharam Pal (P.W.-2) is not an eye-witness and the F.I.R. was lodged by him by delay of 7 days, without any explanation. Learned counsel further submitted that the prosecution evidence is self contradictory and is not reliable. Learned counsel further submitted that the trial Court, without applying its proper judicial mind as well as without considering the evidence available on record, convicted the appellant and the impugned judgment and order is against the provision of law, which is liable to be set aside.

16. Learned counsel further submitted that the appellant is languishing in jail since 2014 ; he, at the time of occurrence, was aged about 18-19 years old ; and he has no criminal history. Therefore, if the offence is made out, a lenient view may be adopted by the Court in passing the sentence against the appellant.

17. Per-contra, learned A.G.A. has vehemently opposed the submission advanced by learned counsel for the appellant and submitted that at the time of occurrence, the victim was less than 16 years and the said offence is proved by the prosecution evidence against the appellant beyond reasonable doubt. Learned A.G.A. further submitted that there is no contradiction between the ocular evidence and medical evidence. Learned A.G.A. further submitted that the recovery of the victim from custody of appellant is not disputed and delay in lodging the F.I.R. is natural and is not fatal to the prosecution case. Learned A.G.A. further submitted that there is no illegality in the impugned judgment and order passed by Court below and the appeal is liable to be dismissed.

18. I have considered the rival submission of learned counsel for both the parties and perused the record.

19. Learned trial Court, after considering the prosecution evidence, found that the prosecution had succeeded to establish the age of victim at the time of occurrence as 15 years and the appellant had kidnapped her from lawful guardianship and committed rape with her, thus, found the appellant guilty for the offence under Sections 366 and 376 (2) I.P.C. and Section 3/4 POCSO Act and convicted and sentenced him for the offence under Section 376 (2) and 366 I.P.C. as above.

20. Section 361 I.P.C. defines the offence of kidnapping. Section 375 defines offence of rape, Section 363 deals with punishment of kidnapping from lawful guardianship, Section 366 I.P.C. is aggravated form of kidnapping and deals with punishment for offence of kidnapping, abducting or inducing woman to compel her marriage, Section 376 I.P.C. deals with the punishment for the offence of rape and Sections 3 and 4 POCSO Act deals with definition and punishment of penetrative sexual assault. Sections 361, 363, 366, 375 and 376 I.P.C. and Sections 3 and 4 POCSO Act as it were in the year of 2014 are as under :

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

*363. **Punishment for kidnapping**.--Whoever kidnaps any person from India or from lawful guardianship, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.*

*366. **Kidnapping, abducting or inducing woman to compel her marriage, etc.**--Whoever kidnaps or abducts any woman with intent that she may be compelled, or knowing it to be likely that she will be compelled, to marry any person against her will, or in order that she may be forced or seduced to illicit intercourse, or knowing it to be likely that she will be forced or seduced to illicit intercourse, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; and whoever, by means of criminal intimidation as defined in this Code or of abuse of authority or any other method of compulsion, induces any woman to go from any place with intent that she may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person shall also be punishable as aforesaid.*

*" **Section 375.** A man is said to commit "rape" if he-*

(a) penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or

(b) inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or

(c) manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or

(d) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person, under the circumstances failing under any of the following seven descriptions:-

First. Against her will.

Secondly. Without her consent.

Thirdly. With her consent, when her consent has been obtained by putting her or any person in whom she is interested, in fear of death or of hurt.

Fourthly. With her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly. With her consent when, at the time of given such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

Sixthly. With or without her consent, when she is under eighteen years of age.

Seventhly. When she is unable to communicate consent.

***Explanation** 1. For the purposes of this section, "vagina" shall also include labia majora.*

***Explanation** 2. Consent means an unequivocal voluntary agreement when*

the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act:

Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity.

Exception 1. .....

Exception 2. .....

*"**Section 376**. (1) Whoever, except in the cases provided for in sub-section (2), commits rape, shall be punished with rigorous imprisonment of either description for a term which shall be less than seven years, but which may extend to imprisonment for life, and shall also be liable to fine.*

*(2) Whoever_*

(a) .....

(b) .....

(c) .....

(d) .....

(e) .....

(f) being a relative, guardian or teacher of, or a person in a position of trust or authority towards the woman, commits rape on such woman ; or.

(g) commits rape during communal or sectarian violence; or.

(h) commits rape on a woman knowing her to be pregnant ; or

(i) commits rape on a woman when she is under sixteen years of age; or

(j) commits rape, on a woman incapable of giving consent; or

(k) being in a position of control or dominance over a woman, commits rape on such woman; or

(l) commits rape on a woman suffering from mental or physical disability; or

(m) while committing rape causes grievous bodily harm or maims or disfigures or endangers the life of a woman; or

(n) commits rape repeatedly on the same woman,

shall be punished with rigorous imprisonment for a term which shall not be less than ten years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and shall also be liable to fine.

Explanation. ....."

Section 3. Penetrative sexual assault - A person is said to commit "penetrative sexual assault" if-

(a) he penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a child or makes the child to do so with him or any other person ; or

(b) he inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of the child or makes the child to do so with him or any other person ; or

(c) he manipulates any part of the body of the child so as to cause penetration into the vagina, urethra, anus or any part of body of the child or makes the child to do so with him or any other person ; or

(d) he applies his mouth to the penis, vagina, anus, urethra of the child or makes the child to do so to such person or any other person.

***Section 4. Punishment for penetrative sexual assault** - Whoever commits penetrative sexual assault shall be punished with imprisonment of either description for a term which shall not be less than seven years but which may extend to imprisonment for life, and shall also be liable to fine.*

21. Dharam Pal (P.W.-2), father of the victim, is not an eye witness of the occurrence. He has stated that on

7.12.2014, the victim had left her house to go to her maternal uncle's house situated in Village Kukarikhurd. He further stated that after two days, he got the information that the victim had not reached there and thereafter he got information that the victim was seen in company of appellant-Vimlesh. He further stated that at the time of her (victim) departure, she had taken away Rs. 35,000/- in cash, a silver anklet of 200 grams along with two mobile phones. Stating that he got the report written (Ex.Ka-2) by a person and after copying the same, lodged the F.I.R. at concerned police station, he further stated that the victim was recovered on 16.12.2014 and the recovery memo (Ext.-Ka-2) was prepared in his presence. In cross-examination, he admitted that at the time of lodging the report, he had gone at concerned police station with his father-in-law, wife and brother-in-law *(sala)* and the said report (Ext.-ka-1) was written by his brother-in-law *(behnoi)*. Stating that he did not know the name and identity of the person who had informed him that the victim had gone with the appellant, he further stated that when the victim was recovered, both mobiles were also recovered from custody of appellant and later on, it were handed over to him, but those mobiles were not sealed by the police. He further stated that on the day of recovery of the victim, the police met him at 3:30 p.m. and thereafter, the victim and the appellant were arrested in *chakalbansi* when they were getting down from a tempo on 16.12.2014.

22. Victim (P.W.-3), star witness, has stated that on 7.12.2014, she was going to her maternal uncle's house situated in Village Kukarikhurd and when she was on her way, the appellant met her and asked to visit Chakalbansi with him. She further stated that thereupon she went with him to Chakalbansi and thereafter to Kanpur. She further stated that she was kept moving hither and thither by the appellant for 6-7 days and the appellant had also kept her in the house of his maternal aunt (mausi). She further stated that during that period, the appellant had committed rape with her on twice occasions. She further stated that on 16.12.2014, the police had caught her with the appellant in presence of her parents and recovery memo (Ext.-Ka-3) was also prepared, whereupon she had also put her signature. She further stated that her statement (Ext.-Ka-5) was also recorded by the Magistrate and her Medico Legal Examination and x-ray was also conducted at District Hospital.

23. Dr. Sanju Agarwal (P.W.-4) has stated that she had examined the victim on 16.12.2014 at about 3:45 p.m. According to her, the height of the victim was 152.5 cm ; her weight was 46 kg ; teeth were 14+14 ; and her breasts were developing. This witness has also stated that neither any external nor any internal injury was found on the body of the victim and on internal examination, it was found that her hymen was torn and old. She further stated that the two slides of vaginal smear were prepared and sent to find out the sperm (dead or alive) to Chief Medical Officer, Unnao. She further stated that she had also prepared Medico Legal Examination Report (Ext.-Ka-6) and supplementary Medico Legal Examination Report (Ext.-Ka-7), but no sperm either dead or alive was found. According to her, the victim was aged about 15 years.

24. Dr. Rajendra Kumar (Radiologist) (P.W.-1) has stated that radio-logical examination, for determination of age of the victim, was conducted by him and it

was found that her knee joint were in process of fusion ; elbow joint were fused whereas wrist joint were not fused. He further stated that the victim's age was about 15 years; he had prepared x-ray report (Ext.-Ka-1) and on the basis of x-ray plate (Material Ex.1), the victim's age might be 14 years also.

25. Constable-Chandra Pal Singh (P.W.-6) has stated that on the basis of written report (Ext.-Ka-2), Chik-F.I.R. (Ext.-Ka-9) was prepared by him on 15.12.2014 and a Criminal Case No. 1043 of 2014 under Sections 363, 366 I.P.C. and Section 11/12 of POCSO Act was registered and the said information was entered in G.D. Report (Ext.-Ka-10).

26. S.I., Suresh Chandra Shukla (P.W.-8), first Investigating Officer, has stated that he had recorded the statement of Dharam Pal (P.W.-2), visited the place of occurrence and prepared site plan (Ext.-Ka-11). He further stated that he had also recovered the victim and arrested the appellant, prepared the recovery memo (Ext.-Ka-3) on the spot.

27. S.I., Pramod Kumar Yadav (P.W.-7), second Investigating Officer, has stated that he had produced the victim before the concerned Magistrate for recording her statement under Section 164 of the Code and after recording her statement, the offence of Section 376 I.P.C, 3/4 POCSO Act were added, during investigation.

28. S.I., Srikant Dwivedi (P.W.-5), third Investigating Officer, has stated that during investigation, he had recorded the statement of witnesses and after investigation, the involvement of other accused except appellant-Vimlesh was not proved and he had submitted the charge-sheet (Ext.-Ka-8) only against the appellant-Vimlesh.

29. The said occurrence was happened on 7.12.2014 i.e. after the enforcement of Criminal Law Amendment Act, 2013. For offence of kidnapping, as provided under Section 361 read with Section 363 I.P.C. and Section 366 I.P.C. and for offence of rape, as provided under Section 375 read with Section 376 I.P.C., the age of the victim is very important and if the victim is below than 18 years, her consent is immaterial either for offence of rape or for kidnapping.

30. Section 376 (1) I.P.C. provides that accused, for offence of rape, shall be punished with rigorous imprisonment for not less than 7 years which may extend to imprisonment for life and also for fine but if rape is committed with victim below than 16 years, such offence is covered under Section 376 (2) I.P.C., wherein the accused shall be punished for rigorous imprisonment which shall not be less than ten years which may extend to imprisonment actual reminder life. The appellant has been convicted by trial Court for offence under Section 376 (2) I.P.C. Therefore, it has to be determined whether the prosecution has succeeded to prove the age of victim below than 16 years or not.

31. Neither Code nor I.P.C. or POCSO Act 2012 provides procedure for determination of victim's age. Alleged offence was committed on 07.12.2014. Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules, 2007 *(hereinafter referred to as the '2007 Rules')* framed under Section 67 of the Juvenile Justice (Care and Protection of Children)

Act 2000, provides procedure for determination of juvenile's age. This provision is as under :

"12. Procedure to be followed in determination of Age.

(1) In every case concerning a child or a juvenile in conflict with law, the court or the Board or as the case may be the Committee referred to in rule 19 of these rules shall determine the age of such juvenile or child or a juvenile in conflict with law within a period of thirty days from the date of making of the application for that purpose.

(2) The Court or the Board or as the case may be the Committee shall decide the juvenility or otherwise of the juvenile or the child or as the case may be the juvenile in conflict with law, prima facie on the basis of physical appearance or documents, if available, and send him to the observation home or in jail.

(3) In every case concerning a child or juvenile in conflict with law, the age determination inquiry shall be conducted by the court or the Board or, as the case may be, the Committee by seeking evidence by obtaining

(a) (i) the matriculation or equivalent certificates, if available; and in the absence whereof;

(ii) the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof;

(iii) the birth certificate given by a corporation or a municipal authority or a panchayat;

(b) and only in the absence of either (i), (ii) or (iii) of clause (a) above, the medical opinion will be sought from a duly constituted Medical Board, which will declare the age of the juvenile or child. In case exact assessment of the age cannot be done, the Court or the Board or, as the case may be, the Committee, for the reasons to be recorded by them, may, if considered necessary, give benefit to the child or juvenile by considering his/her age on lower side within the margin of one year

and, while passing orders in such case shall, after taking into consideration such evidence as may be available, or the medical opinion, as the case may be, record a finding in respect of his age and either of the evidence specified in any of the clauses (a) (i), (ii), (iii) or in the absence whereof, clause (b) shall be the conclusive proof of the age as regards such child or the juvenile in conflict with law.

(4) If the age of a juvenile or child or the juvenile in conflict with law is found to be below 18 years on the date of offence, on the basis of any of the conclusive proof specified in sub-rule (3), the Court or the Board or as the case may be the Committee shall in writing pass an order stating the age and declaring the status of juvenility or otherwise, for the purpose of the Act and these rules and a copy of the order shall be given to such juvenile or the person concerned.

(5) Save and except where, further inquiry or otherwise is required, inter alia, in terms of section 7A, section 64 of the Act and these rules, no further inquiry shall be conducted by the court or the Board after examining and obtaining the certificate or any other documentary proof referred to in sub-rule (3) of this rule.

(6) The provisions contained in this rule shall also apply to those disposed of cases, where the status of juvenility has not been determined in accordance with the provisions contained in sub-rule (3) and the Act, requiring dispensation of the sentence under the Act for passing appropriate order in the interest of the juvenile in conflict with law."

32. Hon'ble Supreme Court in ***Jarnail Singh v. State of Haryana (2013) 7 SCC 263***, deciding the issue of procedure for determination of age of victim of rape, was of the view that the procedure for determination of juvenile's age as provided in Rule 12 (supra) may be adopted for determination of victim's age. The Supreme Court in ***Jarnail Singh (supra)*** has held as under :

"Even though Rule 12 is strictly applicable only to determine the age of a child in conflict with law, we are of the view that the aforesaid statutory provision should be the basis for determining age, even for a child who is a victim of crime. For, in our view, there is hardly any difference in so far as the issue of minority is concerned, between a child in conflict with law, and a child who is a victim of crime. Therefore, in our considered opinion, it would be just and appropriate to apply Rule 12 of the 2007 Rules, to determine the age of the prosecutrix VW-PW6. The manner of determining age conclusively, has been expressed in sub-rule (3) of Rule 12 extracted above. Under the aforesaid provision, the age of a child is ascertained, by adopting the first available basis, out of a number of options postulated in Rule 12(3). If, in the scheme of options under Rule 12(3), an option is expressed in a preceding clause, it has overriding effect over an option expressed in a subsequent clause. The highest rated option available, would conclusively determine the age of a minor. In the scheme of Rule 12(3), matriculation (or equivalent) certificate of the concerned child, is the highest rated option. In case, the said certificate is available, no other evidence can be relied upon. Only in the absence of the said certificate, Rule 12(3), envisages consideration of the date of birth entered, in the school first attended by the child. In case such an entry of date of birth is available, the date of birth depicted therein is liable to be treated as final and conclusive, and no other material is to be relied upon. Only in the absence of such entry, Rule 12(3) postulates reliance on a birth certificate issued by a corporation or a municipal authority or a panchayat. Yet again, if such a certificate is available, then no other material whatsoever is to be taken into consideration, for determining the age of the child concerned, as the said certificate would conclusively determine the age of the child. ***It is only in the absence of any of the aforesaid, that Rule 12(3) postulates the determination of age of the concerned child, on the basis of medical opinion."*** (Emphasis supplied)

33. In this case, the trial Court, relying on the statement of victim (P.W.-3), her father (P.W.-2), Dr. Rajendra Kumar (P.W.-1) and Dr. Snaju Agarwal (P.W.-4), has held that the victim's age was below to 16 years, at the time of occurrence.

34. It is also pertinent to note that the opinion regarding the age of any person, based on medical and radiological evidence, can not be treated accurate and exact. Such determination of age, by medical expert, may vary in view of race, gender, geographical area, nutritional status and other factors like colour of pubic and armpit hair, development of sexual characteristics and other changes in the body of the victim. Such variation may be of one or two year of either side.

35. Supreme Court in ***Jaya Mala v. Home Secretary J & K and Ors. AIR 1982 SC 1297*** has held as under:

"However, it is notorious and one can take judicial notice that the margin of

error in age ascertained by radiological examination is two years on either side."

36. In ***Rajak Mohammad vs. State of Himachal Pradesh, (2018) 9 SCC 248***, where radiologist had given an opinion that the age of prosecution was between 17 to 18 years, three Judges Bench of Supreme Court treating the prosecutrix above than 18 years and expressing its doubt on accuracy of radiological age, has held as under :

"9. While it is correct that the age determined on the basis of a radiological examination may not be an accurate determination and sufficient margin either way has to be allowed, yet the totality of the facts stated above read with the report of the radiological examination leaves room for ample doubt with regard to the correct age of the prosecutrix. *The benefit of the aforesaid doubt, naturally, must go in favour of the accused." (Emphasis supplied)*

37. Now the question arises whether or not, the evidence produced by the prosecution to prove the age of victim below to 16 years, is reliable and trustworthy. Admittedly, neither any matriculation nor equivalent certificate or any date of birth certificate, from the victim's school or any extract of Kutumb Register (birth and death register) maintained at the level of Village-Pradhan/Gaon Sabha of the victim, was filed by the prosecution before the trial Court.

38. Dharam Pal (P.W.-2) has stated that the victim, at the time of occurrence, was aged about 14 years and the victim (P.W.-3) has stated that she was student of class VI and when she attended the school for the first time, she was aged about 5 years. Stating that at the time of occurrence, she was studying in class VI, she further stated that she had left the school after the occurrence. The prosecution has not filed any document/certificate of educational qualification, issued by the said school, to prove the exact date of birth of the victim. According to Dr. Rajendra Kumar (P.W.-1) and Dr. Sanju Agarwal (P.W.-4), at the time of examination, the victim was aged about 15 years. Dr. Sanju Agarwal (P.W.-4) was not cross-examined by the defence on the point of age of victim, whereas Dr. Rajendra Kumar (P.W.-1) has rejected the suggestion of defence counsel at the time of occurrence, the victim was more than 17 years. Thus, in the light of the evidence available on record and in view of the law laid down by Hon'ble Supreme Court in ***Jarnail Singh (supra), Jaya Mala (supra)*** and ***Rajak Mohammad (supra)*** as well as relying upon the medical evidence on record, it may be held that the victim, at the time of occurrence, was more than 16 years but below to 18 years and the finding of the trial Court that the victim was below than 16 years is not acceptable.

39. So far as the submission of learned counsel for the appellant that the F.I.R. was lodged by delay of more than seven days, is concerned, Dharam Pal (P.W.-2), father of the victim is not an eye witness. In cross-examination, he had admitted that the information of the occurrence was given to him by co-villagers. Record further shows that a suggestion was also put to this witness by defence counsel that at the time of occurrence, he was residing at Pune and upon getting information, he reached to his village. Thus, it is clear that since, at the time of occurrence, the appellant was not in

his village *Jodhakhedha* , report could not be lodged immediately and as he got information of the offence, he lodged the F.I.R. In addition to above, the offence is related with kidnapping and rape. In such cases, it is often seen that if the accused is not known to the parents and relative of the victim, they used to make effort to search and locate the victim in their relations and when they become helpless, they take help of police. No time limit has been prescribed in law to lodge the F.I.R. It depends upon the facts and circumstances of each case. Therefore, in view of above, it cannot be said that the delay in lodging the F.I.R. is fatal to the prosecution case.

40. Victim (P.W.-3), stating that the appellant had enticed her away and asked her to go with him to Chakalbansi and kept moving her till 6-7 days hither and thither and also kept her at the house of her mother-in-law (mausi), further stated that the appellant had committed rape with her twice during those days. She has also stated that she was caught by the police with the appellant on 16.12.2014, in presence of her parents. P.W.-2 has also stated that the appellant, along with victim, was caught on 16.12.2014 by police. Both these witness have been cross-examined by the prosecution at length but nothing had come out in their cross-examination which shows any ambiguity or doubt in their statement.

41. In addition to above, both P.W.-2 and P.W.-3 have clearly stated that the victim (P.W.-3) was recovered on 16.12.2014 from Chakalbansi when she was with the appellant. S.I. Suresh Chandra Shukla (P.W.-8) has also stated that he had recovered the P.W.-3 from the custody of the appellant and had also arrested the appellant. In cross-examination, this witness further stated that P.W.-3 was recovered near Village-Chakalbansi. In cross-examination of these witnesses i.e. P.W.-2, P.W.-3 and P.W.-8, no specific question or suggestion was put to these witnesses in order to create any doubt regarding the recovery of the victim from possession of the appellant. Further, a suggestion was also put to P.W.-2, during cross examination, by defence counsel that the victim's marriage was settled with the appellant and since he (P.W.-2) was residing out of station, he could not get any information regarding the settlement of the said marriage and further, a suggestion was also put to this witness that due to a dispute arose in settlement of their marriage, a false case was registered. In addition to above, a similar suggestion was also put to the victim (P.W.-3) during her cross-examination. Both P.W.-2 and P.W.-3 had clearly rejected those suggestion, put before them during their cross-examination. In addition to it, the appellant, in his statement, recorded under Section 313 of the Code, has also stated that his marriage was settled with the victim, but due to dispute of money, their marriage could not be finalized and a false report was lodged against him. The appellant had not produced any evidence in his defence to support the explanation given by him in his statement under Section 313 of the Code.

42. Although, according to P.W.-4, no external or internal injury was present on the private part of the victim and no spermatozoa was found from her vagina, merely on the ground of non presence of injury or spermatozoa where victim's hymen was found torn and healed and she was recovered from the custody of the appellant after nine days of the occurrence, it cannot be said that the offence of rape was not committed, particularly, if the victim was below than 18 years because

according to Section 375 read with Section 376 I.P.C., if the victim is below the age of 18 years, her consent is immaterial in sexual intercourse.

43. It is also pertinent to note at this juncture that the appellant is a distant relative of the victim and there was no enmity of P.W.-2 and P.W.-3 with the appellant. Neither any suggestion was put to the prosecution witnesses during their cross-examination regarding any enmity with the appellant nor it is alleged by the appellant in his statement under Section 313 of the Code. Appellant was arrested with the victim and in medico legal examination, it was found that her hymen was old and torn. In addition to above, the appellant had not produced any documentary or oral evidence in his defence. Learned counsel for the appellant has failed to show any justification as to why P.W.-2 and P.W.-3 had falsely implicated the appellant.

44. It is established principle of criminal administration of justice, particularly in offence of rape, that no person will frame his own unmarried minor daughter as a victim of rape because he is very well aware with the fact that whole life of victim may be victimized by the society, particularly in rural areas. Dharam Pal (P.W.-2) and his daughter are rustic witnesses. The victim (P.W.-3) is not well educated. They were put too lengthy cross examination by learned defence counsel before Trial Court but nothing could be extracted by way of cross examination so as to create any doubt in their testimonies regarding the offence of rape and kidnapping. Their statements are natural and trustworthy. According to the statement and examination of all the witnesses, each and every circumstances of the case, proved by prosecution, leads to only one conclusion that the victim was kidnapped and raped by the appellant. Proposed marriage of appellant with victim, if any, as alleged by appellant, though denied by P.W.-2 and victim (P.W.-3), does not authorise the appellant to kidnap the victim and to establish sexual relationship with her forcibly. There is nothing on record to show that prosecution witnesses had any animus with appellant so as to implicate him falsely by absorbing the actual assailant.

45. Thus, in view of the above, prosecution has succeeded to prove that the appellant had kidnapped the victim who was below than 18 years but more than 16 years and was also unmarried, for compelling her to marry with him and had committed rape with her and consequently, the prosecution has succeeded to prove its case beyond reasonable doubt against the appellant for the offence under Sections 366 and 376(1) I.P.C. read with Section 4 of POCSO Act.

46. So far as the quantum of sentence is concerned, record shows that the appellant was aged about 19 years at the time of occurrence, as he had disclosed his age as 20 years, in statement recorded under Section 313 of the Code on 9.12.2015. Learned counsel for the appellant has submitted that the appellant is very poor person ; he is languishing in jail since 17.12.2014 ; he has no criminal history ; and a lenient view is required to be adopted in sentencing the appellant. For the offence under Section 376 (1) I.P.C., the accused may be convicted for a sentence not less than 7 years which may extend to imprisonment for life and along with fine. Same punishment has been provided under Section 4 of POCSO Act, whereas, for the

offence under Section 366 I.P.C., accused may be convicted for a sentence which may extend to ten years along with fine. Thus, the minimum sentence which can be awarded against the appellant for rigorous imprisonment which shall not be less than seven years along with fine.

47. It is settled principle of sentencing and penology that undue sympathy in awarding sentence with accused is not required. The object of sentencing in criminal law should be to protect society and also to deter criminals by awarding appropriate sentence. In this regard, Court in **State of Madhya Pradesh Vs. Saleem @ Chamaru, AIR 2005 SC 3996**, has said as under:-

"10. The Court will be failing in its duty if appropriate punishment is not awarded for a crime which has been committed not only against the individual victim but also against the society to which the criminal and victim belong. The punishment to be awarded for a crime must not be irrelevant but it should conform to and be consistent with the atrocity and brutality with which the crime has been perpetrated, the enormity of the crime warranting public abhorrence and it should "respond to the society's cry for justice against the criminal".

48. In ***Ramashraya Chakravarti vs. State of Madhya Pradesh AIR 1976 SC 392,*** reducing the sentence of young accused, aged about 30 years, convicted for offence under Section 409 I.P.C., from two years to one year, has observed as under:-

"In judging the adequacy of a sentence the nature of the offence, the. circumstances of its commission, the age and character of the offender, injury to individuals or to society, effect of the punishment on the offender, eye to correction and reformation of the offender, are some amongst many other factors which would be ordinarily taken into consideration by courts. Trial courts in this country already over-burdened with work have hardly any time to set apart for sentencing reflection. This aspect is missed or deliberately ignored by accused lest a possible plea for reduction of sentence may be considered as weakening his defence. In a good system of administration of criminal justice pre-sentence investigation may be of great sociological value. Through out the world humanitarianism is permeating into penology and the courts are expected to discharge their appropriate roles"

49. Thus, in the light of above discussion, the conviction and sentence of the appellant for offence under Section 376 (2) and Section 366 I.P.C. is altered to for the offence under Section 376 (1) and Section 366 I.P.C. and the appellant is convicted and sentenced for the offence under Section 376 (1) I.P.C., for seven years rigorous imprisonment with fine of Rs. 10,000/- and so far as the conviction and sentence for the offence under Section 366 I.P.C., passed by trial Court, is concerned, it requires no interference. All the sentences shall run concurrently and the period of detention, undergone by him, will be set off in view of the provision of Section 428 of the Code.

50. The appeal is **partly allowed** and the impugned judgment and order is modified to the above extent.

51. The copy of this judgment along with lower court record be sent to the concerned trial Court for necessary information and compliance.
